

Mandatory automatic exchange of information in the field of taxation for reportable cross-border arrangements (DAC 6)



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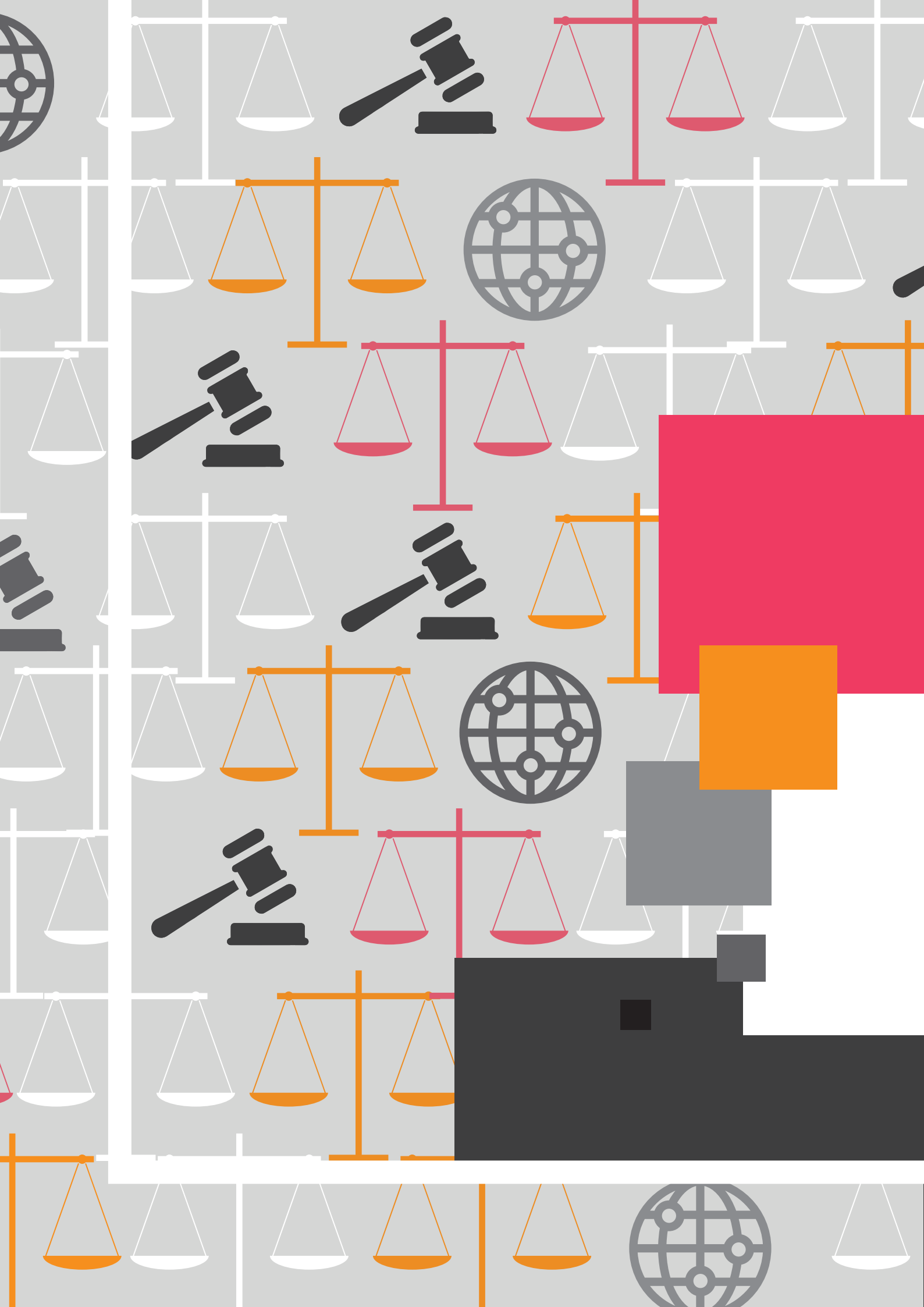


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DAC 6

General overview

What is it?

Political agreement

On 25 May 2018, the Economic and Financial Affairs Council formally adopted the Council Directive amending the existing Directive 2011/16/EU on administrative cooperation in the field of taxation, as regards mandatory automatic exchange of information in relation to reportable cross-border arrangements to disclose potential aggressive tax planning. The Directive is in force since 25 June 2018.

Objective

The main objective of the Directive 2018/822 (“DAC 6”) is to strengthen tax transparency by way of automatic exchange of information between the EU Member States on potentially “aggressive tax planning” arrangements.

