Directive on Administrative Cooperation in (direct) taxation in the EU

1. Summary

Who	**Intermediaries** such as tax advisors, accountants, banks and lawyers, who design, market, organise, make available for implementation or manage the implementation of **potentially aggressive tax-planning schemes with an EU cross-border element** for their clients as well as those who provide assistance and advice
What	**Mandatory reporting by tax intermediaries** (or taxpayers) and the **automatic exchange of information by the tax authorities of EU member states** via the Common Communication Network (CCN) for a wide range of cross-border arrangements in relation to individuals and entities
Why	The main purpose of DAC6 is to **strengthen tax transparency** and **fight against aggressive tax planning.** It broadly reflects the elements of **action 12 of the BEPS** project on the mandatory disclosure of potentially aggressive tax-planning arrangements.
How	The potentially aggressive tax planning arrangements with a cross-border element need to be **reported by the intermediaries** to the tax authorities in the country in which they are resident. The EU member states then will **share the information with all other member states via the Common Communication Network (CCN)** on a quarterly basis. If the taxpayer develops the arrangement in-house, or is advised by a non-EU adviser, or if legal professional privilege applies, the taxpayer must notify the tax authorities directly.
Penalties	Penalties will be imposed on intermediaries that do not comply with the transparency measures. EU member states to implement effective, proportionate and dissuasive penalties

2. What is the DAC 6?

DAC 6 stands for the Directive on Administrative Cooperation in (direct) taxation in the EU, volume 6. It operates as the 6th amendment to the directives designed to encourage cross-border information exchange in the EU. The CRS, for example, was implemented in the EU in 2014 under DAC 2. It provides for mandatory disclosure of reportable cross-border tax arrangements (RCBAs). Unlike the CRS, which targets financial institutions, the DAC 6 has its focus on mandating disclosure from "intermediaries" involved in cross-border tax arrangements with their clients, including among others law firms, accountants and auditors.

3. Who will report?

Reporting will be done by Intermediaries to National Tax Authorities, or by the Taxpayers in certain cases.

The Intermediary includes:

- any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement, or
- a person that based on the information in his possession and his relevant expertise and understanding required to provide such services, knows or could be expected to know that such persons have undertaken aid or advice with regards to the above.

In order to be considered as an Intermediary falling in the above categories, the person needs to meet at least one of the following additional conditions:

1. be resident for tax purposes in an EU Member State.
2. have a permanent establishment in an EU Member State through which the services with respect to the arrangement are provided.
3. be incorporated in, or governed by the laws of an EU Member State.
4. be registered with a professional association related to legal, taxation or consultancy services in an EU Member State.

Intermediaries that are involved in that way with RCBAs must report information on the RCBA to their tax authorities. There will then be automatic exchange of that information with other EU tax authorities.

The Taxpayer includes:

any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

Reporting will be done by taxpayers only if there is no Intermediary (i.e. the taxpayer designs and implements a scheme in-house) or the Intermediary qualifies for exemption under the confidentiality rule.

