

DAC 6 Directive **Mandatory Communication to the Tax Authorities**

“Mandatory Disclosure Regime” / “MDR”

Comments on the Portuguese Law transposing Directive (EU) 2018/822 of 25.5.2018

21 July 2020

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Introduction

What changes does the DAC 6 Directive introduce?

Introduction

What changes does the DAC 6 Directive introduce?

1. What is at stake?

- Following the adoption of Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards automatic exchange of tax information concerning the *cross-border mechanisms* to be reported ("**DAC 6 Directive**"), all Member States of the European Union (EU) are required to transpose it by the end of 2020.
- Portugal's transposition of the DAC 6 Directive results in **the obligation to report to the tax authority certain *domestic* (national) or *cross-border*** (when they concern more than one EU Member State or a Member State and a third country) tax relevant transactions (in the expression of the law "**arrangement**").
- The **scope of the communication includes all *arrangements* that reveal a characteristic or feature of a *cross-border arrangement* that presents an indication of a potential risk of tax avoidance, as listed in Annex IV ("hallmarks")**.
- In some cases, the existence of certain *hallmarks* needs to be confirmed by the ***main benefit test*** to generate a reporting obligation. In other cases, it is sufficient for those hallmarks to be verified for the duty to report to exist.

Introduction

What changes does the DAC 6 Directive introduce?

1. What's at stake? (continued)

- The reporting obligation covers:
 - In the case of ***domestic arrangements***, those that are designed or implemented as from the entry into force of the new law;
 - In the case of ***cross-border arrangements***, those whose first step of implementation took place between 25 June 2018 and 30 June 2020.
- The **reporting obligation, as a rule, falls on intermediaries** (e.g., banks, insurance companies, consultants, auditors, accountants or lawyers) and **not on the relevant taxpayers in question**, except in cases where there is a legal or contractual duty of secrecy (even though the *intermediary* is obliged to ensure that the reporting has been performed) or when the *arrangement* is implemented in-house.
- Although all EU Member States are obliged to transpose the DAC 6 Directive by the end of 2020, under the new Council Directive (EU) 2020/876 of 24 June 2020, Member States may optionally **extend the reporting deadlines by 6 months** (possibly extending them for a further 3 months).

Law n.º 26/2020 of 21 July – which has transposed to Portugal the DAC Directive rules – is silent on Portugal's option to prorogate the relevant deadlines. However, such prorogation is expected to happen (to be followed).

Introduction

What changes does the DAC 6 Directive introduce?

2. The context of DAC 6 Directive

Following the (i) 2008 financial crisis, (ii) the widespread perception of the practice adopted by multiple multinational groups of transferring results to more favourable tax jurisdictions (with estimated losses of tax revenue to states in the order of USD 100-240 billion), and (iii) the scandals revealed by the *LuxLeaks*, *Panama Papers* and *Paradise Papers*, a consensus was generated at the international level to tackle, in a harmonised manner, all behaviours aimed at aggressive tax planning and tax evasion.

Despite the combined efforts on the part of the states that make up the G20/OECD, the European Commission has taken the lead at EU level in ensuring the proper functioning of the internal market, by adopting various EU Directives aimed precisely at discouraging tax avoidance practices and ensuring fair and effective taxation in the Union in a sufficiently coherent and coordinated manner.