What does it mean?

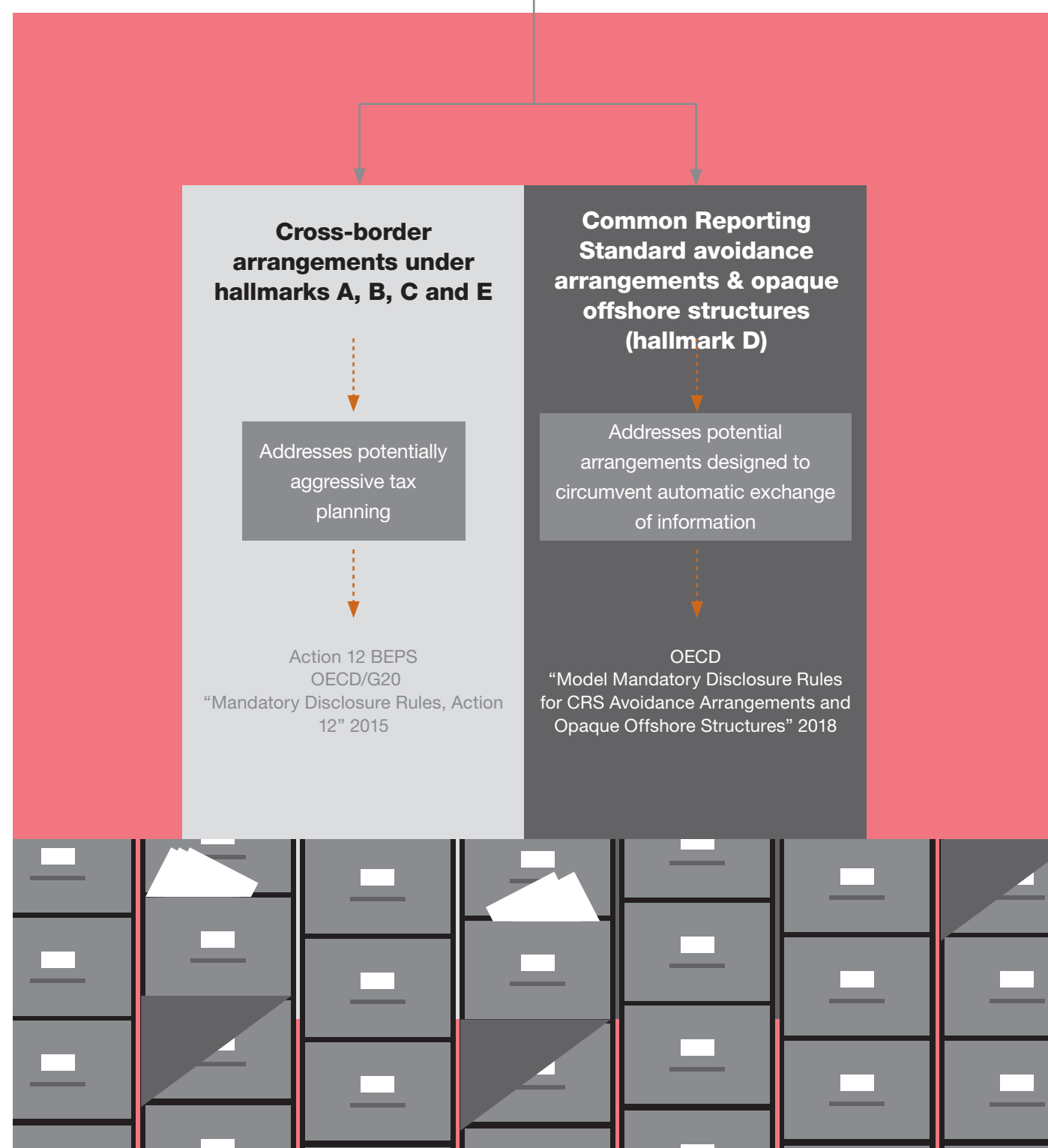
Any transaction involving two countries where at least one is in an EU country will need to be reported where it meets certain criteria (referred to as “**HALLMARKS**”) that could indicate aggressive tax planning.

Who is required to report

The obligation to disclose is on all EU-based intermediaries involved in the arrangement. Under certain conditions the taxpayer may be obliged to disclose as well.

DAC 6:

Mandatory disclosure of information on:



Who has to report?

Intermediary

Definition of an intermediary

- Any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement ("**Promoters**"), and
- Any person that knows, or could be reasonably expected to know, (based on facts, circumstances, available information and the relevant expertise and understanding) that they have undertaken to provide—directly or by means of another person—aid, assistance or advice in relation to services mentioned above ("**Service Providers**").

