



**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.

# PORTUGAL

## Sérvulo & Associados

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

Portugal implemented it through Law no. 26/2020, dated 21 July 2020, entering into force on 22 July but taking effect as from 1 July 2020.

Furthermore, Decree-Law no. 53/2020, dated 11 August 2020, entered into force on 12 August and extended the deadlines for application of Law no. 26/2020.

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

No guidelines whatsoever have been issued by the Portuguese Tax and Customs Authority.

There is an expectation such guidelines will be issued, namely in what concerns the type of arrangements covered and the procedures for complying with the reporting obligations, which currently require further specifications (as it is being the practice in other EU member states).

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

The arrangements to be communicated include national and cross-border arrangements complying with legally foreseen key characteristics, namely those which indicate, objectively and by themselves, a potential risk of tax evasion, including bending legal obligations to report information on financial accounts or the ultimate beneficial owners' identification.

In certain cases, the verification of these characteristics is sufficient so that the reporting obligation takes place; in other situations, a “main benefits” test may take place for concluding in relation to the existence of the obligation of reporting.

The “main benefits” test is considered satisfied if it is possible to determine, without reasonable doubt, that obtaining a tax advantage, at a taxpayer's or third party's level, is the main benefit or one of the main benefits that, objectively and in light of all the relevant facts and circumstances, can reasonably be expected from the mechanism being implemented.

Nonetheless, final guidance from the Portuguese Tax and Customs Authority is still expected in order to clarify the exact types of reportable arrangements.

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

National legislation uses the Directive’s definition, whereas a “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 the following conditions is met:

- 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.

National arrangements are also covered, being defined as those that, depending on their objective characteristics, are apt to be applied or to produce effects, totally or partially, in Portuguese territory and are not considered cross-border mechanisms.

Naturally, these arrangements should also meet at least one of the above-mentioned key characteristics.

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

The definitions at stake – both for hallmarks and the “main benefits” test – follow Directive 2018/822.

Thus, for instance, the above-mentioned test is verified whenever it is possible to determine, without any reasonable doubt, that obtaining the tax advantage, at the level of the taxpayer or of a third party, is the main benefit or one of the main benefits which, objectively and considering all relevant facts and circumstances, may be reasonably expected from the implementation of the arrangement.

Nonetheless, guidance is expected from the Portuguese tax authorities in relation to the application of this test, as well as to the interpretation of said test, as well as the hallmarks.

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

Under Law no. 26/2020, a tax benefit implies the reduction, elimination or temporary deferral of tax, including the use of tax losses, to obtain a tax benefit which would not be obtained otherwise, either fully or partially, without implementing the arrangement.

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

As a rule, yes. However, in certain situations, the simple verification of the above-mentioned key characteristics is sufficient so that the reporting obligation takes place even without applying the "main benefits" test.

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

Yes.

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

Yes. The following information is not subject to being reported: strictly descriptive information of existing tax regimes, including tax benefits; advice in relation to already existing situations; and the exercise of mandates under administrative tax proceedings, tax appeals, tax criminal processes or tax offenses.

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

As a rule, all taxpayers are subject to the new reporting obligations. The obligation of reporting applies to the taxpayers involved in the arrangements (deemed as the "relevant

taxpayer”, but also to the intermediaries involved in the covered arrangements, such as consultants, auditors, lawyers and accountants.

Depending on the existence of legal or contractual privilege, the primary reporting obligation may fall upon the relevant taxpayer or the intermediaries.

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

Yes. Under Portuguese law, certain intermediaries, such as lawyers, are bound by legal privilege, whereas others, such as consultants, may agree on the existence of contractual privilege.

Nonetheless, compliance with the reporting obligations under Law no. 26/2020, if applicable, prevails over any professional confidentiality obligations, either legal or contractual. As a result, Law no. 26/2020 foresees that the intermediaries cannot be liable to responsibility arising from non-compliance with the applicable privilege rules.

#### 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?

According to Law no. 26/2020, the information to be reported should include, if applicable, the following elements:

- a) the identification of intermediaries and relevant taxpayers, including their names, dates and places of birth, in the case of natural persons, residences for tax purposes, tax identification numbers and, if applicable, persons who are associated companies of the relevant taxpayer;
- b) the details of the key-characteristic(s) that shape the mechanism as a reportable mechanism;
- c) a summary of the content of the reportable mechanism, including the name reference by which it is commonly known, if any, and a description, in abstract terms, of the relevant business or regulatory provisions, unless that description leads to the disclosure of a commercial, industrial or professional secret or a business process, or of information whose disclosure is contrary to public policy;
- d) the date on which the first step in the application of the reportable mechanism was or will be carried out;

- e) details of the regulatory provisions that form the basis of the reportable mechanism (depending on the mechanism, such provisions may belong to more than one jurisdiction);
- f) the value of the transactions that compose the reportable mechanism, regardless of the tax advantage expected from the mechanism;
- g) the identification of the member state of the relevant taxpayers and any other member state susceptible to be related to the reportable mechanism;
- h) the identification of any other person or entity without legal personality in a member state likely to be covered by the reportable mechanism, indicating the member states to which that person or entity is linked.

Specific guidance concerning the format to be used for the reporting and procedure for its presentation before the Portuguese tax authorities is still expected.

#### 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. Cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020, must be reported.

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

The Portuguese Tax and Customs Authority (Autoridade Tributária e Aduaneira).

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

Initially, since Law no. 26/2020, dated 21 July 2020, took effect as from 1 July 2020, the communications were supposed to take place by 31 August 2020.

On the other hand, the first communication of the reported information by the Portuguese Tax and Customs Authority to the competent authorities of the remaining member states was supposed to take place by 31 October 2020.

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

Decree-Law no. 53/2020 postponed the deadlines for reporting domestic and cross-border arrangements, initially foreseen under Law 26/2020, as follows:

- Information on reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020 to be filed by 28 February 2021;

- Reportable domestic or cross-border arrangements made available for implementation or ready for implementation, or where the first step in its implementation was made, between 1 July 2020 and 31 December 2020 (also applicable to intermediaries who provided, directly or by means of other persons, assistance or advice concerning a reportable mechanism) – the 30-day reporting period begins on 1 January 2021;
- Situations covered by legal or contractual privilege involving the reporting of information on reportable domestic or cross-border arrangements made available for implementation or ready for implementation, or where the first step in its implementation was made, between 1 July 2020 and 31 December 2020 – the five-day reporting period begins on 1 January 2021;
- Domestic and cross-border marketable arrangements – first periodic report to be filed by the intermediary by 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?**

The lack of filing or late filing of the above-mentioned information, as well as of any required clarifications and complementary information required by the Portuguese Tax and Customs Authority, is subject to penalties varying between €6,000 and €80,000.

There are also penalties of significant amounts for omissions and inaccuracies in the filings made, as well as the lack of presentation or late presentation of evidence or of any required clarifications requested by the Portuguese Tax and Customs Authority.

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

Sérvulo has created an internal compliance team which is responsible for determining the applicable procedures for DAC 6 purposes. This team includes members from all practice areas which are more likely to be involved in potentially reportable arrangements such as tax, corporate and real estate.

Until the Portuguese Tax and Customs Authority issue hallmarks, this team is currently defining the criteria to be used internally to determine if an operation should be considered reportable.

## 10. Contact details

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