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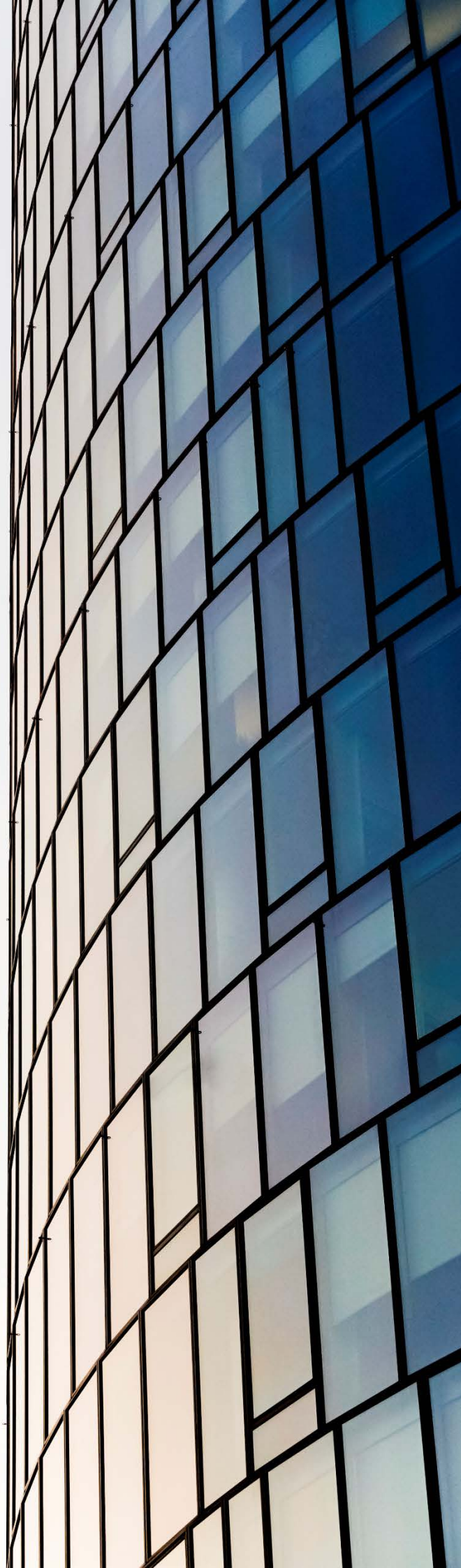
Mandatory Disclosure Rules for Global Mobility Vol. 2.1



KPMG International

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Introduction

The sixth EU Directive on Administrative Cooperation no 2018/822 (DAC6) introduces mandatory disclosure rules (MDR) of cross- border tax arrangements to tax authorities in the EU.

Scope

DAC6 is outlined in a broad scope. The concept of an 'arrangement' is not clearly defined. This means that in the context of global mobility, fairly common situations, e.g. international assignments or contracts with cross- border elements for executives can potentially lead to a reporting obligation.

DAC6 only covers certain taxes. For global mobility, it includes arrangements for income- and payroll tax.

Social security arrangements do not fall in the scope of DAC6.

Penalties

Substantial penalties can be imposed if a reportable tax arrangement is not (completely) reported or not reported in a timely manner. The penalties can exceed EUR 1 mil.

Timeline

DAC6 applies retroactively from 25 June 2018. The original date for the enforcement of the MDR in DAC6 is set to 1 July 2020.

The reportable cross- border tax arrangements that date from 25 June 2018 until 1 July 2020 must be reported by 31 August 2020.

The reportable cross border tax arrangements that are made available or implemented after 1 July 2020 must be reported within 30 days.

The so-called "market-ready" arrangements must be reported every three months.

Deferral

The possibility to defer the MDR deadlines was published in the Official Journal of the EU on 26 June 2020. Deferral is optional for member states, and will be available for a maximum of six months.

If a Member State opts for deferral, this will affect the reporting deadlines only and does not change the retroactive application of DAC6.

Status for deferral	Jurisdiction
No deferral	Finland, Germany
Deferral for 3 months confirmed	Austria
Deferral for 6 months confirmed	Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia France, Gibraltar, Greece, Hungary, Ireland, Italy, Malta, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Sweden, the Netherlands, the UK
No confirmation yet	*Slovakia, Spain*

Example of deadlines with 6 months deferral	
Reportable tax arrangements from 25 June 2018 up to and including 30 June 2020	28 February 2021
Reportable tax arrangements from 1 July 2020 up to and including 31 December 2020	30 or 31 January 2021 (differs per jurisdiction)

Who has to report?

The reporting parties are a **taxpayer/company** and **an intermediary.**

Taxpayer

Most tax arrangements within global mobility do not concern one but two types of taxpayers: **the employer and the employee**. Most member states are yet to clarify who of these parties is the relevant taxpayer in a withholding tax scenario, such as payroll tax. This could either be the payer (the employer) or the recipient (the employee receiving remuneration).