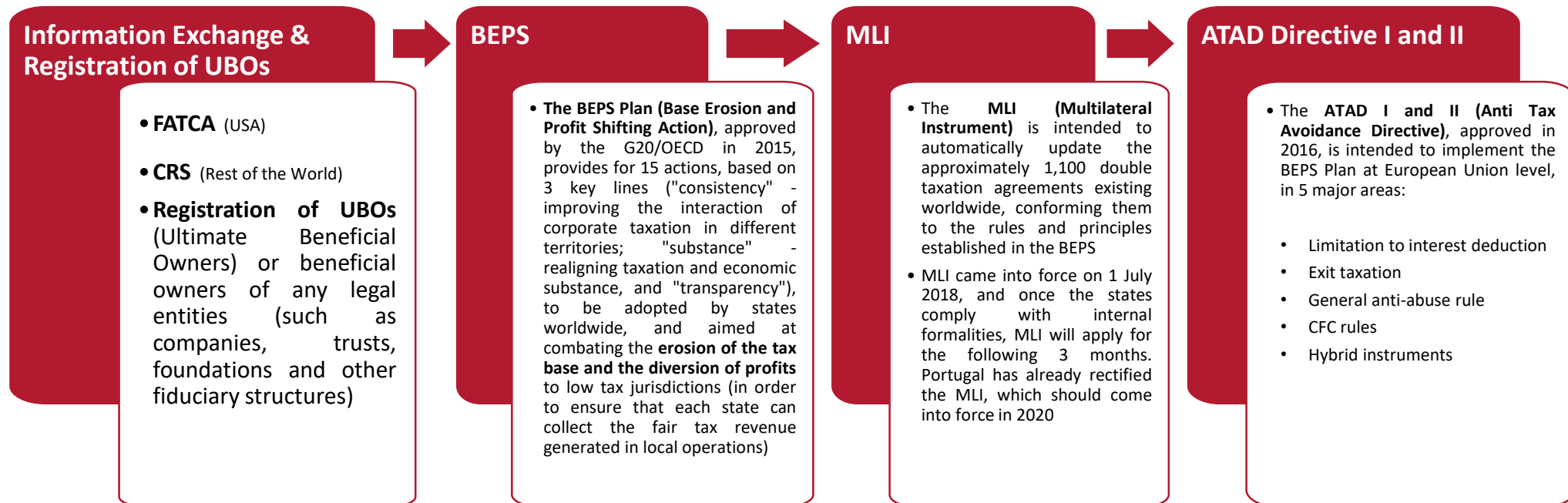
In this context, and since 2011, several Directives have been adopted precisely addressing cooperation between the tax administrations of EU Member States through the sharing of information on the behaviour of multinational groups and individual taxpayers in general.

Introduction

What changes does the DAC 6 Directive introduce?

The context of the DAC 6 Directive (continued)

In very brief terms, the main instruments created at international level are the following:



Introduction

What changes does the DAC 6 Directive introduce?

The context of the DAC 6 Directive (continued)

At EU level, the following Directives on administrative cooperation have been adopted:

Developments in European Administrative Cooperation Legislation				
DAC Directive 1 Dir. 2011/16/EU of 15.2.2011 Introduces new rules, applicable between tax administrations of EU Member States, concerning (i) the exchange of information on request; (ii) the automatic exchange of mandatory information aimed in particular at 5 categories of income: work; directors' fees; life insurance products; pensions and property and income from real estate, and (iii) the exchange of spontaneous information	DAC Directive 2 Dir. 2014/16/EU of 9.12.2014 Change in the scope of the automatic exchange of mandatory information, requiring financial institutions to report to the relevant tax authorities information on relevant income (interest, dividends and similar types of income), account balances and proceeds of the sale of financial assets	DAC Directive 3 Dir. 2015/2376 of 8.12.2015 Creation of a European directory for the automatic exchange of cross-border advance tax decisions and advance pricing agreements	DAC Directive 4 Dir. 2016/881 of 25.5.2016 Creation of the reporting obligation for certain multinational enterprise groups to submit a financial and tax reporting by country or tax jurisdiction (Country-by-Country Report)	DAC Directive 5 Dir. 2016/2258 of 6.12.2016 Defines the rules for access to anti-money laundering information by tax authorities

Introduction

What changes does the DAC 6 Directive introduce?

