D.A.C.6 IN IRELAND – KEY FEATURES OF THE ADMINISTRATIVE GUIDANCE

Author
Martin Phelan

Tags
Arrangements
Cross-border
DAC6
Hallmarks
Intermediaries
Ireland
Participants
Reportable

Martin Phelan, is a partner in Simmons & Simmons, Dublin, where he serves as head of tax. He has advised clients in the Financial Services, TMT and Pharma space on international tax issues for over 20 years.

INTRODUCTION[1]

Following the introduction of Council Directive (E.U.) 2018/822 ("the Directive"), which entered into force on June 25, 2018, certain "intermediaries," including lawyers, banks, accountants, and fund managers, and certain taxpayers are required to disclose "potentially aggressive tax planning schemes with a cross-border element" to the tax authorities in the jurisdictions where they are located. This disclosure is known as "D.A.C.6" reporting. The aim of the regime is to tackle aggressive tax planning by increasing scrutiny of the previously unseen activities of tax planners and advisers.

Despite the focus on "aggressive" arrangements, the reporting obligations can in principle catch a wider range of transactions and matters. The disclosure regime is intended to apply to cross-border transactions that could potentially be used for aggressive tax planning. As such, it is likely that cross-border arrangements that are not used for aggressive tax planning will be reportable because they bear a Hallmark that is listed in one or more of the categories discussed below.

The rules apply to "cross-border arrangements" that will be reportable if one or more relevant "Hallmarks" are applicable. The meaning of both terms is addressed below.

WHAT IS A "CROSS-BORDER ARRANGEMENT"?

The Directive provides that a "cross-border arrangement" ("C.B.A.") is an arrangement concerning (i) more than one E.U. Member State or the U.K. or (ii) an E.U. member state or the U.K. and a third country, where in either case at least one of the following conditions is met:

- Not all the participants in the arrangement are resident for tax purposes in the same jurisdiction.
- One or more of the participants is simultaneously resident for tax purposes in more than one jurisdiction.
- One or more of the participants carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms a part or the whole of the business of that permanent establishment.

---

[1] Views expressed on the Irish Revenue's opinions regarding D.A.C.6 are taken from its published briefing, which can be found at www.revenue.ie under tax & Duty Manual 33-03-03 (updated to March 2021). .

- One or more of the participants carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction.
- The arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

"Arrangement" is not fully defined in the Directive, but it includes a series of arrangements and may comprise more than one step or part of a broader arrangement.

A C.B.A. is reportable if it contains at least one "Hallmark."

WHAT IS A RELEVANT "HALLMARK"?

The Hallmarks are grouped under five broad categories (A – E) and are features or characteristics which are commonly seen in aggressive tax planning arrangements, although as noted above, several of the Hallmarks are more broadly defined and can apply to normal commercial transactions. A high level summary of each of the Hallmarks is set out below.

Certain Hallmarks require the "main benefit or one of the main benefits" of the arrangements to be the obtaining of a tax advantage. This is known as the "main benefit test" ("M.B.T.").

CATEGORIES	HALLMARKS	M.B.T.?
Category A *Commercial characteristics seen in marketed tax avoidance schemes*	The taxpayer or participant is under a confidentiality condition in respect of how the arrangements secure a tax advantage.	Yes
	The "intermediary" is paid by reference to the amount of tax saved or whether the scheme is effective.	Yes
	The transaction uses substantially standardized documentation and/or structures which are not substantially customized for implementation.	Yes
Category B *Tax structured arrangements seen in avoidance planning*	The transaction involves the acquisition of a loss-making company.	Yes
	Income is converted into capital which is taxed at a lower level or exempt from tax.	Yes
	Circular transactions result in the round-tripping of funds with no other primary commercial function.	Yes