Lawyers, accountants, tax & financial advisors, banks, consultants, etc.

The rules are not intended to impose any additional due diligence rules on a Service Provider beyond those that would ordinarily be undertaken for commercial or regulatory purposes.

Details on disclosure obligation

- If e.g., intermediary is entitled to legal professional privilege (where the Member State ("MS") gives a right to such "waiver") or not an EU Intermediary: **shift of the disclosure obligation to other intermediaries**;
- If obligation to disclose not enforceable upon any intermediary (legal professional privilege, no other EU intermediary, etc.): **shift of the disclosure obligation to the relevant taxpayer**;
- If taxpayer designs/implements a scheme in-house (i.e. no intermediary involved): **the disclosure obligation is with the relevant taxpayer**.

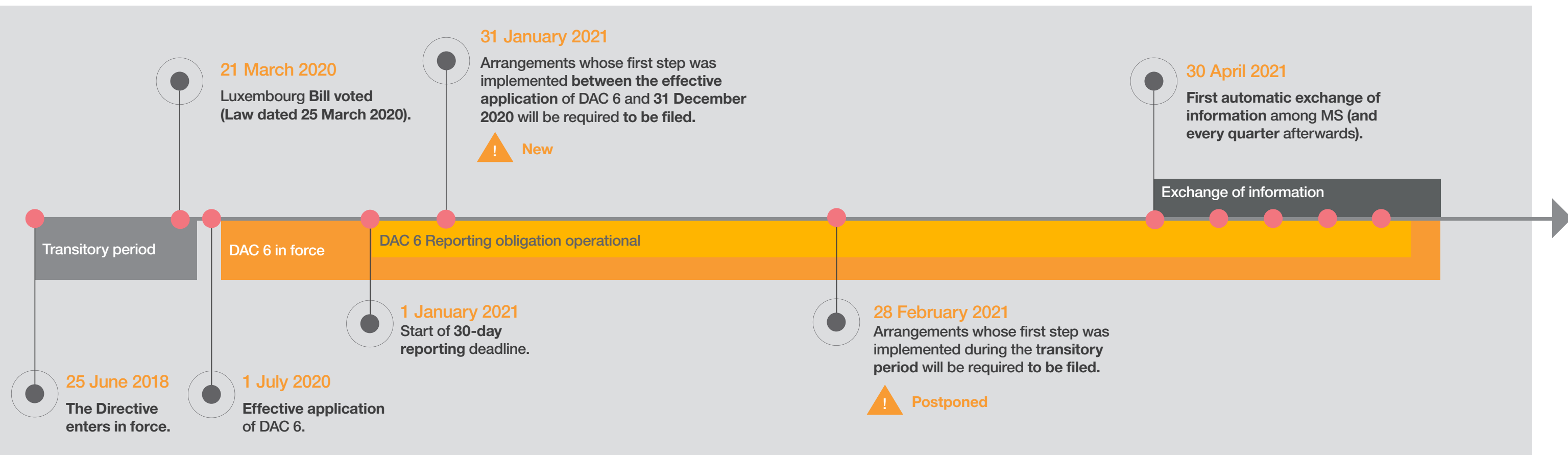
Obligation for the "waived" intermediary to notify, without delay, any other intermediary or the relevant taxpayer of their disclosure obligations.

In Luxembourg, legal professional privilege is granted to lawyers, qualified accountants and auditors based on the Law dated 25 march 2020.

Timeline for the intermediaries concerned*

*Based on Directive 2020/876 amending Directive 2011/16/EU to address the deferral of certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic.

The Directive has been implemented into Luxembourg law by the law dated 24 July 2020.



Certain jurisdictions may introduce a retroactive period impact for CRS avoidance arrangements

Arrangements with value/balance of the relevant Financial Account > USD 1,000,000 implemented by "Promoters" on or after that date should be disclosed based on OECD's Mandatory Disclosure Rules for CRS avoidance arrangements.

When will the arrangement have to be reported?

