

## New EU-Wide Tax Anti-Avoidance Law Introduces Sweeping Disclosure Requirements

December 11, 2019

### KEY POINTS

- Coming into force on 1 July 2020, EU DAC6 Regulations will require intermediaries in certain cross-border arrangements to disclose activity to tax authorities.
- The DAC will apply retroactively to affected arrangements going back to 25 June 2018.
- “Hallmarks” will be used to determine if a cross-border transaction carries a risk of tax avoidance, and each reportable arrangement will be given a unique arrangement reference number.
- Penalties for non-compliance have the potential of being steep as fines could range from £600 to £5,000 for each day of a breach, depending on the circumstances of the breach.

The EU DAC6 Regulations<sup>1</sup> (DAC) create a mandatory regime that requires intermediaries in cross-border arrangements to make a disclosure to their relevant tax authority, where the arrangement meets certain hallmarks that suggest a potential risk of tax avoidance. While DAC6 does not come into force until 1 July 2020, it will have retrospective effect in respect of any reportable arrangements entered into on or after 25 June 2018 must be reported to the relevant tax authority.

A reportable arrangement involves either more than one EU Member State or a Member State and a third country that has certain features or characteristics that are ‘hallmarked’. These hallmarks are designed to target transactions that have a potential risk of tax avoidance. Crucially, however, the hallmarks do not all focus on the motivation of the transaction. So, while the focal point of a number of hallmarks is the actual intention of an arrangement being carried out for tax avoidance purposes, there are a number of hallmarks that catch arrangements that simply satisfy certain factual criteria.

### Intermediaries

Where an arrangement has one or more hallmarks, a disclosure has to be made to the relevant tax authority. In the UK this is Her Majesty’s Revenue and Customs (HMRC). These disclosures have to be made by ‘intermediaries’. DAC6 will have wide reaching consequences due to the broad definition of intermediaries. An intermediary is anyone who:

- designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; or
- *knows or could be reasonably expected to know* that they have provided directly or by means of other persons, aid, assistance or advice with respect to the above.

<sup>1</sup> COUNCIL DIRECTIVE (EU) 2018/822

This includes everyone from the taxpayer, to lawyers, accountants and other professionals who may be involved in the transaction.

In the UK (and certain other EU Member States), lawyers may be excused from their reporting obligation if filing the relevant information would constitute a breach of legal professional privilege. However, this is not a total exclusion – the responsibility will be passed instead to any other intermediaries involved, such as accountants or bankers, or even the taxpayer themselves. The relevant tax authority also may expect lawyers to file information where the nature of such information would not be protected under legal professional privilege.

## Disclosures

The information reported to HMRC will be shared with other EU Member States with the aim of identifying potentially aggressive cross-border tax avoidance schemes as early as possible. Each reportable cross-border arrangement will be given a unique arrangement reference number.

There is an initial reporting deadline of 31 August 2020 for any reportable arrangements entered into between 25 June 2018 and 1 July 2020. Thereafter, there will be a rolling 30-day deadline to report any new relevant transactions.

## Taxpayer annual reporting requirement

Each taxpayer must file information about their use of a reportable cross-border arrangement in each year they use such an arrangement. This report must consist of the arrangement reference number and the effect of the arrangement on the tax affairs of the relevant tax payer.

## Penalties

Penalties for an initial failure to comply with DAC6 can result in a penalty of £600 or £5,000 for each day of a breach, depending on the nature of the breach.

If the breach continues after the initial penalty is imposed, a further penalty not exceeding £600 for each day on which the failure continues will also be imposed.

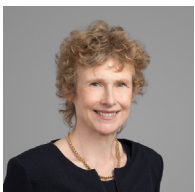
There are additional penalties for relevant taxpayers who fail to comply with their annual reporting obligations, ranging from £5,000 to £10,000, depending on how many times they have failed to comply with the Regulations.

As can be expected, fines can build up quickly. Clients especially need to consider potential transactions that have already taken place that could be caught under DAC6 that could ultimately lead to a fine if not reported by the relevant date.

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## CONTACT

For more information, or if there are concerns that a transaction may be subject to DAC6, please contact your Katten relationship lawyer, or the following:



**Charlotte Sallabank**

Tax  
+44 (0) 20 7776 7630  
charlotte.sallabank@katten.co.uk

# Katten

katten.com

Paternoster House, 65 St Paul's Churchyard • London EC4M 8AB

+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

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