

27 March 2020

Mandatory Disclosure Rules

[EU Directive 2018/22](#) concerns the mandatory disclosure and exchange of certain cross-border tax arrangements (“**CBAs**”). It was adopted by the Council of the EU on 25 May 2018. This is the sixth update of the EU Directive on Administrative Cooperation (EU Directive 2011/16) and is therefore commonly referred to as ‘DAC6’. DAC6 requires so-called intermediaries to disclose information on reportable CBAs to tax authorities within the EU. CBAs are, shortly put, reportable when they affect at least one EU Member State and fall within at least one of a number of hallmarks, which are categories setting out particular characteristics identified by the EU as potentially indicative of aggressive tax planning or the avoidance of exchange of information or identification of beneficial owners.

The primary disclosure requirement lies with the intermediary, which is any person with a nexus to the EU that ‘designs, markets, organises or makes available for implementation or manages the implementation of a reportable CBA’ or ‘knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect’ to such activities. If there is no intermediary or the intermediary is not legally required to file a reportable CBA (legal privilege), the disclosure responsibility shifts to the relevant taxpayer who de facto uses the CBA.

As cross-border investment structures are common in the European non-listed real estate industry, DAC6 is expected to have an impact. Especially fund, asset and investment managers that are involved with cross-border tax planning are generally expected to qualify as intermediaries. Exceptions can of course apply.

All reportable CBAs that have been implemented between 25 June 2018 and 1 July 2020 should be filed retrospectively on 31 August 2020 at the latest. As of 1 July 2020, a 30-day rolling window for new reportable CBAs will apply. Failure to meet the reporting requirements may result in penalties. An exemption from the filing obligation for intermediaries applies in case another intermediary has already reported and there is proof available to substantiate such filing (e.g. a copy of the filing and/or reference number).

COVID-19

Given the COVID-19 situation, various EU governments have formally and informally announced that they are considering to postpone the DAC6 deadlines mentioned above. Moreover, it is rumored that the European Commission is reviewing whether a postponement for all EU Member States should be adopted.

Survey and relevancy of findings for INREV members

The Directive states that in order to improve the prospects for its effectiveness, Member States should lay down penalties against the violation of national rules that implement this Directive. Such penalties should be effective, proportionate and dissuasive. The penalty amount as well as the exact conditions for penalties to be imposed are at the discretion of the Member States.

In order to gain insight into the penalty regimes that have been adopted by various EU Member States in relation to the reporting obligations under DAC6 we have conducted a survey. In our survey we also explore whether there are exceptions and/or moderating factors, as well as when additional guidance on the domestic implementation of DAC6 is expected.

Apart from creating an overview, the purpose of the survey was to investigate whether tax payers could mitigate or lower penalty risks by setting up proper internal procedures covering DAC6, in case of unintentional non-compliance with the applicable reporting obligations. Accidental non-compliance is a large concern of INREV members given the broad and sometimes complex nature of DAC6, and the many arrangements that could trigger a reporting obligation.

The results show that there is a broad range in the maximum amount of penalties that may be imposed (i.e. EUR 5,000 up to EUR 5.8 million). In most EU Member States, exceptions may apply based on the specific circumstances (e.g. a defensible position for not reporting or the absence of negligence). However, there is still a lack of proper guidance in most EU Member States when it comes to such exceptions. It is clear that in many EU Member States, there needs to be some form of willful negligence or misconduct before penalties can be imposed, which means that proper internal procedures might create a “threshold” for tax authorities to impose a penalty in case of (accidental) non-compliance. Such internal procedures would in any case be considered a moderating factor when determining the penalty amount. In our view this is an important finding.

Other moderating factors that we have observed include, but are not limited to, the financial position of the intermediary in question and the (amount of) tax advantage obtained with the CBA that should have been reported. In most EU Member States, more guidance on the domestic implementation of DAC6 is expected in the upcoming months, whereas in other EU Member States no timing on additional guidance has been communicated at all.

The next pages contain a summary of our survey. Please note that the results are based on the guidance to date, and domestic penalty exceptions and/or moderating factors may have been freely translated for readability purposes. Information might be lost in this process.

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Jurisdiction	Penalty amounts	Exceptions from penalties	Moderating factors for penalties	Additional guidance expected
The Netherlands	<p>Maximum of €870,000</p> <p>General penalty policy: 50% for wilful misconduct, 25% for gross negligence. Percentages to be confirmed for DAC6.</p> <p>Sanctions in retrospective period (25 June 2018 to 1 July 2020) will only be applied in exceptional cases.</p>	<p>Defensible position for not reporting based on interpretation of the rules.</p> <p>No gross negligence</p> <p>No wilful misconduct</p>	<p>Expectation that compliance with internal checks and policy would lead to lower range / no penalties.</p> <p>Degree of aggressiveness</p> <p>Financial position intermediary or relevant taxpayer</p> <p>Defensible position for not reporting based on interpretation of the rules</p>	Expected in Q2 of 2020
Italy	<p>Omission to report: €3,000 - €31,500</p> <p>Incomplete/incorrect reporting: €1,000 - €11,500</p> <p>Late reporting: No guidance available</p>	<p>Reportable information connected to 'legal controversy' (e.g., Italian intermediaries can be exempted when they assist clients during a controversy or to avoid a controversy)</p> <p>In case reportable information leads to a criminal liability</p>	Expectation that internal checks and policy compliance would lead to lower range penalties	No timing has been communicated yet
France	<p>Maximum €10,000 per unreported or unnotified arrangement</p> <p>Maximum total amount: €100,000 per year per single taxpayer and/or intermediary</p>	<p>No exceptions as of this moment</p> <p>Awaiting further guidance</p>	Limitation for first infringement (each relevant year / three preceding years): maximum €5,000	No timing has been communicated yet