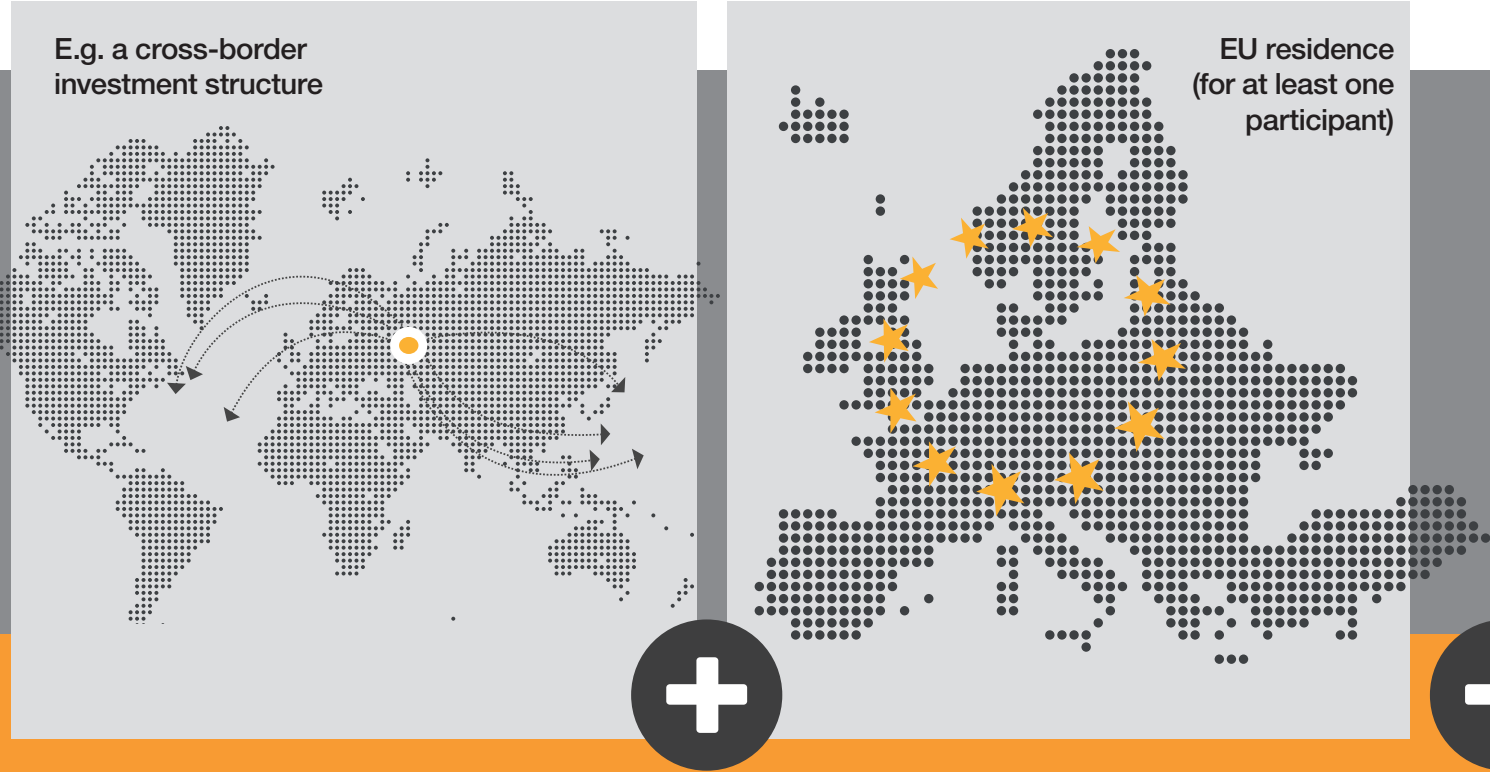
- For **reportable cross-border arrangements** whose first step was implemented during the **transitory period**, intermediaries/taxpayers will be required to disclose **by 28 February 2021**;
- Within **30 calendar days** beginning on the day after the **arrangement is made available for implementation or is ready for implementation** to the taxpayer or when the **first step has been implemented** (whichever occurred first).
- The start date of the 30-day deadline for the reporting of information that would become reportable **between 1 July 2020 and 31 December 2020** is **postponed to 1 January 2021**.

Which arrangements are to be reported?

