07/12/2020

DAC 6

FREQUENTLY ASKED QUESTIONS (FAQ)

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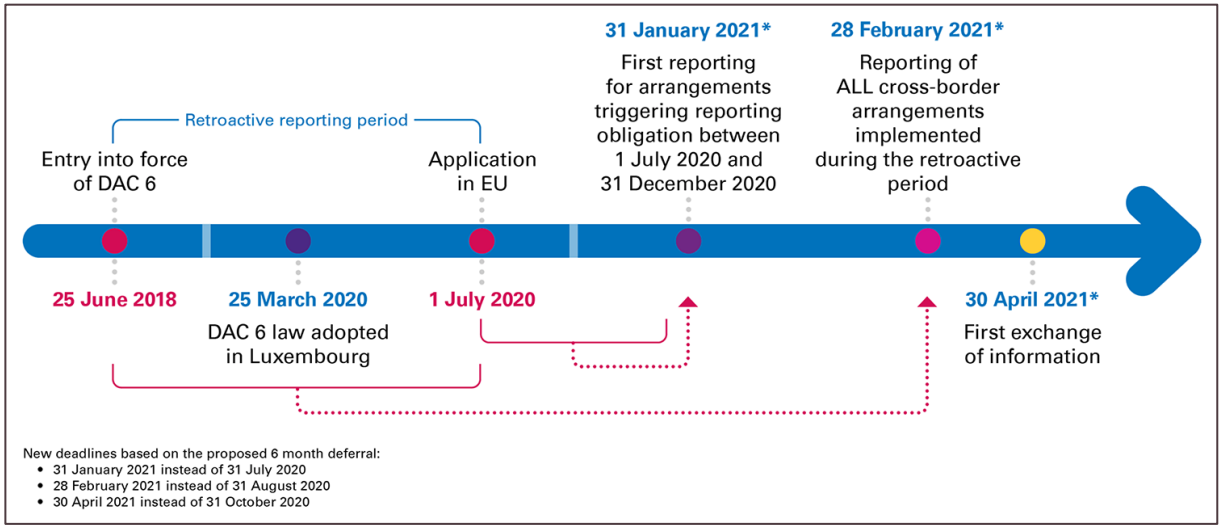
INTRODUCTION - WHAT IS "DAC 6"?

Directive 2018/822/EU of 25 May 2018 ("DAC 6") supplements the mechanisms for inter-state administrative cooperation in tax matters established by the first "DAC" Directive[1], by imposing an obligation to report cross-border tax arrangements which are "potentially aggressive". DAC 6 and the comments on the draft law (No 7465) transposing DAC 6 in Luxembourg remind us that these provisions are inspired by the final report on Action 12 of the OECD BEPS project, relating to the rules for the mandatory communication of information intended to combat the erosion of the tax base and the transfer of profits. The law on cross-border devices to be declared, transposing CAD 6 into national law was published in the Memorial on 25 March, 2020. The administration of direct contributions published on its website on 13 May, 2020 provides details concerning the implementation of the law of 25 March, 2020. Additional clarifications have already been made and further clarifications may be published in the same way.
Although DAC 6 is aimed at potentially aggressive cross-border tax arrangements, the terms it uses to define the arrangements to be reported are very broad. An excessively literal interpretation of these terms could lead to the view that the preferential tax treatment granted in many European jurisdictions to life insurance contracts is sufficient to make them reportable.

ACA considers, however, that the interpretation of DAC 6 must be circumscribed in order to reflect the objectives of the Directive. These are clearly set out in the recitals of the directive and partly taken up in the explanatory memorandum of the draft law. These provisions refer in particular to the final report on Action 12 of the OECD BEPS project.

This document known as "FAQ" (Frequently Asked Questions) is therefore designed to help ACA members in implementing these rules by proposing a reasoned and harmonised interpretation of the relevant provisions for the Luxembourg insurance sector. The fact that a given arrangement is or is not reportable according to the provisions of the Luxembourg legislation does not in any way affect whether or not it will be reportable in another jurisdiction. This document only covers matters relating to insurance products.