4. The DAC 6 Directive

The essential objective of the DAC 6 Directive is to ensure a better functioning of the internal market by discouraging the use of aggressive cross-border tax planning *arrangements*, with the obligation to communicate information essentially based on two moments:

- The obligation for the *intermediaries* or the *relevant taxpayers* to communicate to the tax authorities of EU Member States, according to certain *hallmarks* indicating a potential risk of tax avoidance which have a cross-border nature because they relate to more than one Member State or to a Member State and a third country;
- The automatic (and compulsory) exchange of the information thus collected between the tax authorities of all Member States.

Communication is made for all taxes (except VAT, customs and excise duties) levied on ***bespoke arrangements*** (customised) or ***marketable arrangements*** (i.e., a *cross-border arrangement* that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised - as is the case, for example, with certain products marketed by banks and/or insurance companies).

Introduction

What changes does the DAC 6 Directive introduce?

4. DAC 6 Directive (continued)

All structures/operations containing at least one of the *hallmarks* present in Annex IV of the DAC 6 Directive are communicable.

These key characteristics act as signals for potentially aggressive tax practices and do not necessarily have to result from specific situations of tax evasion and, even less, from an anticipation of how the tax authorities should react to the tax situations to be reported.

The *hallmarks* are divided into two main categories: generic or specific.

An important point is that certain *hallmarks* need to be confirmed by the *main benefit test* in order to generate a reporting obligation (the test is satisfied if it can be determined that obtaining a tax advantage is the principal benefit or one of the principal benefits).

In other cases, it is sufficient for certain *hallmarks* to be identified for the reporting obligation to be automatically to apply.

Introduction

What changes does the DAC 6 Directive introduce?

The DAC 6 Directive - The impact on the market

Under DAC 6, the reporting obligation falls primarily on *intermediaries* such as banks, insurers, consultants, auditors, lawyers and accountants, or the *relevant taxpayer* in question itself.

An *intermediary* is any person:

- Who designs, markets, organises or makes available for application or administers the application of a mechanism to be communicated;;
- Who, having regard to all relevant facts, knows or can reasonably be expected to know that they have committed (i) to providing, directly or through other persons, aid, assistance or advice in the design, marketing, organisation or delivery of a mechanism to be communicated, or (ii) to administer such an *arrangement*.

The exclusion of responsibility for communication on the part of an *intermediary* is not satisfied by a mere waiver of their obligation. The *intermediary* is obliged to ensure that the *relevant taxpayer* has delivered the communication to the tax authorities in a timely manner (if the *relevant taxpayer* has not done so, this obligation must be fulfilled by the *intermediary* - see slides 17 and 18).

Introduction

What changes does the DAC 6 Directive introduce?

5. The DAC 6 Directive in Portugal

The text of Law n.º 26/2020 of 21 July, can be consulted here: <https://dre.pt/application/conteudo/138461836>

The Portuguese version has some differences from the text of the DAC 6 Directive and the following should be highlighted:

- **Application to *domestic arrangements*** - i.e., those that are capable of being applied or produce effects, in whole or in part, in Portuguese territory and are not cross-border mechanisms;
- **Extension of taxes covered** - also applies to VAT, IMI, IMT, and Stamp Duty;
- **Limitation of the concept of *intermediary*** – the following are excluded from the communication obligation (but this does not exempt other intermediaries or relevant taxpayers from fulfilling the communication obligation): (i) anyone who provides information that is merely descriptive of existing tax rules or (ii) anyone who advises on an existing situation; (iii) anyone who acts within the scope of a mandate in the tax administrative procedure, the tax challenge procedure, the tax criminal procedure, or the tax administrative offence procedure.

Reporting of *cross-border arrangements*

How does it work?

Reporting of *cross-border arrangements*

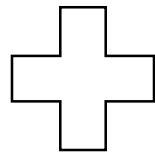
What should be reported?