Cross-border arrangement

Arrangement concerns multiple countries

EU nexus



Hallmarks

Main benefit test required: If obtaining a tax advantage constitutes the main benefit or one of the main benefits a person is expected to derive from an arrangement			No main benefit test	
A	B	C	D	E
Generic hallmarks	Specific hallmarks	Specific hallmarks for cross-border transactions	Specific hallmarks for AEoI and beneficial ownership	Specific hallmarks for transfer pricing

Reportable cross-border arrangement

- **Standardised form of the report**
 - Identification of intermediaries and relevant taxpayers;
 - Details of the hallmarks;
 - Summary of the content of the arrangement;
 - Date of implementation of the first step;
 - Details of the national provisions related to the arrangement;
 - Value of the arrangement;
 - Identification of the Member State impacted.
- **VAT is excluded** from the scope.
- Requirements of DAC 6 **does not cancel the reporting obligations of DAC 3** on automatic exchange of rulings

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DAC 6

Hallmarks

Generic and specific hallmarks linked to the main benefit test

Scope of “Main benefit test” i.e. if obtaining a tax advantage constitutes the main benefit or one of the main benefits a person may be reasonably expected to derive from an arrangement

Category A

Generic hallmarks linked to the main benefit test

- 1. Confidentiality:** tax arrangements where the relevant taxpayer/participant undertakes not to disclose how the arrangement could provide a tax benefit with regard to other intermediaries or the tax authorities. This concept should not be related to professional secrecy but rather to commercial secrets and business know-how.
- 2. Success fee:** fixed percentage of the tax advantage is charged as a fee by the intermediary or partial/full refund of the fees to the intermediary if tax advantage not partially/fully achieved.
- 3. Standard arrangement:** standardised documentation and/or structure is available to more than one taxpayer without a need to be substantially customised for implementation.

The fundamental characteristic of such schemes is their ease of replication. Standard banking contracts (e.g. mortgages) would not need to be reported, because the tax advantage represents an insignificant benefit as compared to other main benefits (e.g. satisfaction of housing needs).

**(Based on the Summary record of the EC meeting on 24 September 2018).*

Category B

Specific hallmarks linked to the main benefit test

1. Acquisition of a **loss-making company** and discontinuing its main activity and using its losses in order to reduce the tax liability, including through a transfer of those losses to another jurisdiction or by acceleration of the use of those losses.
2. An arrangement that has an effect of **converting income into capital, gifts or other types of revenues** which are taxed at a lower level or are exempt from tax.
3. Arrangements which include **circular transactions resulting in the round-tripping of funds**, through using entities without other primary commercial activity or operations offsetting themselves or that have similar features.

Category C §1 (b) (i), (c), (d)

Specific hallmarks related to cross-border transactions

- **Deductible cross-border payments** made between two or more associated enterprises if tax jurisdiction of the recipient **does not impose corporate tax or corporate tax rate is zero/almost zero** (nominal rate below 1% based on the summary record of the EC meeting on 24 September 2018).
- **Deductible cross-border payments** made between two or more associated enterprises if the payment benefits from a **full exemption** from tax in the jurisdiction of the recipient.
- **Deductible cross-border payments** made between two or more associated enterprises if a payment benefits from a **preferential tax regime** in the jurisdiction of the recipient.

Please refer to the BEPS action 5 report for non-exhaustive examples of harmful regimes that were reviewed. However, the concept of “preferential tax regime” is wider than a “harmful” regime based on the summary record of the EC meeting on 24 September 2018.

Specific hallmarks not linked to the main benefit test

Specific hallmarks related to CRS & not linked to the main benefit

Out of the “Main benefit test” scope

Category C (a), (b) (ii), (2), (3), (4)

Specific hallmarks related to **cross-border transactions** if at least of the following condition is met:

- **Deductible cross-border payments** made between two or more associated enterprises if recipient is not resident for tax purposes in any tax jurisdiction.
- **Deductible cross-border payments** made between two or more associated enterprises if the jurisdiction of the recipient is included in the list of third-country jurisdictions which have been assessed as **non-cooperative** by Member States or the OECD.
- **Relief from double taxation** for the same item of income/capital claimed in more than one jurisdiction as well as **deductions for the same depreciation** on the asset are claimed in more than one jurisdiction.
- **Transfers of assets and material difference** in the amount treated as payable for the assets in the jurisdictions involved.

Category E

Specific hallmarks concerning **transfer pricing**

- Arrangements which involves the use of **unilateral safe harbour rules**.
Based on the OECD Transfer Pricing Guidelines, a safe harbour rule is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country’s general transfer pricing rules. Examples could be prices established under such rules that would be automatically accepted by the tax administrations that have expressly adopted such rules.
Based on the summary record of the EC meeting on 24 September 2018, the EC took the view that national rules on safe harbours should be ‘unilateral’ where they depart from the international consensus, as this is enshrined in the OECD Transfer Pricing guidelines.
- Arrangements involving the **transfer of hard to value intangibles** for which no reliable comparable exist and projection of future cash flows, income expected or the assumptions used are highly uncertain.
- Arrangements where **intra-group cross-border transfer of functions, risks or assets if projected annual result for the 3 years after the transfer are less than 50% of the projected annual EBIT** of the transferor if transfer had not been made.