[1] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

FAQs		Références
1. What is the timetable for the entry into force of the transposition law?	The provisions of the transposition law are due to enter into force as from 1 July 2020. However, this date has been extended by 6 months due to the Covid 19 crisis. The law also provides for a retroactive measure: The intermediaries and taxpayers concerned must also transmit information concerning cross-border arrangements which have to be reported, for which the first stage of implementation is between 25 June 2018 and 30 June 2020.  Source: Luxembourg Tax Alert 2020-15 - KPMG Luxembourg (home.kpmg)	Article 2 DAC 6 Articles 8 and 18 of the Law.
2. What triggers the obligation to report?	In the event that an insurance policy is reportable, ACA proposes that the date of commencement of risk, or any issue of documentation confirming a change, should trigger the obligation to report. The report must be made within 30 days from the day after the event which triggers the obligation, namely the issue of the insurance policy or any issue of documentation confirming a change.	Article 2 of the Law

FAQs		Références
3. Who is subject to the obligation to report?	The reporting obligation is borne by the intermediaries. In the event that an intermediary, as defined in the draft law, is not identified, the reporting obligation is borne by the taxpayer concerned. The definition of intermediary can be divided into two categories: - the "promoter", which has an active role in the arrangement because it designs or markets it; and - the "service provider", whose role is more passive but which, on the basis of the circumstances and its expertise, knows, or could reasonably be expected to know, that it has undertaken to provide aid or assistance in connection with the design or the marketing of a reportable cross-border arrangement. Each insurer must be able to analyse whether it is a promoter and/or a service provider and act accordingly. An intermediary who carries on, in relation to a cross-border arrangement, exclusively activities such as the design, marketing, organisation of a cross-border arrangement, the provision of such an arrangement for the purposes of its implementation, is not to be qualified as a participant in the arrangement, unless this intermediary is also active in the arrangement that it has itself devised, proposed, set up, made available for implementation or managed the implementation for the benefit of the taxpayer concerned. The question of whether the insurer has an active role in the scheme is a fundamental question that must be examined on a case-by-case basis. In line with the opinion of the Council of State and the parliamentary report, there is no cross-border arrangement if all participants in the arrangement (i.e. excluding the intermediary itself) are resident for tax purposes in the same State (which is not Luxembourg) and only the intermediary has a link with Luxembourg. An intermediary is exempted from the obligation to transmit information only to the extent that it can prove that the information has already been transmitted by another intermediary. Proof that the same information has been transmitted in another Member State and/or by another intermediary or taxpayer concerned shall be provided by any means upon request of the ACD. The indication of the reference number of the arrangement alone will in principle not be considered sufficient.	Article 1 point 4 of the Law Article 5 of the Law
4. What is a "cross-border arrangement"?	A "cross-border arrangement" is an arrangement concerning either more than one Member State or a Member State and a third country. It should be noted that the concept of "arrangement" is not defined as such and may therefore cover a large number of elements: a transaction, a contract, etc. ACA considers that the fact that an arrangement is cross-border in nature does not give rise to a presumption of harmful tax practices and is not sufficient to make it reportable. The parliamentary report confirms ACA's understanding by stating that: "With regard to the concept of 'cross-border arrangement', the Finance and Budget Committee notes that the mere fact that an arrangement is cross-border in nature does not in itself imply an obligation to report that arrangement. […]"	Article 1 of the Law

FAQs	Références
5. Which cross-border arrangements need to be reported?	

It is for each insurance undertaking to decide, on a case-by-case basis in the light of the information made available to it on the basis of its existing obligations, whether a life insurance contract is to be considered a reportable arrangement within the meaning of this law. In order to guide each insurance undertaking in this analysis, please find below a summary outline of the points to be considered:

<table>
<tr><td>Arrangement which is …</td><td>cross-border …</td><td colspan="5">for potentially aggressive tax planning</td><td colspan="2">Intermediaries and taxpayers</td></tr>
<tr><td rowspan="2">No legal definition</td><td rowspan="2">Arrangement concerning more than one Member State or a Member State and a third country (e.g. residence, permanent establishment, other tax links with EU of the participants in the arrangement)</td><td colspan="5">Hallmarks as indicators</td><td rowspan="2">Intermediary which is a “promoter” OR Intermediary which is “aware” AND a taxpayer</td><td rowspan="2">Territorial link with the European Union required</td></tr>
<tr><td>A
General hallmarks</td><td>B
Specific hallmarks linked to the main benefit</td><td>C
Specific hallmarks linked to cross-border operations</td><td>D
Specific hallmarks linked to the CRS and the beneficial owners</td><td>E
Specific hallmarks linked to transfer pricing</td></tr>
<tr><td></td><td></td><td colspan="3">Main benefit test</td><td colspan="2">No main benefit test</td><td colspan="2"></td></tr>
<tr><td></td><td></td><td colspan="5">Cross-border arrangement to be reported</td><td colspan="2"></td></tr>
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Source PwC https://www.pwcavocats.com/fr/assets/files/pdf/2019/Avril/fr-tls-support-presentation-dac-6.pdf

The parliamentary report confirms that “a case-by-case analysis is necessary in order to determine whether such an arrangement should be considered a ‘reportable cross-border arrangement’ within the meaning of the Law.” We therefore have confirmation that a cross-border life insurance contract is not systematically reportable.