All cross-border mechanisms containing at least **one of the *hallmarks*** described in Annex IV to DAC 6 Directive must be reported:

Cross-Border Arrangement

Arrangement means any type of plan, project, proposal, advice, instruction or recommendation, consisting of a construction with one or more stages, or series of simultaneous or sequential constructions, which may be personalised or marketable (i.e., that does not require substantial adaptation)

A ***Cross-Border Arrangement*** means one that relates to (i) more than one Member State or (ii) a Member State and a third country

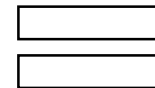


Hallmarks

A feature or element of a *cross-border arrangement* which gives an indication of a potential risk of tax evasion

Hallmarks are only reportable if:

- They fulfil the *main benefit test* (i.e. they aim to achieve as the principal benefit, or one of the principal benefits, the achievement of a tax advantage) - see slide 15 - Categories A to C
- Are of automatic application - see slide 16 - Categories D and E



Obligation to notify the tax authorities

Reporting of *cross-border arrangements*

Key characteristics (Hallmarks) subject to the main benefit test

Category A

- Confidentiality clause (on how the *arrangement* may generate a tax advantage)
- Success fees
- Standard documentation applicable to more than one taxpayer

Category B

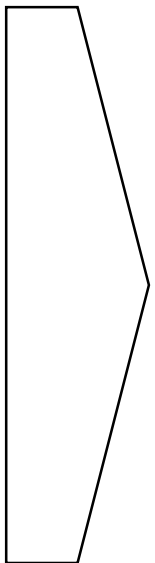
- Acquisition of a company with tax losses carried forward and its use in other taxable operations
- Conversion of the nature of taxable income into more favorably taxed categories of income
- Circular operations through entities without economic substance

Category C

- Tax deductibility of cross-border payments between associated companies where the recipient (i) is not a tax resident in any jurisdiction; (ii) is a resident in a non-cooperative EU or OECD jurisdiction and/or that jurisdiction does not subject it to income tax and/or subject it and exempt and/or apply a nominal rate <1%; (iii) the income is more favorably taxed

Category C (continued)

- Tax deductibility of depreciation on the same asset in more than one jurisdiction
- Taking advantage of schemes that result in double non-taxation of income
- Transfer of assets within the same group where the tax base is materially different in two jurisdictions



For any of the key *hallmarks* listed here to be compulsorily communicated, it is necessary for all the requirements of **the main benefit test** to be met, e.g. that, without any doubt and on the basis of all relevant facts and circumstances, it can be concluded that the *arrangement* in question is intended to obtain as the principal benefit, or one of the principal benefits, a tax advantage

Reporting of *cross-border arrangements*

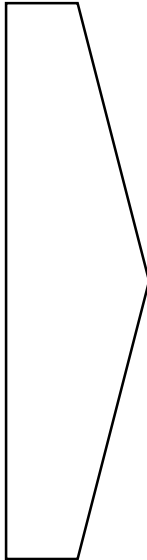
Key characteristics (Hallmarks) of automatic communication

Category D

- Any behaviour which, through an *arrangement*, is intended to circumvent the application of the rules on exchange of information concerning financial accounts (CRS or equivalent rules)
- Any behaviour which, through non-transparent holding chains, and which does not have economic substance, is intended to make it difficult to identify UBO (e.g. any trust structures)

Category E

- Use of safe harbours conferred by a jurisdiction and not accepted at OECD level in relation to transfer pricing
- Transfer of intangible assets that are difficult to value
- Transfer within the same function, risk or asset group that determines, within 3 years, a reduction of at least 50% in EBIT, if the transfer had not been made



In these cases, if any of the key *hallmarks* are present, **it is sufficient for them to be identified so that the obligation to communicate is automatically verified** (there is therefore no need to subject them to the *principal benefit test*)

Reporting of *cross-border arrangements*

When should the communication be made and by whom?