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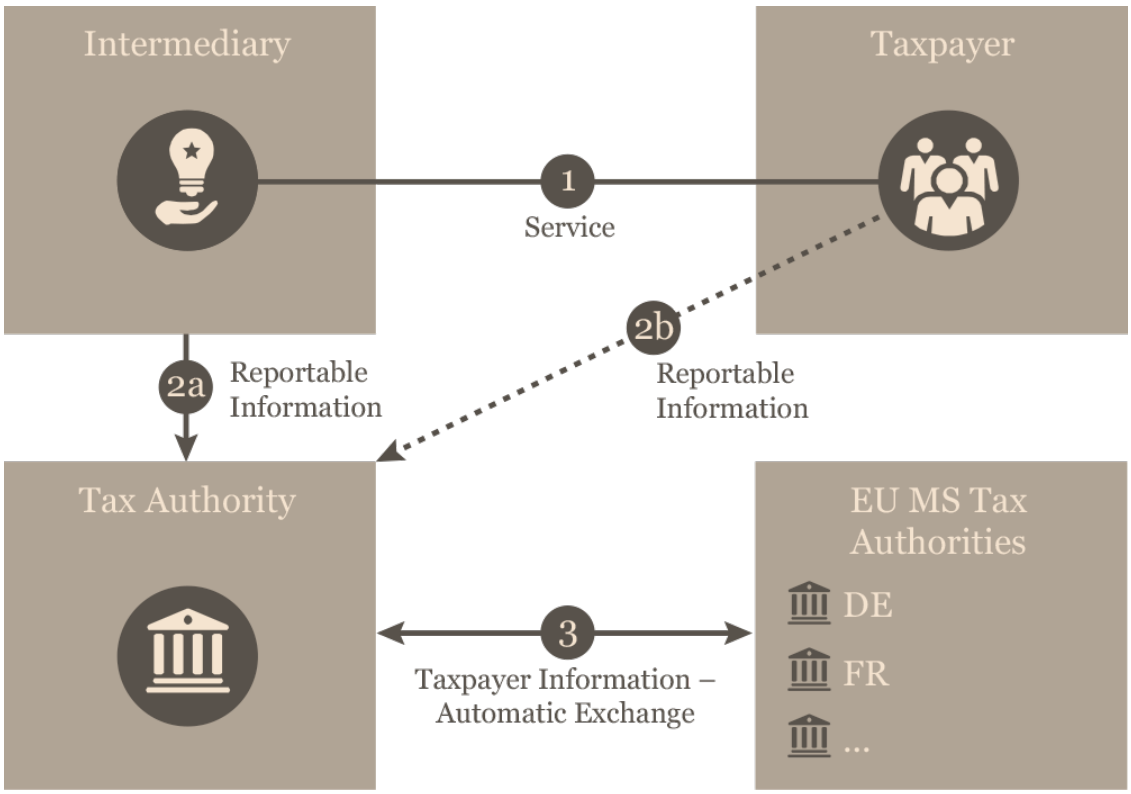


4. What Schemes are Reportable?

A scheme or arrangement is reportable if the following apply:

