



**LEGALINK**

INTERNATIONAL BUT PERSONAL

**DAC6**

THE EU DIRECTIVE  
ON CROSS-BORDER  
TAX ARRANGEMENTS

# INTRODUCTION

On 25 May 2018 the Council of the European Union adopted Directive 2018/822/EU as the sixth amendment to the Directive on Administrative Cooperation 2011/16/EU, commonly referred to as "DAC 6", which imposes extensive reporting requirements with respect to cross-border tax planning arrangements affecting at least one EU member state. DAC 6 is part of the continuing efforts of the EU Commission to clamp down on tax avoidance and evasion in the internal market by creating transparency regarding potentially aggressive cross-border tax planning schemes.

The reporting obligations under DAC 6 are very broad and do not just apply to tax lawyers and therefore create a new set of compliance issues for the legal profession, in particular for lawyers involved in cross-border M&A transactions. Since DAC 6 only provides a general framework and gives the member states significant discretion regarding the transformation into national laws, it is useful for any practitioner who can be a potential "intermediary" to have an overview over the various laws and regulations in the EU member states.

# GIBRALTAR

## Hassans International Law Firm

### 1. When was DAC 6 implemented into the National Tax Law of Gibraltar?

DAC 6 was incorporated into the Income Tax Act by the Income Tax (Amendment) Regulations 2020 (“the Regulations”), published on 30 January 2020, which can be accessed on <https://www.gibraltarlaws.gov.gi/uploads/legislations/income-tax/2020=055.pdf#viewer.action=download>. These Regulations had a commencement date of 1 July 2020, so were technically implemented into local law on that date.

- Have the tax authorities in your jurisdiction issued guidelines for the application and enforcement of the obligations under DAC 6?

No, guidelines have not been issued by the tax authorities, although many professional firms have produced guidance for the application and enforcement of DAC 6.

### 2. What constitutes a reportable cross-border tax arrangement under the laws and regulations of your jurisdiction?

- What constitutes a “cross-border” arrangement? To what extent are national structures also covered?

The Regulations provide the following definition:

“10ZG.(1) ‘cross-border arrangement’ means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of conditions in subsection (2) is met.

(2) Those conditions are that— (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction; (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction; (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment; (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment

situated in that jurisdiction; (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

(3) For the purposes of this Part, an arrangement also includes a series of arrangements.

(4) An arrangement may comprise more than one step or part.”

Because the arrangement must concern either more than one member state (which for these purposes includes Gibraltar) or a member state and a third country, national structures which do not involve any transaction, ownership or interest located outside Gibraltar are not covered.

- How are the hallmarks and the “main benefits” test in Annex IV to DAC 6 defined and interpreted in your jurisdiction?

“Main benefit” is defined as follows: 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.

The hallmarks largely replicate the wording in the DAC 6 Directive.

- What constitutes a “tax benefit” under the legislation in your jurisdiction?

The term “tax advantage” has not been defined in the legislation.

- Is it required that the achievement of the “tax benefit” is the sole or the main purpose of the structure?

No, the main purpose of the arrangement may not be tax-related, but the “main benefits” test will still be met if the main benefit or one of the main benefits is to obtain a tax advantage.

- Do the laws and regulations of your jurisdiction require a connection to a potential abuse of tax structures?

No.

- Did your jurisdiction adopt a whitelist of non-reportable “standard” tax arrangements?

No.

### 3. Who is subject to the reporting obligation (taxpayer, intermediary, other)?

The reporting obligation lies with the intermediary save where there is no intermediary, in which case it lies with the taxpayer. Also, where there is an intermediary, but that intermediary notifies another intermediary that, due to professional confidentiality rules, they cannot report, then the obligation lies with the other intermediary.

- Do the laws and regulations of your jurisdiction address the issue of potential legal conflicts of intermediaries with professional confidentiality obligations?

Yes, section 10ZI (6) of the Income Tax Act 2010 provides:

“(6) Intermediaries have the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the law of Gibraltar; and

(a) where this subsection applies, intermediaries must notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under section 10ZJ; and

(b) intermediaries are only entitled to a waiver to the extent that they operate within the limits of the relevant law of Gibraltar in respect of their professions.”