In fact, such a cross-border arrangement will have to be analysed on a case-by-case basis in the light of facts and circumstances in order to establish whether or not there is a reporting obligation.

ACA proposes the following broad lines of interpretation:

- Any arrangement which does not involve any artificial transaction, but is based on an application in accordance with the letter and spirit of the tax rules, should not be considered a tax advantage for the purposes of the main benefit test.
- This position is confirmed once again by the parliamentary report: “As regards the interpretation of the ‘main benefit test’, the Finance and Budget Committee considers that this test is not satisfied

FAQs		Références
	where the main tax advantage obtained by means of the arrangement is in accordance with the object or purpose of the applicable legislation and in conformity with the legislator's intention. - In order to determine whether the arrangement in question is consistent with that intention, all the constituent elements of the arrangement must be taken into consideration, so that an arrangement which, taken as a whole, does not fulfil that intention, for example by taking advantage of the subtleties of a tax system or the inconsistencies between two or more tax systems in order to reduce the tax payable, nevertheless satisfies the main benefit test." - Accordingly, a life insurance contract which has the effect of allowing the policyholder or his/her beneficiaries to benefit by a tax deferral or/and privileged taxation on the paid-up capital, as provided for such life insurance contracts by the law of his/her place of residence or by Luxembourg law, should not be systematically considered as being a tax arrangement to be reported in Luxembourg under DAC 6. By way of example, contracts offered by Luxembourg insurance undertakings in accordance with Articles 111 and 111bis of the Luxembourg Income Tax Law are not in principle considered to be cross-border arrangements which must be reported.	
6. To what extent does an insurance policy issued by a Luxembourg insurer have to be reported?	A Luxembourg life insurance contract must be reported if it satisfies one of the hallmarks listed in the annex to the Law (certain hallmarks being coupled with the main benefit test or MBT). **Category A** General hallmarks linked to the main benefit test 1. ARRANGEMENT SUBJECT TO A CONFIDENTIALITY CLAUSE* 2. ARRANGEMENT SUBJECT TO A PERFORMANCE FEE/GUARANTEE* 3. MARKETABLE ARRANGEMENTS*. **Category B** Specific hallmarks linked to the main benefit test 1. TRADE IN LOSSES*. 2. CONVERSION OF ONE INCOME INTO ANOTHER LESS TAXED INCOME* 3. CIRCULAR TRANSACTIONS* **Category C** Specific hallmarks related to cross-border transactions, some of which are linked to the main benefit test 1. DEDUCTION OF CROSS-BORDER PAYMENTS BETWEEN ASSOCIATED ENTERPRISES (VIRTUALLY) WITHOUT ANY CORRELATIVE TAXATION 2 Deduction for depreciation for the same asset 3. Multiple cross-border double-tax relief 4. Transfer of assets of an asymmetric cross-border value **Category D** Specific hallmarks concerning the exchange of information and beneficial owners 1. Circumventing the CRS 2. Use of an artificial property chain of a cross-border nature concealing the identity of the beneficial owners **Category E** Specific hallmarks concerning transfer pricing 1. Use of unilateral safe harbour rules 2. Transfer of hard-to-value intangibles between associated enterprises 3. Transfers of functions/risks/assets within a group involving a significant decline of EBIT * HALLMARKS FOR WHICH THE MAIN BENEFIT TEST MUST BE SATISFIED Source PwC : https://www.pwcavocats.com/fr/assets/files/pdf/2019/Avril/fr-tls-support-presentation-dac-6.pdf	Annex to the Law Paragraph 104 of the final report on Action 12

	FAQs	Références
	No hallmark appears to be specifically aimed at life insurance policies. However, it is not possible to conclude categorically that a particular hallmark does not apply. Insurers must therefore consider all hallmarks in their analyses and not only those mentioned in these FAQs. However, certain hallmarks could have an impact on Luxembourg life insurance contracts, such as hallmark A.3 "Standardised documentation" and hallmark B2. "Income conversion". Luxembourg insurers should also pay attention to the hallmarks under D (hallmarks relating to circumvention of the CRS) concerning the automatic exchange of information and beneficial owners. The main tax benefit test does not apply to the D hallmarks. ACA considers that a mere change of residence of the holder of a life insurance policy does not trigger the application of hallmark D. ACA considers that the hallmarks must be interpreted in accordance with the objectives of DAC 6 and therefore cannot be general in scope. We would point out here that ACA suggests that a life insurance contract is not *per se* a systematically reportable arrangement and that a **case-by-case analysis** must be carried out in order to determine whether the contract in question satisfies certain hallmarks and, where necessary, the main tax benefit test. **Hallmark A.3 "Standardised documentation"**, the statement of reasons of the draft law specifies that this hallmark *"concerns an arrangement whose documentation and/or structure are largely standardised, and covers 'prefabricated' tax products that can be used as they are, or after limited modifications. In order to set up such an arrangement, the customer does not need significant support in the form of professional advisory services"* and refers to paragraph 104 of Action 12. Paragraph 104 states: *"the fundamental characteristic of such schemes is their ease of replication. Schemes with this replication characteristic have variously been described as 'shrink-wrapped' or 'plug and play' schemes. Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit their circumstances. The adoption of the scheme does not require the taxpayer to receive significant additional professional advice or service."* We can conclude that the A.3 hallmark does not refer to the standardised documentation used by insurers such as: - Application/subscription forms of providers of products or services; - The general terms and conditions of suppliers of products or, more generally, documents whose standardisation is principally the result of: • compliance with the law, regulations, other binding measures or best practices; seeking to simplify or harmonise information so as to ensure that it is fair, clear and not	

