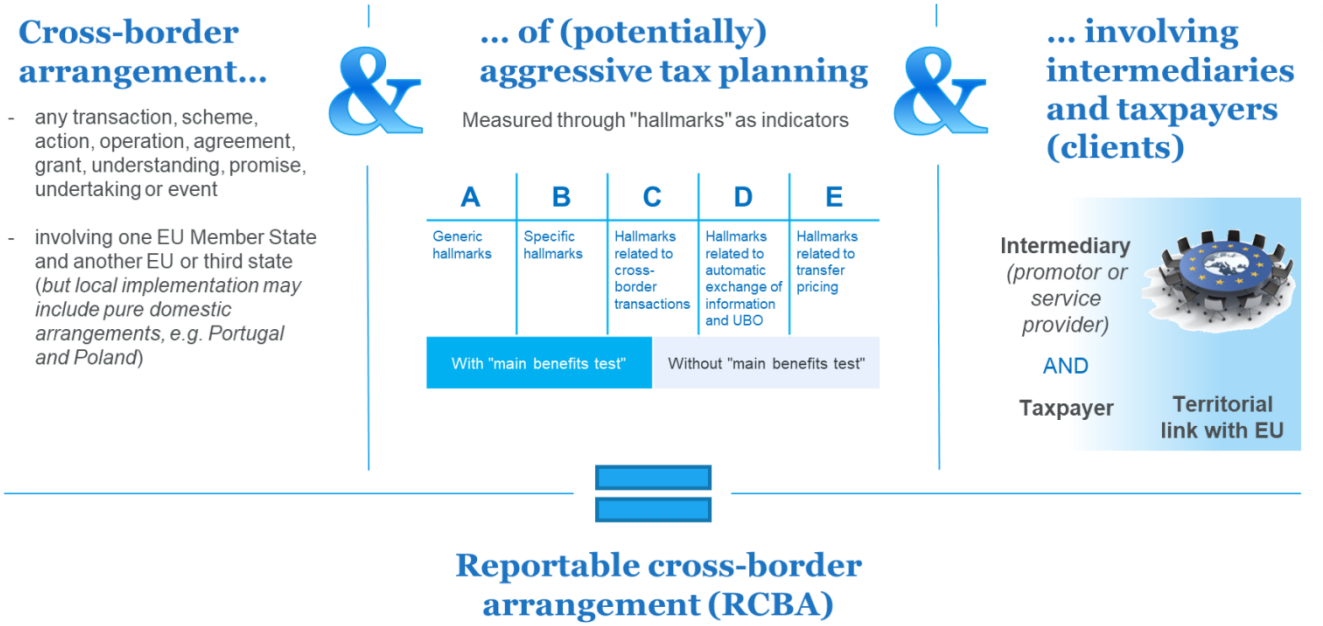
Bird & Bird & DAC6 Briefings: Data Transactions

August 2020

DAC6 in a nutshell



"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) – or in certain circumstances the taxpayers themselves (such as the leasing companies) – 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 taxpayer or intermediary 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. This Briefing builds on the general knowledge of previous issues, with a focus on what these rules mean for data transactions.

Key hallmarks for data transactions

C.1.
Cross-border payments (low/no tax, ..)

E.2.
Transfer of hard-to-value intangibles

E.3.
Transfer of substantial functions/assets/risks

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 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 (i) there are no reliable comparables; and (ii) 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.

Note: *The above list is certainly not exhaustive for data transactions, but rather a list of what are likely the most common hallmarks that will have to be monitored.*

How does this translate to data transactions?

In general, advice in regard to, and the implementation of, GDPR compliant policies are not of a nature to qualify as the implementation of arrangements.

However, where the implementation of a policy would require the transfer of data, such transfer could theoretically shelter an aggressive tax optimisation. Admittedly, in most cases no such motives will be present for data transfer transactions. Unfortunately, however, the hallmarks are so broad that a **transfer of data ownership for reward** could fall within the scope of a number of hallmarks and still trigger a reporting obligation.

By way of example: if the data were originally stored "offshore" and the implementation of a new GDPR policy imposes the transfer of such data to an EU jurisdiction, any payment made by the EU resident entity to the "offshore" transferor could be caught by a DAC6 reporting obligation under specific conditions (Hallmark C.1.).

But even if no "offshore" entity is involved, a reporting may still be due with less stringent conditions: considering that data constitute intangible assets which must be valued under transfer pricing regulations. When the data fall within the definition of "hard-to-value" intangibles (HTVI), an automatic reporting obligation kicks in, irrespective of where the data move to or what price had been paid (Hallmark E.2.). "Hard-to-value" means that there are no reference prices with unrelated parties and no predictable future cashflows. Or put differently, data will not be HTVI if data have been 'licenced' out to third parties, or if they have no commercial value and thus also do not trigger any future income.

Finally, in the unlikely event that data are stored in SPV entities (*i.e.* only occupied in holding and managing data for the group) the transfer of the data to an entity in another jurisdiction may entail the transfer of substantial assets and so trigger a DAC6 reporting obligation (Hallmark E.3.).

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.

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