CATEGORIES	HALLMARKS	M.B.T.?
Category C *Cross-border payments, transfers broadly drafted to capture innovative planning but which may pick up many ordinary commercial transactions where there is no main tax benefit*	Deductible cross-border payments are made between "associated enterprises" defined in Lines (i) to (iv) **and** one of payments described in Line 1 to Line 5 below apply. Enterprises are "associated" if one enterprise (i) holds > 25% of the voting rights in another enterprise, (ii) owns > 25% of the share capital of another enterprise (directly or indirectly), (iii) is entitled to > 25% of the profits of another enterprise, or (iv) exercises significant influence over the management of another enterprise.	
	1. Payment to a recipient not resident for tax purposes in any jurisdiction.	No
	2. Payment to a recipient resident in a jurisdiction which levies a 0% or near 0% corporate tax rate.	Yes
	3. Payment to a recipient resident in E.U. or O.E.C.D. blacklisted countries.	No
	4. Payment which is tax exempt in the recipient's jurisdiction.	Yes
	5. Payment which benefits from a preferential tax regime in the recipient jurisdiction.	Yes
	Deductions for depreciation are claimed in more than one jurisdiction.	No
	Double tax relief is claimed in more than one jurisdiction in respect of the same income.	No
	An asset transfer takes place where the amount treated as payable is materially different between jurisdictions.	No
Category D *Arrangements which undermine tax reporting and transparency under the Common Reporting Standard*	Arrangements which have the effect of undermining reporting requirements under agreements for the automatic exchange of information.	No
	Arrangements which obscure beneficial ownership and involve the use of offshore entities and structures with no real substance.	No
Category E *Unilateral safe harbors* *Transfers of hard-to-value intangibles* *Transfers of items + >50% reduction in E.B.I.T. of transferor*	Arrangements involving the use of unilateral transfer pricing safe harbor rules.	No
	The transaction involves transfers of hard to value intangibles for which no reliable comparable exist and where financial projections or assumptions used in the valuation are highly uncertain.	No
	A cross-border transfer of functions/risks/assets is projected to result in a more than a 50% decrease in E.B.I.T. during the next three years.	No

WHEN DOES THE REPORTING APPLY?

The disclosure regime became effective in all Member States on July 1, 2020. However, Ireland, along with many other Member States, exercised an option given in Council Directive (E.U.) 2020/8765 to defer the first disclosures of information to January 31, 2021, and February 28, 2021, to cover the legacy periods. The Directive was transposed into Irish law by the European Union (Administrative Cooperation in the Field of Taxation) (Amendment) Regulations 2020. Thereafter, reports are due within 30 days from the first step of the transaction implementation.

WHAT DO THE IRISH AUTHORITIES CONSIDER TO BE A TAX ADVANTAGE?

According to the Revenue, the term "tax advantage" is defined broadly to include the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and the deferral of tax or the avoidance of an obligation to deduct withholding tax.

A tax advantage may be obtained or intended to be obtained in respect of any tax levied by, or on behalf of, an E.U. Member State, except for value-added tax, customs duties, excise duties and compulsory social security contributions.

Fees for documents issued by public authorities and consideration due under a contract are excluded from the scope of taxes covered by the disclosure regime.

". . . what is not important, in the context of this test, is the particular facts or circumstances of the participants as that would be a subjective test."

WHAT DOES THE M.B.T. MEAN TO THE IRISH TAX AUTHORITIES?

The Revenue have stated in the published guidance notes that the M.B.T. applies a reasonable awareness test. The specific language used in the Directive refers to scenarios where the main benefit or one of the main benefits that a person (having regard to all facts and circumstances) "may reasonably expect to derive from an arrangement is the obtaining of a tax advantage."

Accordingly, in the context of a C.B.A., what is important is whether it would be (i) reasonable for a person (ii) to expect to derive a tax advantage as a main benefit from such arrangement. In this regard, the word "reasonable" is based on the common law "reasonable man test." The reasonable man test asks what a "reasonable person of ordinary prudence" would do in a given situation. It is an objective test. The word expect, as used in this context, is a verb which means to regard something as likely to happen.

Therefore, what is not important, in the context of this test, is the particular facts or circumstances of the participants as that would be a subjective test. Rather, what is important, in the context of this test, is whether a hypothetical reasonable person could expect to obtain tax benefits from the arrangement and that such benefits would be a main benefit of that arrangement. As the reporting is generally performed by intermediaries, this approach is logical.

The test involves asking a hypothetical question of what a reasonable person would reasonably expect, given the facts of a particular arrangement.

The main benefit test requires an objective comparison of the value or significance of an expected tax advantage *vis-à-vis* any other benefit likely to be obtained from an arrangement. Such a comparison is to be carried out in the context of the arrangement itself and the range of benefits expected to arise from entering the arrangement.

If, having carried out such a comparison, it is determined that a tax advantage is the main benefit or one of the main benefits that is likely to be obtained from the arrangement, then the test will be satisfied. If, on the other hand, it is the case that a tax advantage is one of a number of benefits that are likely to be obtained from an arrangement, but not a main benefit, then the tax advantage will simply be the "icing on the cake" and the test will not be satisfied.[2]

WHAT IS THE VIEW OF THE IRISH AUTHORITIES ABOUT CONFIDENTIALITY?

