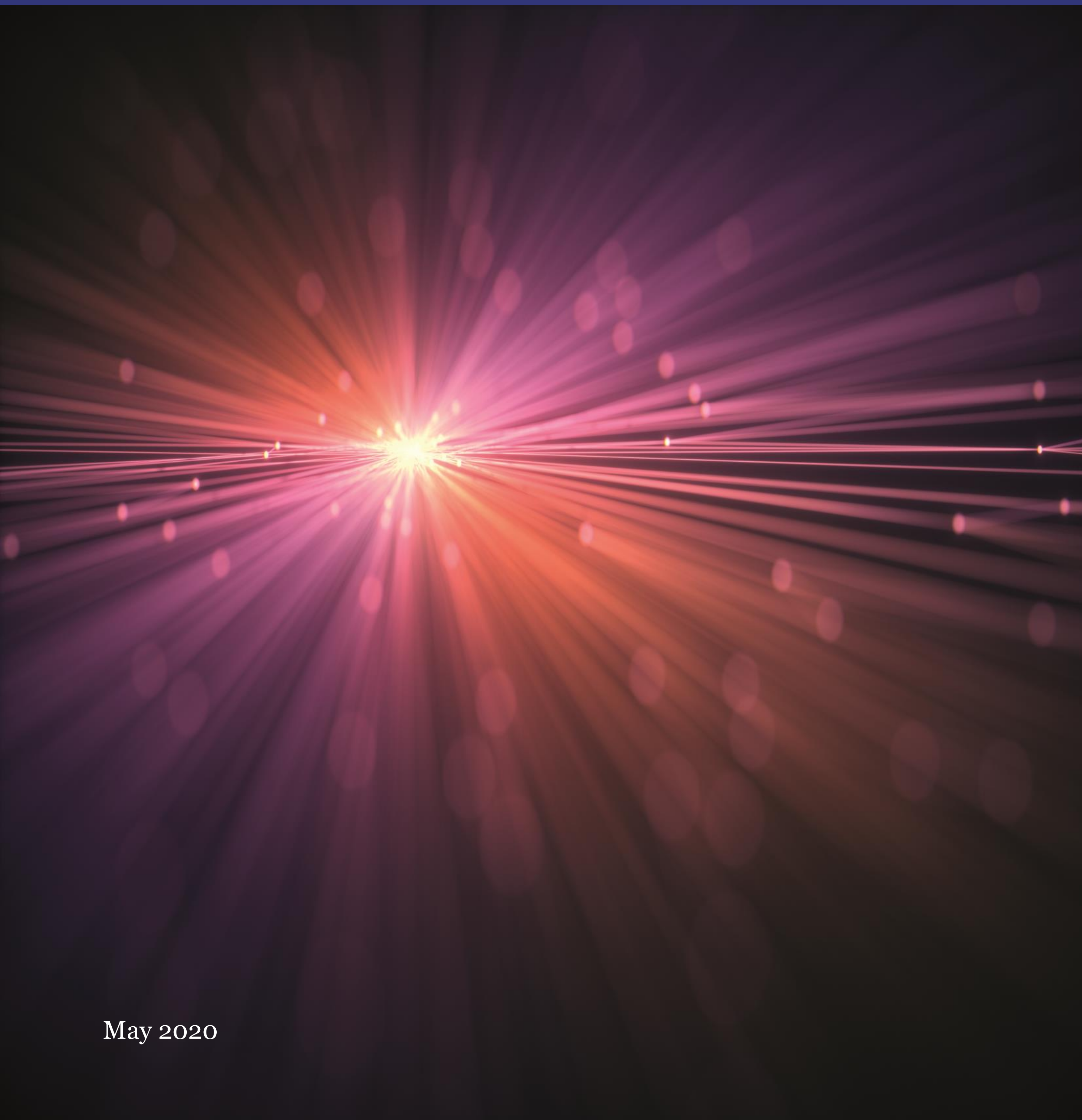
Bird & Bird DAC6 Briefings: Hallmarks Overview



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DAC6 in a nutshell

Cross-border arrangement...

- any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event
- involving one EU Member State and another EU or third state (*but local implementation may include pure domestic arrangements, e.g. Portugal and Poland*)

&

... of (potentially) aggressive tax planning

Measured through "hallmarks" as indicators

A	B	C	D	E
Generic hallmarks	Specific hallmarks	Hallmarks related to cross-border transactions	Hallmarks related to automatic exchange of information and UBO	Hallmarks related to transfer pricing
With "main benefits test"		Without "main benefits test"		

&

... involving intermediaries and taxpayers (clients)

Intermediary (*promotor or service provider*)

AND

Taxpayer

Territorial link with EU

=

Reportable cross-border arrangement (RCBA)

"DAC6" or the 6th Directive on the Administrative Cooperation between EU Member States aims at improving the functioning of the internal market by discouraging the use of aggressive cross-border tax planning arrangements.

In a nutshell, the directive requires intermediaries (such as financial institutions, advisors, etc.) – or in certain circumstances the taxpayers themselves – to report any advice and/or implementation of a cross-border arrangement of potentially aggressive tax planning to the local tax authorities. The presence of such aggressive tax planning is evaluated on the basis of certain objective indicators (called "hallmarks"). Some of these hallmarks only become relevant if one of the arrangement's primary motives is to obtain a tax advantage. Others will just be reportable based on specific indications that the financial institution is (supposed to be) aware of.

For further general information, please consult the first issue of our DAC6 Briefings ("Introduction of a Mandatory Disclosure Obligation") or visit the [DAC6 In Focus]() page on our website.