- For the *intermediary* (general rule system)
 - Communication **within 30 consecutive days**, counted from the earliest of: (i) the day after the *arrangement* was made available for implementation; (ii) the day after the *arrangement* is ready for implementation, or (iii) the date when the first implementation step was taken;
 - Communication **within 30 consecutive days** of the date on which the *intermediary* was provided, directly, or through an *intermediary*, support or advice, of any information which is known to the intermediary or which is in their possession or control in relation to any *cross-border arrangements*;
 - Notification of the *relevant taxpayer* (where there is a legal or contractual duty of secrecy) within **5 consecutive days** of the above facts to comply with the obligation. If the *relevant taxpayer* does not provide proof of fulfilment of the obligation, the *intermediary* is obliged to notify it **within 10 consecutive days**;
 - Waiver of communication when providing proof within **30 + 10 consecutive days** of multiple communications or communications to another Member State;
 - In the case of a *marketable arrangement*, the *intermediary* must also submit an update report **every three months**, including new information.

Reporting of *cross-border arrangements*

When should the communication be made and by whom?

- **By the relevant taxpayer (subsidiary regime)**
 - Applicable only when there is no *intermediary* obliged to report the *arrangement*;
 - Communication **within 30 consecutive days** of the facts already described in the previous slide;
 - Where there is a legal or contractual duty of secrecy, the *relevant taxpayer* must inform the *intermediary*, within **30 consecutive days** of receipt of the latter's notification, of the fulfilment of the obligation to report, submitting to the *intermediary* proof of submission of the declaration;
 - Waiver of communication where proof is provided within **30 + 10 consecutive days** of multiple communication or before another Member State;
 - Communication to the authorities **every year** of the updating of the information previously communicated.

Reporting of *cross-border arrangements*

Deadlines for the first communication

- ***Cross-border arrangements:***

- **31 August 2020** - for all *cross-border arrangement* for which the first step of implementation took place between 25 June 2018 and 30 June 2020.
- In the case of **legal or contractual secrecy**, the *intermediary* must notify the *relevant taxpayer* within 10 consecutive days as of the entry into force of the Law, and must comply with the ancillary duty of communication by 31 August 2020 if, by that date, it has not been informed by the *relevant taxpayer* that it has complied with its duty of communication.
- **Until 10 September 2020 (in the case of an additional 10-day period in situations provided for by the Law)** - in cases where the communication must be complied with by multiple *intermediaries* and/or *relevant taxpayers*, the *intermediary* and/or the *relevant taxpayer* is exempted from this communication to the tax administration if it produces, within an additional 10 days after the expiration of the 30 consecutive days (see previous slides), documentary evidence that the same information has already been communicated to another Member State and/or to the Portuguese tax administration.

- ***Domestic arrangements:***

- From the date of entry into force of the new law, taking into account the time limits provided for therein.

Reporting of *cross-border arrangements*

Deadlines for the first communication

- Extension, on a voluntary basis, of the time limits applicable for the purpose of the communication



Under the new Council Directive (EU) 2020/876 of 24 June 2020, EU Member States may optionally **extend the relevant deadlines** (possibly for a further 3 months) as follows:

Relevant Facts to Communicate	Beginning of Term
<ul style="list-style-type: none"> "Historic" cross-border mechanisms implemented between 25 June 2018 and 30 June 2020 	28 February 2021
<ul style="list-style-type: none"> <i>Cross-border arrangements</i> that have been made available for implementation, or are ready to be implemented, or the first stage of their implementation has been carried out between 1 July 2020 and 31 December 2020 Intervention by <i>intermediaries</i> in the direct or indirect provision of assistance between 1 July and 31 December 2020 	1 January 2021
<ul style="list-style-type: none"> <i>Cross-border arrangements</i> that have been made available for application, or are ready to be applied, or the first stage of their application has been carried out from 1 January 2021 Intervention by <i>intermediaries</i> in the provision, directly or indirectly, of assistance as of 1 January 2021 	From 1 January 2021
<ul style="list-style-type: none"> Forwarding of the first periodic report by <i>intermediaries</i> on <i>marketable cross-border arrangements</i> 	30 April 2021
<ul style="list-style-type: none"> First exchange of information between EU Member States 	30 April 2021