According to Revenue, arrangements involving the use of confidentiality conditions will be reportable in any of three circumstances:

- The confidentiality condition has the effect of limiting disclosure of the expected tax advantage *vis-à-vis* other intermediaries and/or the tax authorities.
- It is reasonable to conclude, from an objective standpoint, that the confidentiality condition is intended to secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
- A tax advantage is the main benefit or one of the main benefits which, having regard to all the relevant facts and circumstances, a person may reasonably expect to obtain from the arrangement.

For an arrangement to bear this Hallmark, it is not necessary that the confidentiality condition refer explicitly to the limitation on disclosure. It is only necessary that the confidentiality condition has the effect of limiting disclosure of the expected tax advantage vis-à-vis other intermediaries or the tax authorities.

Examples of confidentiality conditions include

- nondisclosure agreements,
- steps that discourage potential users from taking external advice,
- use of promotional material referring to nondisclosure,
- steps that discourage users from keeping promotional material or other details of how the arrangement operates, and
- discouraging users from communicating directly with the Revenue or another tax authority.

---

[2] *Commissioners of Inland Revenue v. Sema Group Pension Scheme Trustees*, 74 TC 593 at 637.

WILL CONFIDENTIALITY PROVISIONS ALWAYS TRIGGER DISCLOSURE?

No. According to the Revenue, the use of such agreements will not trigger reporting unless it is reasonable to conclude, from an objective standpoint, that the confidentiality condition is intended to secure a tax advantage vis-à-vis other intermediary or the tax authorities and the tax advantage is the main benefit or one of the main benefits which, having regard to all the relevant facts and circumstances, a person may reasonably expect to obtain from the arrangement.

"A strict application of the standardized documents Hallmark is likely to result in a significant volume of transactions being reported to the Revenue that are not used for tax avoidance purposes."

WHEN DOES THE USE OF STANDARDIZED DOCUMENTS NOT RESULT IN MEETING THE HALLMARK?

A strict application of the standardized documents Hallmark is likely to result in a significant volume of transactions being reported to the Revenue that are not used for tax avoidance purposes. To alleviate the administrative burden this may place on intermediaries and taxpayers, Finance Act 2020 introduced section 817RI. The section provides that the use of certain tax reliefs and exemptions will not trigger reporting under this Hallmark where the relief or exemption in question falls into any of the following categories:

- It benefits from equivalent reporting exclusions under Ireland's domestic mandatory disclosure regime.
- It is provided for in legislation.
- It involves some degree of Revenue oversight, certification, or approval.
- It is used in a routine fashion for *bona fide* purposes.

Examples of such reliefs and exemptions include documents that are used in regard to (i) approved profit-sharing plans, (ii) approved salary reduction arrangements, and (iii) approved retirement benefit arrangements.

WHAT ARE THE UNILATERAL SAFE HAROR RULES OF HALLMARK E1?

This hallmark applies to arrangements that involve the use of unilateral safe harbor within the meaning of the O.E.C.D. Transfer Pricing Guidelines, which provides as follows:

> A safe harbour in a transfer pricing regime 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. A safe harbour substitutes simpler obligations for those under the general transfer pricing regime. Such a provision could, for example, allow taxpayers to establish transfer prices in a specific way, *e.g.* by applying a simplified transfer pricing approach provided by the tax administration.[3]

[3] Paragraph 4.102 of the O.E.C.D. Transfer Pricing Guidelines.

DO BILATERAL APA'S NEGOTIATED WITH TAX AUTHORITIES OF MORE THAN ONE STATE COME WITHIN THE SCOPE OF THE CATEGORY E HALLMARK REGARDING UNILATERAL SAFE HARBORS?

No. Only arrangements involving the use of unilateral safe harbors come within the scope of The Category E Hallmark. Examples include standard mark-ups for trading companies. Therefore, bilateral advance pricing agreements concluded between tax authorities do not fall within the scope of Category E Hallmarks.