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Germany	<p>Omission to report: Maximum of €25,000</p> <p>Incomplete/incorrect reporting: Maximum of €25,000</p> <p>Late reporting: Maximum of €25,000</p> <p>During the retrospective period (25 June 2018 to 1 July 2020) no penalties should apply</p>	<p>No negligence</p> <p>No willful misconduct</p> <p>Burden of proof with German tax authorities</p>	<p>Expectation that internal checks and policy (e.g. detailed DAC6 assessment has been conducted) would lead to lower range penalties</p>	<p>More guidance expected June 2020</p>
United Kingdom	<p>Omission to report: £5,000 per unreported or unnotified arrangement or (if considered too low) £600 per day during the initial period (after 30 days of reporting window), can be increased up to £1,000,000</p> <p>Incomplete/incorrect reporting: £5,000 per unreported or unnotified arrangement or (if considered too low) £600 per day during the initial period (after 30 days of reporting window), can be increased up to £1,000,000</p> <p>Late reporting: £5,000 per unreported or unnotified arrangement or (if considered too low) £600 per day during the initial period (after 30 days of reporting window), can be increased up to £1,000,000</p>	<p>Reasonable excuse (can include maintenance of internal procedures)</p> <p>During the transitional period: when a failure is due to lack of clarity around the obligations or interpretation of the rules</p>	<p>‘Relevant considerations’:</p> <ul style="list-style-type: none"> - Fees intermediary - Tax benefit - Failure was deliberate (or not) - Reasonable foreseeable consequences - Internal checks and policy compliance 	<p>Updated draft guidance expected late March/early April</p> <p>Final guidance expected 1 July 2020 (likely to postponed)</p>

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Poland	<p>Omission to report: Maximum 24,960,000 PLN (c. EUR 5.8m)</p> <p>Incomplete/incorrect reporting: Maximum 24,960,000 PLN (c. EUR 5.8m)</p> <p>Late reporting: Maximum 24,960,000 PLN (c. EUR 5.8m)</p> <p>May be increased in case of specific circumstances</p> <p>Additional fines may imposed to "large intermediaries" in case internal procedures have not been implemented and complied with</p>	<p>Guilt should be attributed to the offense committed (intention should be present) in order for penalties to be applicable</p> <p>Awaiting further guidance and development of practice of Polish authorities and courts</p>	<p>Awaiting further guidance and development of practice of Polish authorities and courts</p> <p>No mitigating circumstances for now</p>	No timing has been communicated yet
Belgium	<p>Omission to report: maximum €50,000 (in case fraudulent intent / intent to harm maximum €100,000)</p> <p>Incomplete/incorrect reporting: maximum €12,500 (in case fraudulent intent / intent to harm maximum €25,000)</p> <p>Late reporting: maximum €50,000 (in case fraudulent intent / intent to harm maximum €100,000)</p> <p>No penalty applies for late disclosure before 31 December 2020 and for disclosures relating to the retrospective period (25 June 2018 to 1 July 2020) that are in principle due no later than 31 August 2020</p>	No exceptions as of this moment	<p>Awaiting further guidance</p> <p>No mitigating circumstances for now</p>	Further guidance expected in May/June (likely to be postponed)

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Ireland	<p>Omission to report: €500 per day for each day on which the compliance failure continues, rising to €1,000 per day after the expiry of an 'initial' period</p> <p>Incomplete/incorrect reporting: €500 per day for each day on which the compliance failure continues, rising to €1,000 per day after the expiry of the 'initial' period</p> <p>Late reporting: €500 per day for each day on which the compliance failure continues, rising to €1,000 per day after the expiry of the 'initial' period</p> <p>A maximum penalty of €4,000, plus daily penalty of €100 for each day on which the compliance failure continues during the retrospective period (25 June 2018 to 1 July 2020)</p> <p>A fixed penalty of €5,000 for failure to disclose the reference number allocated to a reportable cross border arrangement on the tax return for the period in which a tax advantage is obtained or in the period in which the reportable cross border arrangement was implemented</p>	<p>No exceptions as of this moment unless intermediary or taxpayer can show that the specified information has been submitted by another intermediary or taxpayer in line with the legislation</p>	<p>Awaiting further guidance</p> <p>No mitigating circumstances for now</p>	<p>Awaiting further guidance</p> <p>Second round of draft guidance to be expected around Easter</p> <p>Final guidance expected in Q2</p>

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Luxembourg	<p>Omission to report: maximum €250,000</p> <p>Incomplete/incorrect reporting: maximum €250,000</p> <p>Late reporting: maximum €250,000</p> <p>(draft legislation)</p>	Awaiting further guidance	<p>The intentional nature of an infraction would be taken into account for the penalty amount (internal procedures could allow for arguments to support non-intentional nature)</p> <p>(draft legislation)</p>	No timing has been communicated yet
Spain	<p>Omission to report: Fixed penalty of €1,000 per data or set of data (i.e. typically, assuming a standard 8 data/set of data omitted)*</p> <p>Incomplete/incorrect reporting: Fixed penalty of €1,000 per data or set of data (i.e. typically, assuming a standard 8 data/set of data omitted)*</p> <p>Late reporting: Generally 50% reduction over the standard penalty that would apply for omissions, incomplete / incorrect filing, provided there has been no previous notice or requirement received from the tax authorities.</p> <p><i>* Minimum of €3,000 per set of data and maximum of professional fees (to be) received by intermediary.</i></p> <p>(draft legislation)</p>	No negligence (based on general Spanish tax legislation, no guidance yet in draft legislation).	Internal checks and policy compliance may lead to lower range penalties (based on general Spanish tax legislation, no guidance yet in draft legislation).	No timing has been communicated yet.

Want to know more about this DAC6 survey?

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