A. It is Cross-Border and

B. It falls in the Hallmarks.

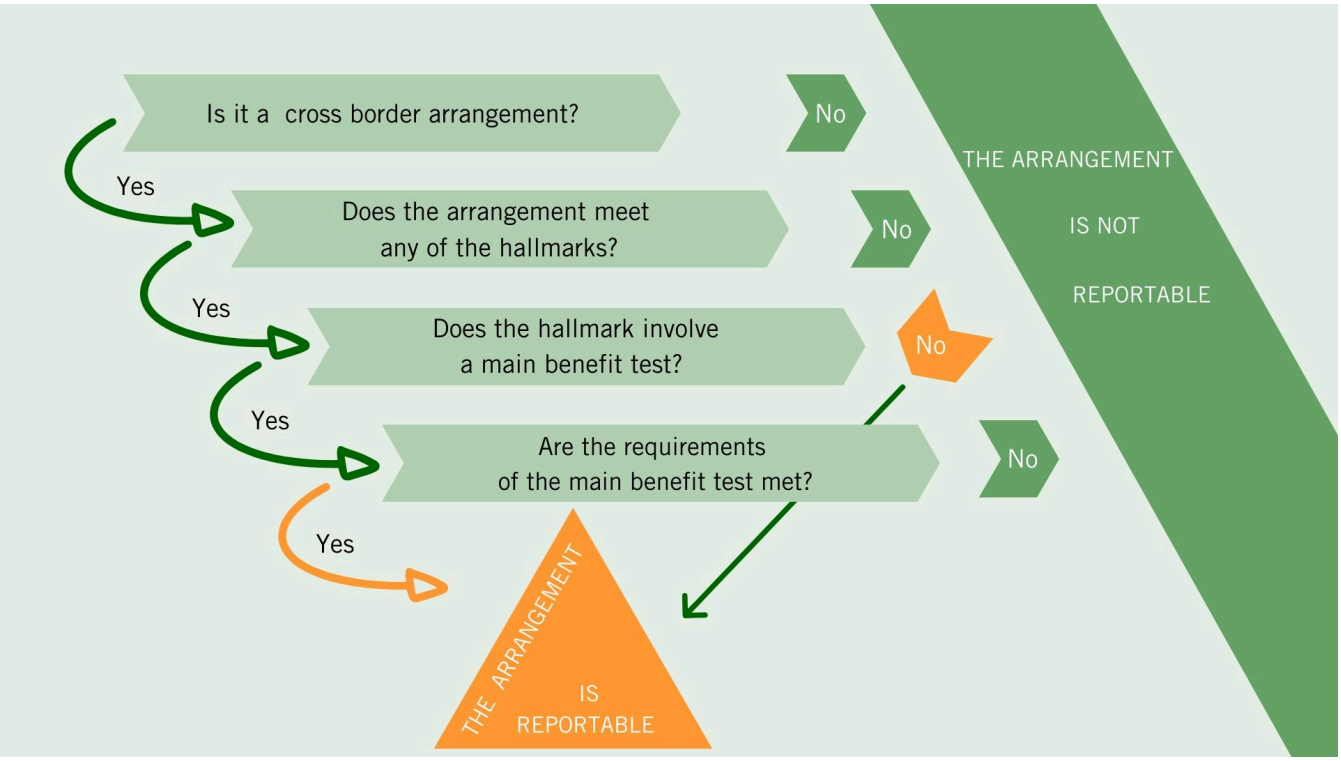
4.1. Cross Border

In order for an arrangement to be categorized as cross-border, it must be an arrangement concerning either more than one EU Member State, or a Member State and a third party or country, whereby at least one of the following conditions is met:

1. Not all participants in the arrangement are tax resident in the same jurisdiction;
2. A permanent establishment linked to any of the participants is established in a different jurisdiction and the arrangement forms part of the business of the permanent establishment;
3. At least one of the participants in the arrangement carries on activities in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
4. At least one of the participants has residency for tax purposes in more than 1 jurisdiction;
5. Such an arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

4.2. Hallmarks

The bill provides for five specific Hallmarks (i.e. characteristics or features of arrangements) in order to determine whether the cross-border arrangement is reportable or not. In certain cases, the hallmarks have to satisfy a Main Benefit Test in order to be disclosed to the authorities.



Main Benefit Test is satisfied if it can be established, having regards to all relevant facts and circumstances, that the main benefit or one of the main benefits of entering into such an arrangement is the obtaining of a **tax advantage**.

Tax Advantage includes the following:

- Tax Relief or increased tax relief;
- Tax refund or increased tax refund;
- Tax avoidance or reduction of tax liability;
- Postponement of tax or acceleration of tax refund;
- Avoidance of withholding tax;

The **Hallmarks** are divided into categories as follows:

Category A: Generic Hallmarks Linked to Main Benefit Test - these include the following provided that they fulfil the "Main Benefit Test"

1. An arrangement where the taxpayer or a participant, undertakes the obligation to comply with a condition of confidentiality that may require him not to disclose the manner in which the arrangement could secure a tax advantage to other intermediaries or to the Tax Authorities;
2. An arrangement where the Intermediary receives a fee for its services proportionate to the amount of the tax advantage received by the tax payer or a success fee in case that a tax advantage is obtained;
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation;

Category B: Specific Hallmarks Linked to Main Benefit Test – these include the following provided that they fulfil the "Main Benefit Test":

1. The acquisition of loss-making companies and entering into such arrangements for the purpose of benefiting through group tax relief, including the transfer of taxable losses to another jurisdiction or acceleration of such losses;
2. Conversion of income into exempt or lower-taxed revenue streams (such as capital, gifts etc);
3. Circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features;