Consequently, the following types of arrangements will not be considered to involve the use of unilateral safe harbor rules:

- Arrangements involving the use of administrative simplification measures that do not directly involve the determination of arm's length prices, for example, simplified documentation requirements in the absence of a pricing determination.
- Arrangements that adopt the simplified approach to low value intra-group services. The Revenue has issued guidance regarding its simplified approach to low value intra-group services. Revenue's practice of accepting a mark-up of 5% of the cost-base without requiring a taxpayer to provide a benchmarking analysis is consistent with international guidance in this area.
- Arrangements involving the use of provisions that exclude certain categories of taxpayers or transactions from the scope of transfer pricing rules. For instance, Small and Medium Enterprises are currently outside the scope of Ireland's transfer pricing rules.
- Where a particular category of taxpayer or transaction falls within the scope of a unilateral safe harbor rule, but the arrangement does not rely on or involve the use of that rule.

WHEN DO INTRA-GROUP TRANSFERS OF FUNCTIONS, RISKS, AND ASSETS FALL WITHIN THE SCOPE OF CATEGORY E HALLMARK?

Category E contains a Hallmark involving the transfer of functions, risks, and assets when the transfer could be part of a plan to move profits to another jurisdictions. Here, the key to the application of the Hallmark is an intragroup cross-border transfer of functions, risks, or assets combined with a substantial reduction of operating profits by the transferor.

The second leg for application of the Hallmark is that the projected annual earnings computed without taking into account interest and taxes – typically revered to as earnings before interest and taxes ("E.B.I.T.") of the transferor for the three-year period following the transfer are less than 50% of the projected annual E.B.I.T. of the transferor(s) if the transfer had not been made. E.B.I.T. is defined and computed according to applicable accounting standards. In essence, the tainted transaction

keeps the business within a corporate group, but moves the income generating activity to a low-tax country as a means of substantially transferring E.B.I.T. to the new location.

This Hallmark generally does not apply where the following two conditions are present:

- The transferor is projected to make a loss were the transfer not to proceed.
- The projected post-transfer operations of the transferor project reduced losses, zero earnings, or a positive E.B.I.T.

As the projected E.B.I.T. was negative before the transfer, this Hallmark should not apply as each of the three outcomes cannot be said to represent a 50% reduction in E.B.I.T.

WHAT COMPUTATIONS ARE REQUIRED IN DETERMINING WHETHER THE CATEGORY E HALLMARK IS APPLICABLE TO A MOVE OF FUNCTIONS, RISKS, AND ASSETS?

The Revenue advises that, to establish whether this hallmark is met, it will be necessary for a taxpayer to produce two sets of projections for the three-year period following the transfer. The first is based on the projected position of the transferor without the transfer taking place. The second is based on the projected position of transferor with the transfer taking place. Each set projections should take into account all relevant facts and circumstances at the time the reporting obligation arises under the disclosure regime.

IF A REPORT MUST BE FILED, WHO FILES THE REPORT?

In general, an intermediary files the report. However, if the intermediary is bound by professional privilege that would be violated by making the report, the intermediary is obligated to advise the taxpayer to file its own report. Full information must be transferred to the taxpayer by the intermediary.

Note that a person required to file a report to the Revenue in respect of a reportable C.B.A. is not required to include in the return information that is not within its knowledge, possession, or control.

HOW MUCH INVESTIGATION IS REQUIRED OF THE PERSON MAKING THE REPORT?

A person required to file a report regarding a C.B.A. must take all reasonable steps necessary to obtain the required information. Reasonable steps are the steps a person in this situation would ordinarily be expected to take in the course of ordinary commercial due diligence on a transaction of that nature. However, there is no specific obligation to actively seek out information that the intermediary and/or the relevant taxpayer does not hold in the first place.

WHO ARE THE INTERMEDIARIES?

There are two categories of intermediary for D.A.C.6 purposes.

The first category of intermediary is any person that designs, markets, organizes, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.

This category of intermediary will comprise those that actively design and advise on tax planning schemes for their clients, such as lawyers specializing in tax law and professional tax advisors. It will also include companies in corporate groups that design and advise on such schemes using in-house experts for implementation by other group members.

The second category of intermediary is any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that such person has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

This category of intermediary is likely to encompass a much broader range of persons than the first category. It may include accountants, auditors, wealth managers, lawyers, insurance companies, asset managers of investment funds and bankers. As with the first category of intermediary, it will also include companies in corporate groups that design and advise on such schemes using in-house experts for implementation by other group members.

HOW DO THE IRISH AUTHORITIES VIEW THE LEGAL PRIVILEGE EXCEPTION?

An intermediary is exempt from the obligation to file a report of the specified information with the Revenue if a claim to legal professional privilege in respect of that information could be maintained in legal proceedings. Where only part of the specified information is subject to professional privilege, the exemption will apply only in respect of that part of the specified information.