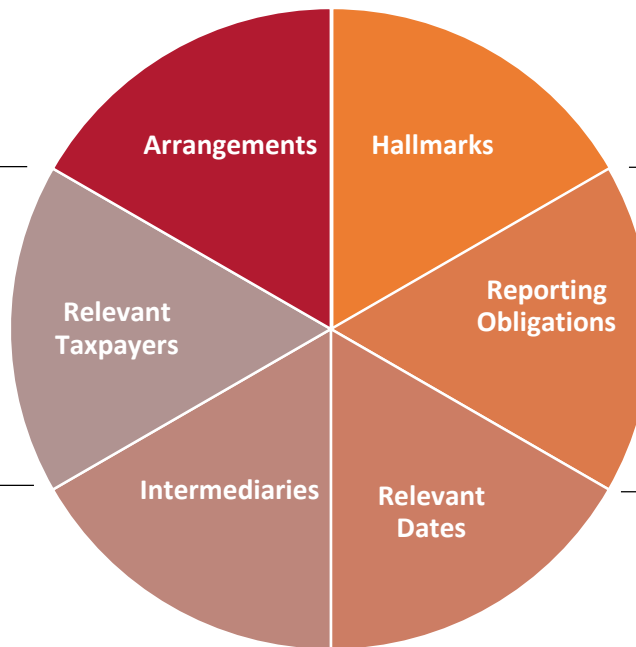
Reporting of *cross-border arrangements*

Summary

- Any type of plan, project, proposal, advice, instruction or recommendation, whether personalised or tradable, cross-border (involving at least one EU Member State) or domestic

- Any natural or legal person, even without legal personality

- Any person who designs, organises, provides or administers a reportable *arrangement* (with exceptions) covering banks, insurance companies, consultants, auditors, lawyers and accountants



- Generic *hallmarks* subject to the *main benefit test*
- Hallmarks* that are not subject to the *main benefit test*

- Cross-border arrangements* - covers all income taxes other than VAT, customs and excise duties
- Domestic arrangements* - also covers VAT, Municipal Tax, Property Transfer Tax and Stamp Duty

- Cross-border arrangements*: 01.1.2021 or 28.2.2021 (in the latter case for "historical" arrangements from 25.06.2018 until 30.6.2020)
- Domestic arrangements*: only reportable from the entry into force of the Law

Reporting of *domestic arrangements*

What should be reported, timings and by whom?

Reporting of *domestic arrangements*

What should be reported, timings and by whom?

Our comments in the previous slides for *cross-border arrangements* apply in general, with the difference that the communications also cover the *arrangements* targeting the following taxes: VAT, Property Tax, Property Transfer Tax, and Stamp Duty.

Non-compliance with reporting requirements

Implications

Non-compliance with reporting requirements

Implications

Failure to comply with the reporting obligations results in the *intermediary* or the *relevant taxpayer* being liable for an administrative offence as follows:

Administrative offences	Legal Entities		Individuals	
	Malicious intent	Negligence	Malicious intent	Negligence
Failure to submit or submission outside the legal deadline for communications	EUR 12,000 to EUR 160,000	EUR 12,000 to EUR 80,000	EUR 6,000 to EUR 80,000	EUR 6,000 to EUR 40,000
Omissions or inaccuracies concerning the information required	EUR 4,000 to EUR 120,000	EUR 4,000 to EUR 60,000	EUR 2,000 to EUR 60,000	EUR 2,000 to EUR 30,000
Failure to submit, or submission outside the legal deadline, of any required clarification	EUR 6,000 to EUR 160,000	EUR 6,000 to EUR 80,000	EUR 3,000 to EUR 80,000	EUR 3,000 to EUR 40,000
Non-compliance resulting from non-communication of <i>cross-border arrangements</i> implemented since 25 June 2018 and 30 June 2020	Limits of fines reduced to 1/5			



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