Category C: Specific Hallmarks Related to Cross-Border Transactions: these include:

1. Arrangements that involve deductible cross-border transactions between associated enterprises in cases where:
    a. the recipient is not resident for tax purposes in any jurisdiction, or
    b. the recipient is resident for tax purposes in a jurisdiction:
        I. charging corporate income tax at the rate of 0% or almost 0%, or
        II. the recipient is resident for tax purposes in a jurisdiction of third-country jurisdictions which is assessed as non-cooperative by the EU or the OECD;
    c. the payment benefits from full exemption from tax in the jurisdiction where the recipient is resident for tax purposes, or
    d. the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;
2. Tax deductions for the same depreciation of assets are claimed in more than one jurisdiction;
3. Tax relief is claimed for the same income/capital in more than one jurisdiction;

4. Arrangement that includes transfer of assets where there is a material difference in the amount being treated as payable in consideration for the transferred assets in the jurisdictions involved.

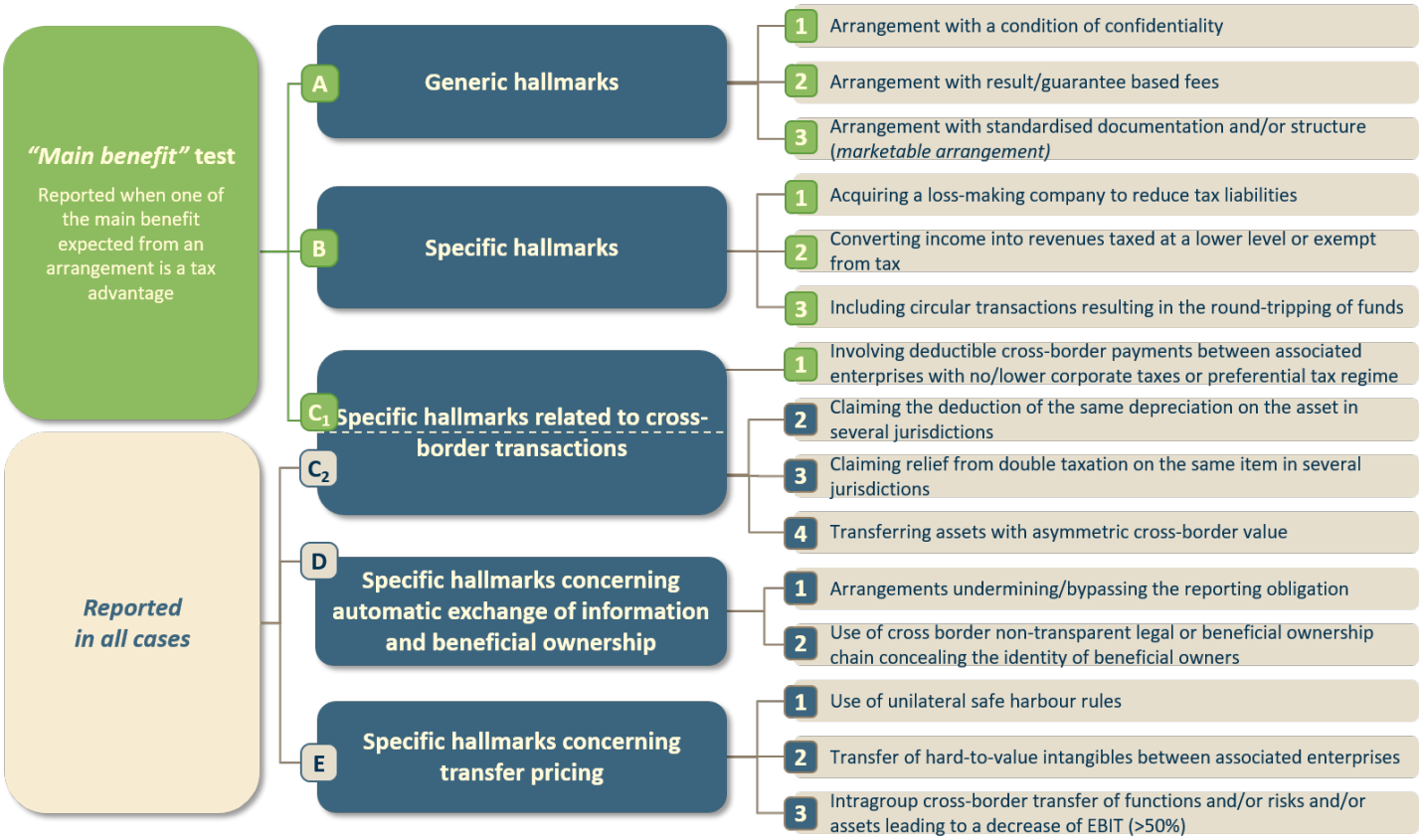
In respect of the above hallmarks, the "Main Benefit Test" has to be taken into account for points 1(b)(i), (c) and (d). For the rest of the hallmarks the Main Benefit Test does not have to be fulfilled.

