A&L Goodbody

Focus on
COVID-19
Coronavirus

Proposal to defer mandatory reporting of cross border tax arrangements under DAC6

In response to the disruption caused by COVID-19, the European Commission has proposed a three-month deferral period for the rules regarding the mandatory filing and exchange of information on reportable cross-border tax arrangements under DAC6.

In this update, we look at what arrangements are reportable under DAC6, what the European Commission has proposed and how these changes will alter the reporting timelines.

The European Commission's Proposal

On 8 May 2020, the European Commission proposed a three-month deferral for the filing and exchange of information on reportable cross-border tax arrangements under Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (**DAC6**).

Under the European Commission's proposal, which is designed to recognise the severe disruption caused by the COVID-19 pandemic, the date from which DAC6 applies would continue to be 1 July 2020. However, a three-month deferral would operate such that:

- the commencement date of the 30-day period for reporting cross-border arrangements would be extended from 1 July 2020 to 1 October 2020
- the deadline for reporting historical cross-border arrangements (i.e. arrangements that became reportable in the period from 25 June 2018 to 30 June 2020) would be extended from 31 August 2020 to 30 November 2020
- the first exchange of information by Member States would be postponed from 31 October 2020 to 31 January 2021.

The European Commission also proposed the possibility of one further extension to the deferral period by a maximum of three additional months, depending on how the pandemic evolves.

The measures will be welcomed by taxpayers and "intermediaries" alike, offering further time to determine their reporting obligations. However, in order to take effect, the proposal will first need to be considered by the European Council and the European Parliament. Once the wording on the proposed directive is agreed, each Member State will then need to transpose the directive into national legislation.

Overview of DAC6

DAC6 is an EU directive requiring the mandatory disclosure to tax authorities of certain cross-border arrangements. It aims to strengthen tax transparency and prevent aggressive tax planning. Finance Act 2019 contains the Irish implementing provisions.

In short, "intermediaries" such as A&L Goodbody (**ALG**), and in certain instances, taxpayers will be required to report information regarding cross-border arrangements that bear certain characteristics or "hallmarks" indicating a potential risk of tax avoidance to the Revenue Commissioners. The reporting obligation applies in respect of relevant arrangements the first step in implementation of which occurred on or after 25 June 2018. Once the report has been filed with the Revenue Commissioners, they will in turn automatically share this information with the competent authorities of other EU Member States.

The mere fact that a transaction is reportable is not of itself an indication that there is any tax mischief. The purpose of the DAC6 reporting obligations is to provide tax authorities with information about potentially aggressive tax planning schemes so that Member States can then assess whether those schemes facilitate tax avoidance and take any steps necessary, including amending national legislation, to close off the particular scheme.

What is a reportable cross-border arrangement?

A "**reportable cross-border arrangement**" is a cross-border arrangement (i.e. it concerns either more than one EU Member State, or an EU Member State and a third country where, broadly, not all the participants are tax resident in the same country) which contains one of the "hallmarks" or characteristics of potential tax avoidance.

While some of the hallmarks contain a "tax benefit" motivation requirement, others do not. Therefore the range of transactions that are caught is broader than those that had fallen within Ireland's pre-existing domestic mandatory disclosure regime.

Who reports?

Subject to limited exceptions an "intermediary" must make a return of "specified information" with the Revenue Commissioners in respect of a reportable cross-border arrangement.

An "**intermediary**" for this purpose is either the person that:

i. designs, markets, organises or makes available for implementation or manages the implementation of the arrangement, or
ii. having regard to the facts and circumstances and relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that it is providing aid, assistance or advice with respect to i. above and is tax resident in an EU Member State, registered with a professional association related to legal, taxation or consultancy services in a Member State, etc.

As such, ALG would be an intermediary for the purpose of reporting.

In the event that the advice benefited from legal professional privilege the reporting obligation would shift, upon notification, to the client taxpayer or another intermediary (if any).

Where multiple intermediaries (including ALG) are involved in the cross-border arrangement, ALG would not have a reporting obligation if another involved intermediary:

- confirms that it has made a DAC6 return to the Revenue Commissioners, and
- provides ALG with the Revenue assigned reference number. This information should be provided by the other intermediary to ALG within 5 working days of the other intermediary obtaining the reference number, or ALG becoming involved in the transaction

What is reported?

Broadly, an intermediary must report "specified information" in relation to a reportable cross-border arrangement.

Specified information includes, for example:

- intermediary and taxpayer (i.e. client) details relating to tax residence tax identification number (**TIN**)
- country of issuance of the TIN name and address
- associated enterprises (if any)
- details of the hallmark(s) making the transaction reportable the value of the arrangement
- the date on which the first step in implementing the arrangement has, or will be, taken details of Member States likely to be concerned by the cross-border arrangement

When is the report made?

The deadline for reporting will depend broadly, on when the reportable cross-border arrangement occurs. In this regard, a distinction is drawn between:

- 'historical' cross-border arrangements, where the first step in implementation occurs on or after 25 June 2018 and before 1 July 2020 (**Historical Arrangements**)
- reportable cross-border arrangements that occur on or after 1 July 2020 (**Post-1 July 2020 Arrangements**)

While Historical Arrangements were due to be reported en bloc by 31 August 2020, Post-1 July 2020 Arrangements are subject to a 30-day reporting timeframe and must be reported to the Revenue Commissioners within 30 days of the earliest of the following:

- the arrangement being made available for implementation
- the arrangement being ready for implementation, or
- the first step in implementation of the arrangement being taken

However, due to the severe disruption caused by the COVID-19 pandemic, the European Commission has proposed to defer the DAC6 reporting timelines for a maximum period of three months. Under this proposal, while the date from which DAC6 applies would continue to be 1 July 2020, a three-month deferral period would apply to the reporting of both Historical Arrangements and Post-1 July 2020 Arrangements, as well as to the quarterly information reports to be exchanged between the relevant tax authorities of EU Member States (the **Information Exchange Reports**).

The European Commission's proposal also envisages the possibility of one further extension to this deferral period by a maximum of three additional months, depending on how the pandemic evolves.

The proposal must be considered by the European Council, which may, after consultation with the European Parliament, issue a directive on the matter. As with all EU directives, each Member State would then need to transpose the measures into national legislation.

	Original Reporting Timeline (under DAC6)	Proposed Reporting Timeline (under EU Commission Proposal)
Historical Arrangements	31 August 2020	30 November 2020
Post-1 July 2020 Arrangements	30-day reporting timeframe beginning 1 July 2020	30-day reporting timeframe beginning 1 October 2020
Information Exchange Reports	31 October 2020	31 January 2021

What are the consequences of a DAC6 report being made?

The mere fact that a DAC6 report is made in respect of a transaction does not indicate that there is any particular tax liability or mischief occurring.

However, the fact that transactions may be reported might deter taxpayers from entering into certain transactions and also enables tax authorities to obtain information on types of transactions that are being entered into earlier than they would have previously. In such circumstances EU Member States may be able to make appropriate changes to their laws to prevent transactions occurring that they consider undesirable.

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