### 4. What information must be included in a report on cross-border tax arrangements under DAC 6 in your jurisdiction and is there a specific format to be used?

Intermediaries are required to file “information that is within their knowledge, possession or control on reportable cross-border arrangements“ (section 10ZI(1) Income Tax Act 2010). No specific format has been provided by the Commissioner for Income Tax at this time, although it is understood that a portal will be made available online for information to be filed.

The Commissioner for Income Tax, who is responsible for communicating information to the competent authorities of member states, must communicate the following, as applicable-

- (a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;

- (b) details of the hallmarks that make the cross-border arrangement reportable;
- (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
- (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
- (f) the value of the reportable cross-border arrangement;
- (g) the identification of the relevant taxpayer's or taxpayers' member state, and any member states which are likely to be concerned by the reportable cross-border arrangement; and
- (h) the identification of any other person in a member state likely to be affected by the reportable cross-border arrangement, indicating to which member states such person is linked.

**5. Is there an obligation to report tax arrangements which were already implemented in the past? If yes, what is the cut-off date?**

Yes, intermediaries must file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of the Cooperation Directive. The deadline for the filing of information on those reportable cross-border arrangements was originally 31 August 2020 but has been delayed to 28 February 2021.

**6. Who is the competent authority for filing a report under DAC6 in your jurisdiction?**

The Commissioner for Income Tax.

**7. What is the deadline for filing a report?**

In respect of reportable cross-border arrangements, within the period of 30 days beginning— (a) on the day after the reportable cross-border arrangement is made available for implementation; or (b) on the day after the reportable cross-border arrangement is ready for implementation; or (c) when the first step in the implementation

of the reportable cross-border arrangement has been made, whichever occurs first. (s.10ZI(1) Income Tax Act 2010).

The period of 30 days for filing information referred to above begins by 1 January 2021 where- (a) a reportable cross-border arrangement is made available for implementation or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and 31 December 2020; or (b) intermediaries provide, directly or by means of another person, aid, assistance or advice between 1 July 2020 and 31 December 2020. (s.10ZI(1A) Income Tax Act 2010).

– **Has there been an extension of deadlines due to the COVID-19 pandemic?**

Section 10ZI(1A) above was subsequently added into the legislation in order to provide some reprieve due to the COVID-19 pandemic. As mentioned in the answer to Question 5, there has been an extension to the reporting on arrangements which have happened in the past, from 31 August 2020 to 28 February 2021. In short, the extensions are as follows:

- the start date for the 30-day reporting period for cross-border arrangements moves from 1 July 2020 to 1 January 2021;
- the date for the reporting of historical cross-border arrangements (those reportable between 25 June 2018 and 30 June 2020) moves from 31 August 2020 to 28 February 2021; and
- the date for the first periodic report for marketable arrangements by intermediaries moves from 31 October 2020 to 30 April 2021.

**8. What are the penalties and/or other legal consequences for failing to submit a DAC 6 report within the applicable deadline?**

There is a penalty of £300 for failure to make a report. If the penalty is assessed and the failure continues after the person is notified, they are liable to a further daily penalty whilst the default persists of up to £60 per day. There is a penalty of up to £3,000 for making an inaccurate report whilst knowing of the inaccuracy, or later discovering the inaccuracy and not taking reasonable steps to inform the Commissioner of the discovery.

**9. Has your firm implemented specific processes regarding DAC 6 compliance? If yes, please describe.**

Yes, we have provided training to all lawyers in order for them to understand their obligations as intermediaries under the legislation. We have also conducted an exercise where each lawyer has reviewed all transactions, structures and matters since 25 July 2018 in order to identify which are reportable. We have produced an internal handbook to assist

lawyers with this process. We have done the same exercise with our associated corporate services provider, Line Group Limited. All individuals and entities who may fall within the definition of “intermediary”, such as directors and trustees, have reviewed past arrangements and received training and support in order to identify which are reportable and what the reporting obligations entail.

## 10. Contact details

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