Category D: Specific Hallmarks Concerning the Automatic Exchange of Information and Beneficial Ownership - these include the following, under conditions:

1. Arrangements that undermine the EU reporting obligations or of equivalent significance reporting obligations in relation to the exchange of Financial Account information, including obligations raised from conventions with 3rd countries;
2. Arrangements involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures;

Category E: Specific Hallmarks Concerning Transfer Pricing - these include the following:

1. Arrangements that involve unilateral safe harbour rules;
2. Arrangements that involve transfer of hard-to-value intangibles, subject to conditions;
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made;



5. What information will be disclosed?

The reporting shall have among others the following details:

1. Identification of taxpayers, associated parties thereof and intermediaries involved.
2. Details of the hallmarks that generated the reporting obligation.
3. A summary of the reportable arrangement.
4. The date which the first step in implementing the reportable cross-border arrangement was made (or will be made).
5. Details of the relevant domestic rules forming the basis of the reportable arrangement.
6. The value of the reportable cross-border arrangement.
7. The Member State of the taxpayer and any other Member State which are likely to be concerned by the reportable cross-border arrangement.
8. Any other person in a Member State likely to be affected by the reportable cross-border arrangement and the Member State in which such person is linked.

6. Penalties

Failure of compliance to the reporting requirements entails to heavy penalties, depending on the reasoning for such failure as follows:

Omission of Reporting by the Intermediary or the taxpayer concerned

- Failure of notification by the Intermediary to either another Intermediary or the taxpayer concerned, their respective obligation for reporting, due to the Intermediary's exemption from reporting.
- penalty starts from EUR 10,000 up to EUR 20,000

Delay of reporting by either Intermediary or taxpayer concerned, for a period of up to 90 days from the date that the reporting obligation is raised.

- Delay of notification of the Intermediary to either another Intermediary or the taxpayer concerned, their obligation for reporting due to the Intermediary's exemption from reporting, for a period of up to 90 days from the date that the reporting obligation is raised.
- The penalty starts from EUR 1,000 up to EUR 5,000

Delay of reporting by either Intermediary or taxpayer concerned, for a period in excess of 90 days from the date that the reporting obligation is raised.

- Delay of notification of the Intermediary to either the another Intermediary or the taxpayer concerned, their obligation for reporting due to the Intermediary's exemption from reporting, for a period in excess of 90 days from the date that the reporting obligation is raised.
- The penalty starts from EUR 5,000 up to EUR 20,000

If the Intermediary or the taxpayer concerned submits incomplete or untruthful information.

- If the Intermediary or the taxpayer concerned fails to submit the information within 14 days from the date of receipt of the written request from the Authorities.
- The penalty starts from EUR 1,000 up to EUR 10,000

ABOUT BKMS

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