For the purpose of this exemption, the term “legal professional privilege” will be interpreted in accordance with Irish law. Therefore, except for those cases where litigation is in actual contemplation, legal privilege will generally apply only to confidential legal advice given to a client by a lawyer and will not extend to documentation prepared in the ordinary course of a transaction or to the identity of the parties involved. Furthermore, as the privilege is that of the client, not the legal professional, the client may elect to waive its right to legal privilege to the extent necessary to allow the legal professional to disclose the information to Revenue.

Intermediaries should analyze whether their interactions with their clients in respect of arrangements within the meaning of section 817RA are privileged and discuss with all clients that benefit from the legal professional privilege whether

they wish to waive their rights under applicable privilege. The decision belongs to the client once properly informed of the scope of the exemption, taking into account all facts and circumstance, with regard to matters for which legal counsel has been retained.

Where an exemption from disclosure applies due to legal professional privilege, an intermediary is required to notify, without delay, the relevant taxpayer of its obligation to file a return of information with the Revenue. For the purpose of this obligation, "without delay" should be taken to mean as being as soon in time as the intermediary becomes aware that an exemption applies due to legal professional privilege.

"Different levels of penalties are provided for under Irish law, depending on the nature of the infringement."

WHAT IS THE VIEW ABOUT MAKING A MISTAKE IN A DISCLOSURE?

Where a decision is taken that an arrangement is not disclosable, but it subsequently transpires that the conclusion is not supported by applicable law implementing D.A.C.6, an intermediary has the right to establish to the satisfaction of Revenue that the decision was arrived at in an objective way, considering all relevant facts and circumstances and based on available information. Where, on the other hand, the Revenue forms the view that the failure to comply is not justified, penalties for noncompliance may be imposed.

WHAT PENALTIES ARE IMPOSED FOR NONCOMPLIANCE WITH REPORTING OBLIGATIONS?

Different levels of penalties are provided for under Irish law, depending on the nature of the infringement.

The maximum penalty is generally €4,000[4] where the compliance failure relates to the obligations of an intermediary in relation to marketable arrangements for the following compliance failures:

- The failure of an intermediary to inform another intermediary or the relevant taxpayer of their disclosure obligations where a reporting exemption applies due to legal professional privilege.
- The failure of a relevant taxpayer to provide the Arrangement identification number to any other relevant taxpayer.
- The failure to comply with reporting obligations that apply in relation to the "lookback" period.

If the failure to comply continues after imposition of the initial penalty, a further penalty of €100 may be imposed for each day on which the failure continues

Where the compliance failure does not relate to marketable arrangement, the maximum penalty is €500 for each day on which any of the following compliance failures occur:

---

[4] Section 817RH(1)(a).

- The failure of an intermediary to file a return of information with the Revenue, with the exception of the reporting obligations that apply in relation to the "lookback" period.
- The failure of an intermediary to provide any other intermediary and each relevant taxpayer with the Arrangement identification number.
- The failure of a relevant taxpayer to file a return with Revenue.

If the failure continues after daily penalties are imposed, a further penalty of €500 may be imposed for each additional day on which the failure continues.

Where the failure to comply relates to the obligation of a relevant taxpayer to include the Arrangement identification number in its annual return of income, a maximum penalty of €5,000 may apply.

While the legislation prescribes the maximum penalties that may be imposed, it will ultimately be for the courts to decide whether a person is liable to a penalty and, if the person is so liable, the amount of that penalty. Once the amount of the penalty is asserted, the Revenue procedure will be to make an application to the relevant court for a determination on the matter.

When determining the amount of a penalty that is to apply, the Court is to have regard for the following:

- If the person is an intermediary, the amount of any fees received or likely to have been received by the person in relation to the reportable cross-border arrangement.
- If the person is a relevant taxpayer, the amount of any tax advantage gained or sought to be gained by the person from the reportable cross-border arrangement.

WHAT IS THE PROCESS FOR FILING A REPORT?

Returns are filed electronically on the Revenue Online System ("R.O.S."), https://www.revenue.ie/en/online-services/index.aspx. It is possible that multiple returns of the same transaction will be made. Whenever possible it is requested that the same Arrangement identification number should be used.

Before filing a report online, a person must register, either in their own account or through an intermediary, with the R.O.S. filing system.

Disclaimer: *This article has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be relied upon, used, or taken as legal advice. Reading these materials does not create an attorney-client relationship.*