Hallmarks A

A.1.
Confidentiality
on tax advantage

A.2.
Fees contingent
on tax advantage

A.3.
Standardized
documents / structures

<u>**Hallmark A.1.**</u> targets arrangements where there is a **condition of confidentiality** on a taxpayer or an intermediary who may not disclose the existence of a tax advantage vis-à-vis other intermediaries or the tax authorities.

<u>**Hallmark A.2.**</u> targets arrangements where the intermediary is entitled to receive a **fee** (or interest, remuneration for finance costs and other charges) **for the arrangement**. This could be either a percentage of the advantage or a payment only if and when such advantage has been obtained - the so-called “no cure no pay”.

<u>**Hallmark A.3.**</u> targets arrangements with **standardised documentation** or on the basis of a **standardised structure**.

Note that <u>all these hallmarks</u> are subject to the Main Benefit Test, meaning that reporting can only be required if the targeted arrangement was primarily to obtain a tax advantage.

Hallmarks B

B.1.
Combined steps to access losses

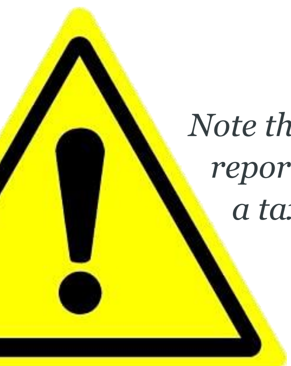
B.2.
Conversion of income

B.3.
Round-tripping of funds

Hallmark B.1. targets arrangements whereby steps are undertaken to **access the tax losses** of an acquired company after having discontinued its main activity.

Hallmark B.2. targets arrangements that have 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 B.3. targets arrangements whereby **funds are being circulated** through various steps with no economic benefit.



Note that all these hallmarks are subject to the Main Benefit Test, meaning that reporting can only be required if the targeted arrangement was primarily to obtain a tax advantage.

Hallmarks C

C.1. Cross-border payments (low/no tax, ..) → **C.2.** Double dip → **C.3.** Double relief → **C.4.** Consideration mismatch

Hallmark C.1. targets a number of **cross-border payments**.

A **first category** represents payments to associated recipients that are resident in **tax favourable jurisdictions**, *i.e.* zero tax jurisdictions (or tax havens), jurisdictions with preferential tax regimes for specific type of income, or jurisdictions with a territorial tax system (exemption foreign source income).

A **second category** represents payments to associated recipients that are (i) **not resident for tax purposes in any tax jurisdiction**, or (ii) resident in a **non-cooperative jurisdiction** (according to EU or OECD).

Hallmark C.2. targets arrangements whereby a deduction for the amortisation of the same asset is claimed in more than one country: the so-called **double-dip**.

For instance, in the hands of the legal owner or lessor, and of the beneficial owner or lessee; or both by the head office and by its permanent establishment).

Hallmark C.3. targets arrangements whereby a **double credit/relief** is claimed in regard to the same item of income or capital in more than one country.

Hallmark C.4. targets arrangements whereby two jurisdictions would assess the price for the transfer of an asset materially differently.

Note that the first category of C.1. targeted payments is subject to the Main Benefit Test, meaning that reporting can only be required if the targeted arrangement was primarily to obtain a tax advantage.

Hallmarks D

D.1.
Circumventing exchange of UBO info

D.2.
Non-transparant legal or beneficial ownership

Hallmark D.1. targets arrangements set up to **circumvent the automatic exchange of information** on financial accounts (such as bank accounts, savings accounts and so on).

There are 4 types of arrangements:

- the use of products that would fall outside the scope of the definition of Financial Accounts;
- the use of jurisdictions that do no exchange information on financial accounts (so-called non-cooperative jurisdictions);
- the use of entities or structures that do not fall under any obligation to report on account holders; or
- the use of jurisdiction that generally have AML legislation, but are weak in enforcing those rules.

Hallmark D.2. targets arrangements involving **non-transparent legal or beneficial ownership** chains.

There are three main conditions:

- the use of persons/structures not carrying on substantive economic activity;
- they are established in another jurisdiction than that of the UBO; and
- the UBO is made unidentifiable

Even though standard practice and not motived by tax reasons, these conditions are quite often met when using trusts in a jurisdiction which has not implemented a UBO register for such type of entities.

Hallmarks E

E.1. Unilateral safe harbor rules	E.2. Transfer of HTVI	E.3. Transfer of substantial functions/assets/risks

Hallmark E.1. targets arrangements involving the use of **unilateral safe harbour transfer pricing rules**.

A safe harbour rule means that, usually because of the size of the companies involved or because of the low-value activities, no transfer pricing report must be established and that a lump sum transfer pricing rate may be applied.

Hallmark E.2. targets arrangements involving the transfer of **hard-to-value intangibles** between associated companies. The term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer:

- there are no reliable comparables; and
- at the time the transaction was entered into, the **projections of future cash flows** or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are **highly uncertain**, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

Hallmark E.3. targets arrangements, again intra-group, involving the **transfer of functions, risks or assets** as a consequence of which the transferor's projected EBIT over a period of 3 years is going to be less than 50%, had he not transferred those functions, risks or assets.

How can Bird & Bird assist?

- Our international tax team advises clients on whether they have disclosure obligations, and whether or not certain activities contain hallmarks.
- We advise clients on how to manage and coordinate the reporting, if multiple intermediaries (whether or not in various countries) are involved, through DAC6 frameworks. We advise clients on how to manage and coordinate their reporting obligations, especially where multiple intermediaries (across a variety of countries) are involved.
- Please get in touch to find out more about how we can help.

Your key contacts

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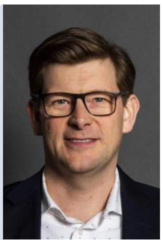

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