Out of the “Main benefit test” scope

Category D1

Specific hallmarks concerning **automatic exchange of information and beneficial ownership**

1. Undermining the reporting obligation (CRS) with

- the **use of account, product or investment** not being a Financial Account but having substantially similar characteristics **e.g.:** use certain types of e-money as a substitute for a depository account, issuance of certain types of derivative contracts out of scope of CRS but which replicate underlying Financial Assets in the scope of CRS
- the **transfer of accounts or assets** to, or the use of jurisdictions that are not bound by automatic exchange of information with the State of residence of the relevant taxpayer
- the **reclassification of income/capital** into products/payments not subject to automatic exchange of information
- the **transfer of a Financial Institution/Account/Assets** into a Financial Institution/Account/Assets not subject to reporting under the automatic exchange of information **e.g.:** strategies such as dividing the amounts held in a Financial Account to remain under the USD 250,000 threshold for CRS reporting
- the **use of legal entities/arrangements/structures** that eliminate reporting of Account Holders/Controlling Persons **e.g.:** arrangement designed to mislead a Financial Institution about real discretionary beneficiaries of a trust (e.g. replacing a charity by the real intended discretionary beneficiaries after account opening without informing the FI).
- the **use of arrangements** that undermine or exploit **weaknesses in the due diligence procedures** used by Financial Institutions to comply with their obligations to report Financial Account information (including the use of jurisdictions with weak AML regimes or transparency requirements) **e.g.:** Residence/Citizenship by investment schemes to undermine identification of actual residence jurisdiction

! Member States could use to illustrate or interpret the OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures



Retroactive effect?

CRS Avoidance Arrangements with the value/balance of the relevant Financial Account > USD 1,000,000 implemented by “Promoters” and that entered into force after the 29 October 2014 could be reportable under DAC 6 following countries implementation rules (as recommended in the OECD’s Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures)

Specific hallmarks not linked to the main benefit test

Out of the “Main benefit test” scope

Category D2

Specific hallmarks concerning **automatic exchange** of information and **beneficial ownership**

The below hallmark specifically targets Passive Offshore Vehicles that are held through an Opaque Structure, and is designed to capture structures that would not ordinarily be subject to CRS reporting (such as holding structures that hold assets other than Financial Accounts, e.g. real estate).

The definition of Opaque Structure has a generic element that tests whether the structure has the effect of not allowing the accurate identification of the beneficial owners and it also specifically identifies well recognised tax planning techniques that can be used to achieve this outcome, such as the use of undisclosed nominees.

2. Arrangement with a non-transparent legal or beneficial ownership chain with

- No substantive **economic activity** nor **substance**, and;
- Where the **jurisdiction** of incorporation, residence, management, control, establishment of the legal arrangement is **different from** the jurisdiction of residence of the beneficial owners, and;
- For which **beneficial owners are unidentifiable**.

e.g.:

- Use of nominee shareholders;
- Informal control arrangement with persons with direct control over a vehicle (e.g. arrangements where the trustee of a trust habitually acts under the instruction of another person even though the person is not recognized as a trustee or protector under the trust deed);
- Arrangements that have the effect of depriving a legal owner of the economic benefit of the asset or income in favour of a third party such that the third party has the benefit of the asset without being recognised as the beneficial owner (such as an arrangement whereby a person provided funding to a non-affiliated company in exchange for an option to acquire all or substantially all of the assets of that company for a nominal sum);
- This could also include the use of prepaid debit and credit cards and interest free loans (arrangements that provide a person with access to assets or income without being identified as the beneficial owner).



