

# How are Swiss-based international groups affected by EU Directive on Administrative Cooperation?

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## Introduction

### Key features of DAC 6 and its effect on Swiss-based international groups

#### Comment

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The latest amendment to the EU Directive on Administrative Cooperation (2011/16/EC) (DAC 6) requires the mandatory reporting of certain cross-border tax arrangements and the subsequent automatic exchange of such information within the European Union.

DAC 6 is based on Base Erosion and Profit Shifting Action 12 and aims to increase tax transparency by identifying arrangements that involve aggressive tax planning at an early stage.

Although DAC 6 concerns only EU member states and Switzerland is therefore not obliged to incorporate it into national law, international groups based in Switzerland may be affected by the new directive through their subsidiaries or branches in the European Union.

The DAC 6 mandatory reporting regime was originally intended to take effect from 1 July 2020, obliging qualifying intermediaries or the respective taxpayer to disclose information on reportable cross-border tax arrangements up to 25 June 2018 to their tax authorities within 30 days. However, due to the COVID-19 pandemic, the European Council agreed on an optional six-month deferral of the DAC 6 reporting deadlines on 24 June 2020.

### Key features of DAC 6 and its effect on Swiss-based international groups

#### ***What arrangements must be reported?***

##### *Cross-border arrangements and hallmarks*

A reportable cross-border arrangement means any arrangement that concerns at least one EU member state and a third country, including Switzerland, and meets at least one of the characteristics or features known as 'hallmarks' listed in Annex IV of DAC 6. These hallmarks are categorised into:

- generic and specific hallmarks triggering a reporting obligation only if the main benefit of the arrangement was to obtain a tax advantage (ie, in combination with the main benefit test (see below)); and
- other specific hallmarks triggering a reporting obligation *per se*.

The generic hallmarks linked to the main benefit test include confidentiality clauses, performance-related remuneration and substantially standardised documentation that is available to more than one taxpayer without a need to be substantially customised for implementation.

The specific hallmarks linked to the main benefit test comprise:

- the acquisition of a loss-making company while discontinuing the main activity of such company and using its losses in order to reduce tax liability;
- arrangements that lead to the conversion of income into revenue that is taxed at a lower level or exempt from tax (eg, conversion of income into capital).
- arrangements which include circular transactions (resulting in the round-tripping of funds); and
- arrangements involving deductible cross-border payments which benefit from a preferential tax regime in the recipient's residence state or on which the recipient's residence state imposes no corporate income tax or imposes corporate income tax at the rate of zero or almost zero.

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The following specific hallmarks trigger the reporting obligation *per se* (ie, irrespective of the fulfilment of the main benefit test):

- cross-border transactions involving:
  - ◊ a recipient of a payment which is not resident in any tax jurisdiction or which is tax resident in a jurisdiction that has been assessed as non-cooperative;
  - ◊ a taxpayer requesting deductions for the same depreciation;
  - ◊ relief from double taxation in more than one jurisdiction; and
  - ◊ the transfer of assets in order to apply (substantially) different valuation methods;
- hallmarks concerning automatic exchange of information and beneficial ownership; and
- hallmarks concerning transfer pricing, such as:
  - ◊ the use of unilateral safe harbour rules;
  - ◊ the transfer of hard-to-value intangibles; or
  - ◊ intragroup cross-border transfers of functions and/or risks and/or assets exceeding 50% of the projected earnings before interest and taxes.

#### *Main benefit test*

As mentioned above, certain hallmarks will trigger a reporting obligation only if the main benefit test is satisfied. This will be the case if the main benefit or one of the main benefits that a person may reasonably expect to derive from an arrangement consists of obtaining a tax advantage.

In the context of the main benefit test, it is irrelevant whether the taxpayer has actually obtained a tax advantage, which means that the test is based on an objective point of view.

#### **Who is obliged to report?**

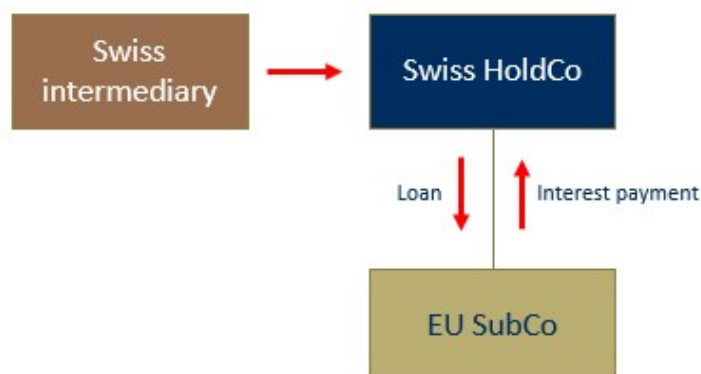
Intermediaries – but also, in some specific cases, taxpayers – are subject to the reporting obligations under DAC 6.

An 'intermediary' is any party that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement. This definition covers any party that knows or could be reasonably expected to know that they directly or indirectly provide aid, assistance or advice with regard to the relevant arrangements. As a result, a wide range of professionals (eg, consultants, accountants, financial advisers, lawyers, in-house counsels and banks) may be subject to reporting obligations under DAC 6. However, the relevant party must have a connection to the European Union, which will be true if they:

- are resident or incorporated in an EU member state;
- have a permanent establishment in an EU member state; or
- are registered with a tax, consultancy or legal professional association in an EU member state.

Therefore, Swiss intermediaries do not fall within the scope of DAC 6 and are not required to meet the related reporting obligations. If only a Swiss intermediary is involved in the arrangement or the involved EU intermediary is subject to a professional privilege and their duty to report is therefore waived, the reporting obligation will pass to the taxpayer.

For example, where a Swiss holding company grants a loan to an EU subsidiary and the applicable interest rate is determined based on the safe haven interest rates published annually by the Swiss Federal Tax Administration (SFTA), the criterion of a cross-border arrangement is met and one of the hallmarks – namely, the use of unilateral safe harbour rules – is also fulfilled, leading to a reporting obligation under DAC 6. In the absence of an EU intermediary, the reporting obligation is conferred on the relevant EU subsidiary, since the Swiss holding company and any Swiss intermediaries potentially involved remain outside the scope of DAC 6.



#### **What happens in the event of non-compliance?**

To ensure that the reporting obligations are complied with, individual EU member states will impose penalties of up to €700,000.

### **Comment**

DAC 6 is an EU directive and, as such, need not be incorporated into Swiss law. Nor does it extend to companies having their registered seat in Switzerland. However, its impact on groups based in Switzerland may be significant. In certain circumstances, groups based in Switzerland may be affected by DAC 6 – for example, on account of intercompany loan relationships whose interest rate is determined on the basis of:

- the safe harbour interest rates published annually by the SFTA;
- royalties paid to a Swiss group company by an EU subsidiary that are preferentially taxed in Switzerland; or
- linked to the main benefit test, the acquisition of a European loss-carrying company.

Considering the broad scope of DAC 6, it is crucial that Swiss-based groups identify qualifying intercompany transactions at an early stage and ensure that they comply with the applicable subsidiary reporting obligations in cases with no involvement of EU intermediaries.

*For further information on this topic please contact [Fabienne Limacher](#) or [Maurus Winzap](#) at Walder Wyss by telephone (+41 58 658 58 58) or email ([fabienne.limacher@walderwyss.com](mailto:fabienne.limacher@walderwyss.com) or [maurus.winzap@walderwyss.com](mailto:maurus.winzap@walderwyss.com)). The Walder Wyss website can be accessed at [www.walderwyss.com](http://www.walderwyss.com).*

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