However, if an arrangement has been reported by one party, it will not have to be reported again by another party. Companies may therefore seek to set up work flows to manage the reporting obligation compliance for their employees, insofar necessary.

Intermediary

In short, an intermediary is any person that provides aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border tax arrangement.

When a company is advised about a cross- border tax arrangement by an external advisor, it is likely that **the external advisor will qualify as an intermediary**. An intermediary will then be obliged to disclose a reportable cross- border tax arrangement (except for cases in which legal professional privilege can be claimed).

Shift in reporting obligation

If no intermediary is involved, or if legal privilege is invoked by advisors, the reporting obligation can shift to the taxpayer/company who is implementing a tax arrangement. This is especially relevant when a company performs **in-house tax planning**.

If an intermediary provides advice for a tax arrangement (e.g. analysis of taxability when working cross-border) that is reportable, an intermediary is obliged to report. If a taxpayer/company then uses this reportable tax arrangements in other situations, e.g. for other employees, a new tax arrangement will arise and the reporting obligation lies with the taxpayer/company, as no intermediary was involved with that specific tax arrangement.

What has to be reported?

DAC6 results in a reporting obligation for **cross- border arrangements** that meet certain hallmarks. For a number of these **hallmarks**, a substance test must also be fulfilled for the arrangement to be reportable, the so-called **Main Benefit Test (MBT).**

Cross- border tax arrangements

are arrangements that include at least **one EU member state and one other country or territory (incl. non-EU country or territory).** For example, employee assignments from the US to an EU member state qualify as cross-border arrangements.

Some EU member states also include domestic tax arrangements in the scope for the mandatory disclosure.

Hallmarks

DAC6 endeavors to capture **potentially aggressive tax-planning arrangements** by compiling of a list of the features and elements of tax arrangements and transactions that present a strong indication of tax avoidance or even abuse. Those indications are referred to as 'hallmarks'.

A full list of the hallmarks can be found in Annex IV of DAC6. For global mobility, it is anticipated that the following hallmarks are most relevant:

- **Hallmark A3** – a tax arrangement that has substantially standardized documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customized for implementation.
- **Hallmark B2** – an arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
- **Hallmark C3** – a relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

Main benefit test (MBT)

A number of hallmarks (e.g. A3 and B2) only lead to a reporting obligation if it can be established that the main benefit or one of **the main benefits which a person may reasonably expect to derive from a tax arrangement is the obtaining of a tax advantage.**

In this regard, it is not enough only to consider whether the involved parties have an intention to achieve a tax advantage, but **to consider whether such tax advantage is achieved or not irrespective of one's intent with the tax arrangement.**

MBT is a substance test that excludes arrangements that do not have a tax advantage as one of their main benefits from the reporting obligation.

For hallmarks that are not subject to the MBT (e.g. C3), triggering the hallmark is enough to lead to a reporting obligation.

Challenges

Example:

An intermediary (external advisor) has advised about the documentation used by a Global Mobility department in a company, e.g. contracts and assignment letters.

If this documentation is subsequently used by the company for multiple assignments, where only personal details such as names and remuneration information are changed, **hallmark A3 may be triggered**. **This means that per individual case, it should be analyzed whether the conditions in MBT are met.**

If the intermediary is **not involved** with individual assignments (e.g. there are no issues requiring external advice), the obligation to perform this assessment and any reporting obligation will be with the company.

Commonly occurring situations like the one in the aforementioned example mean that it is crucial to ensure the **awareness of implications of DAC6** within all departments involved with Global Mobility (including HR, Tax, and Payroll).

Challenges to take into account:

— Determining whether a reporting obligation arises and who has to report is technically complex**. The facts and circumstances of each individual arrangement must be assessed against the hallmarks and possibly MBT.** At this point, the tax authorities have not provided clear-cut guidance on what is reportable and what is not.

— There are **no uniform rules across the EU (including the proposed deferral)**, meaning that taxpayers/companies need to understand the differences between rules in determining their compliance obligations and to co-ordinate obligations between stakeholders in different countries.

— **A demarcation of responsibilities** within companies and between companies and advisors must be set up as clearly as possible.

How we can help

KPMG can assist you in developing a process to:

— **Educate stakeholders:** trainings can be set up and training materials can be provided in order to help ensure that the required level of DAC6 knowledge is present within your organization.

— **Identify arrangements:** the first step in helping to manage DAC6 compliance is identifying where arrangements commonly originate within your organization.

— **Assess arrangements:** whether or not a reporting obligation is identified, it is advisable to document for every case how a conclusion was reached.

— **Use managed services technology** to efficiently comply with your obligations through a standardized approach. The KPMG DAC6 Processor can be deployed as a technology solution to support the assessment of reporting obligations.

KPMG professionals are experienced in both the relevant tax laws of the EU member states and IT implementation of the legal requirements.

KPMG has a dedicated network across the EU to assist you in interpreting the specific implementation of DAC6 in each EU member state and to coordinate reporting obligations between Member States.

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