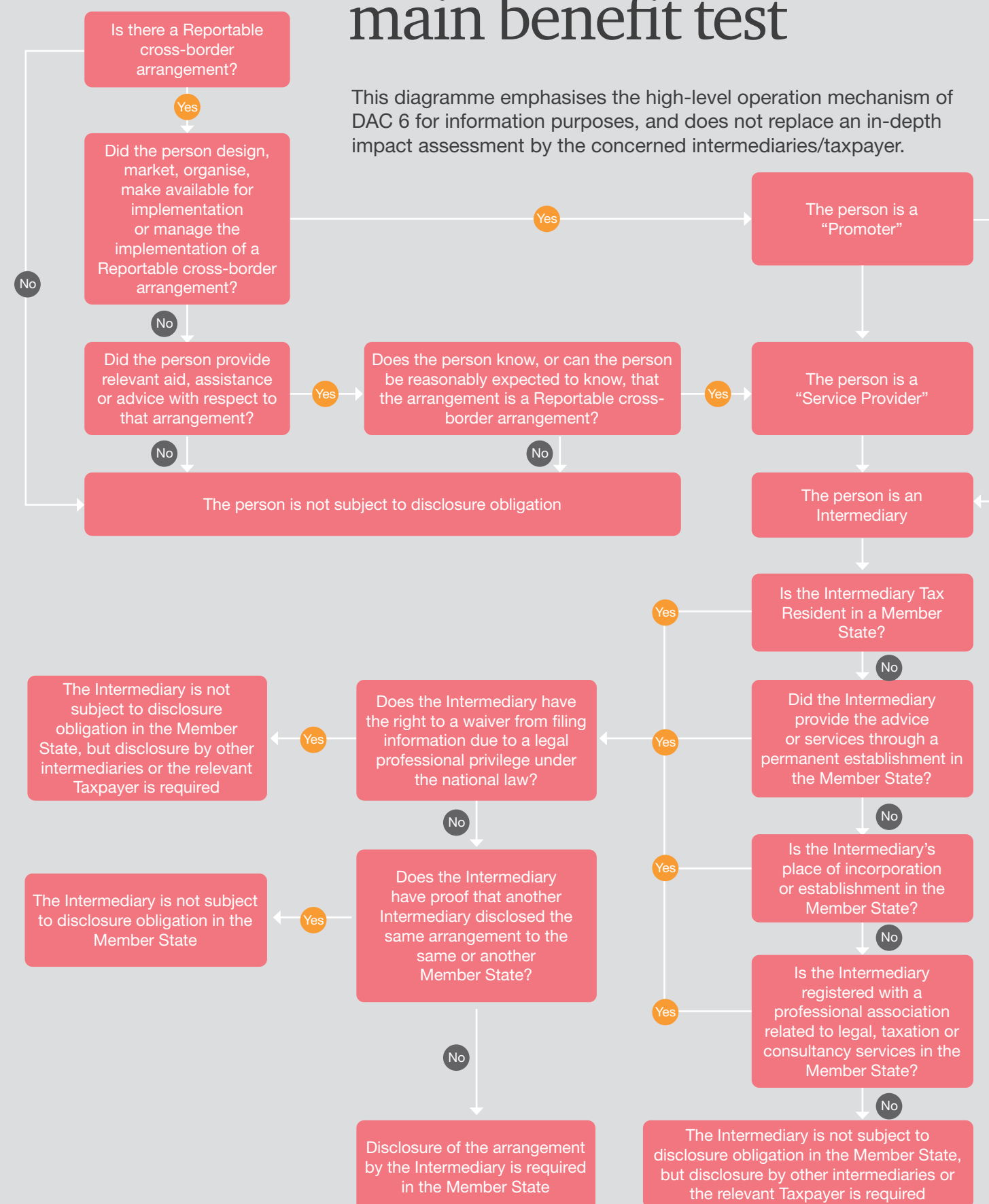
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High level overview of the operation of DAC 6 main benefit test

This diagramme emphasises the high-level operation mechanism of DAC 6 for information purposes, and does not replace an in-depth impact assessment by the concerned intermediaries/taxpayer.



3

DAC 6

Our services

How we can help

Our team combines experts in tax, people, processes, data and technology. By bringing together these different skill sets, we can help taxpayers understand the new rules and implement effective controls and processes to ensure disclosable events are proactively identified and managed.



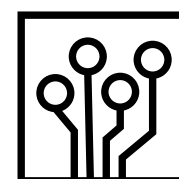
Risk assessment

- Risk assessment (per business unit) underpinned by a tried and tested methodology to help you assess:
 - key risk areas and processes,
 - applicable hallmarks,
 - your impacted businesses, and
 - readiness to comply.
- Review of a (sample) of transactions



Define Governance framework

- Comprehensive documented framework to identify and manage risks and potentially impacted transactions.
- Define roles and responsibilities.
- Draft and review procedures
- PwC DAC 6 Smart Reporting to monitor in-scope transactions



Technology and data

- DAC 6 reporting
- Integrated approach using technology to address multiple reporting requirements using the same data set and reporting mechanism in the required format.



Training & ad hoc advisory


- On-site training with our specialists.
- DAC 6 e-learning modules
- Ad hoc advisory
- Regulatory intelligence

Our solution - DAC6 Smart Reporting


Make use of technology to ensure DAC6 compliance.


Our tool helps you to meet the new mandatory disclosure rules.

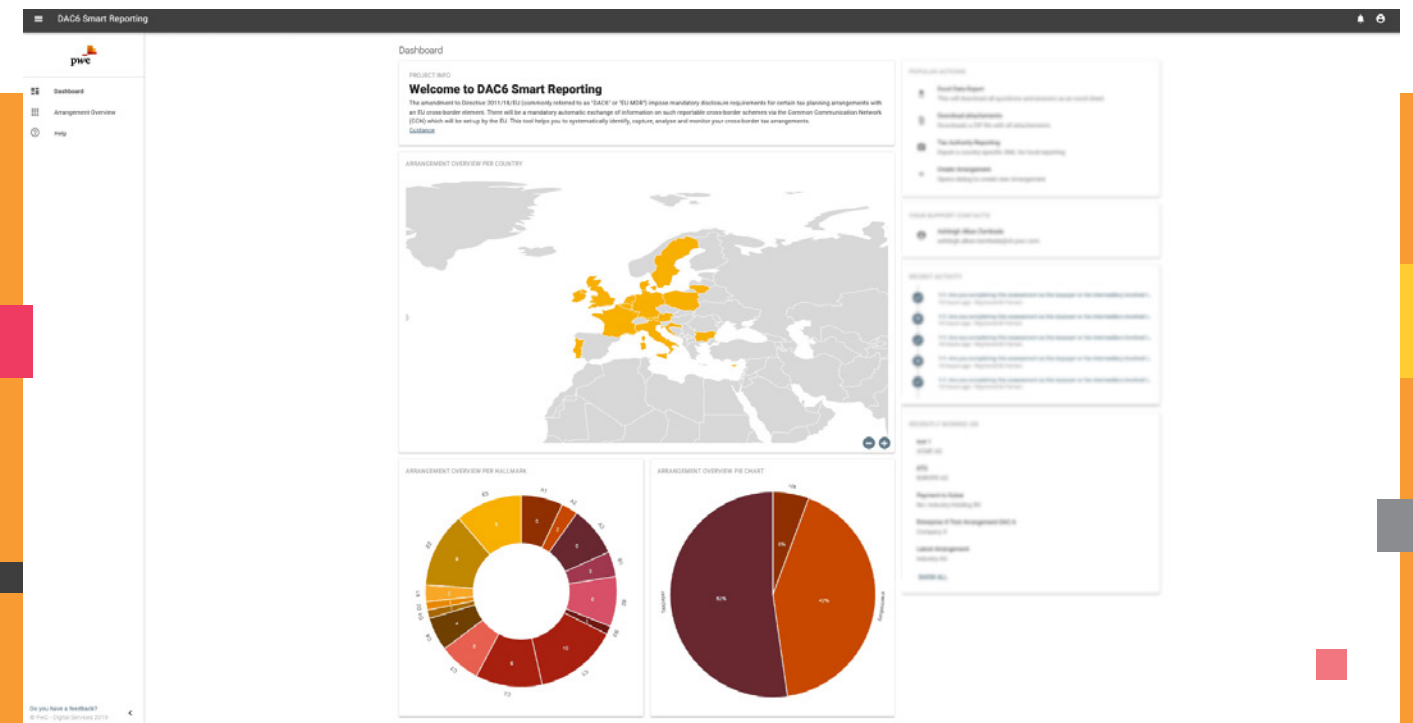
Hosted in Luxembourg by our dedicated PSF.

 **Identify, capture and monitor cross-border arrangements.**

 **Assess cross-border arrangements according to local laws.**

 **Identify responsible party for reporting.**

 **Generate reporting to local tax authorities.**



Highlights and key features

- A web-based solution, **hosted on servers in Luxembourg by PwC Tax Information S.à r.l.**, which is a full subsidiary of PwC Luxembourg and a CSSF regulated **Professional of the Financial Sector** subject to all Luxembourg data protection and banking secrecy laws.
- Systematic, structured and auditable way to **collect cross-border tax arrangements**.
- **Up-to-date local country-specific content always**, as well as **general guidance and interpretations** on DAC 6 provisions.
- **Proven technology**. SmartSurvey is used by several multinational clients for different data gathering, analysis and monitoring exercises.
- **Quick-glance overview of countries** where your entities have **reporting potential** and KPI charts (configurable).
- **Collaboration with third-party** intermediaries advising on a cross-border arrangement by sharing single questions or entire questionnaire for the assessment.
- **Local-reporting functionality** based on local specifications of different Tax Administrations in the EU.
- **Executive reports** displayed differently, including PDF or XLS download.
- **Continuous updates** based on client/user feedback.

Notes



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