FAQs		Références
	• misleading for customers; • harmonisation designed to reduce the risk vis-à-vis co-contracting parties or the cost of maintaining a product or service which would result from unnecessary differences in documentation. ACA also considers that a life insurance contract is not a "prefabricated tax product" and that therefore the criteria for this hallmark do not apply to life insurance contracts. In fact, each contract in principle embodies personalised elements (e.g. determination of the beneficiary, choice between different types of investments and vehicles). Moreover, compliance with the legislation in force entails an obligation for each professional in the sector to canvass the needs and requirements of the customer in order to offer her/him a suitable solution. There is therefore a certain form of advice which exists when taking out a life insurance contract. **B2. "Income conversion"** This characteristic seems to target specific aggressive tax provisions which do not seem to be connected with life insurance contracts (e.g. "leasing, hybrid instruments"). However, here again, the terms of this hallmark are so broad that they may, if interpreted literally, include any type of financial instrument including life insurance contracts. As regards life insurance contracts in general, they offer the possibility of investing in a wide variety of instruments in order to constitute, using the income generated by these investments, a capital sum that can be repaid or bequeathed to one or more beneficiaries, generally with some preferential tax treatment, if certain specific conditions are met. However, the invested assets are the legal and beneficial ownership of the insurer. The policyholder or her/his beneficiaries have no legal property right over the assets. A life insurance contract is taken out and any income that accumulates is paid to the insurer. The policyholder therefore does not benefit from any conversion of its income during the currency of the insurance contract, since the income accrues to the owner, that is to say, the insurer, and not to the policyholder. In view of the foregoing, ACA considers that the criteria of this hallmark cannot be satisfied systematically by life insurance contracts. In the event that this hallmark is applicable, the test of the main tax benefit must be considered in order to determine whether it applies. ACA recommends that each decision in this regard be documented, whether or not the analysis leads to reporting or not.	

FAQs		Références
7. Does DAC 6 entail a specific due diligence obligation for insurers in collecting the necessary information?	The legislative provisions do not impose specific obligations on intermediaries beyond existing professional obligations (e.g., AML, KYC). The statement of reasons of the draft law further states that: *"intermediaries"* have *"no specific obligation beyond existing professional obligations to actively seek out information that the intermediary ... does not hold in the first place."* An insurance undertaking is therefore not obliged actively to seek information which would go beyond what it would already have collected on the basis of its existing professional obligations. The parliamentary report confirms that there is no additional specific due diligence obligation while not contradicting the position taken by the Council of State on this point.	Commentary under Article 2 of the draft law
8. Can the absence of reporting under DAC 6 be justified by the fact that the intermediary already satisfies the CRS requirements?	The reporting obligations under DAC 6 are additional to any existing reporting obligations under the CRS.	
9. Reporting	Reporting must be made to the Administration des Contributions Directes (ACD) and must include as applicable (see the full list in Article 10 of the Law): – The identification of the intermediaries and taxpayers concerned, including their name, date and place of birth (for natural persons), their tax residence, their TIN and, where applicable, the persons who are associated enterprises of the taxpayer concerned; – Detailed information on the hallmarks identified in Annex IV according to which the cross-border arrangement must be reported; – A summary of the contents of the cross-border arrangement having to be reported; – The date on which the first stage of the implementation of the cross-border arrangement having to be reported was completed or will be completed; – Detailed information about the national provisions on which the cross-border arrangement having to be reported is based; – The value of the cross-border arrangement having to be reported; For ACA, the surrender value of the policy is the value of the cross-border arrangement which should be indicated when reporting. In the event that the contract does not provide for exit by surrender but the policy is reportable, ACA proposes that the date of issue of the change documentation be used to calculate the value of the outstanding amount to be reported.	Article 10 of the Law

FAQs		Références
	– The identification of the Member State of the taxpayer(s) concerned as well as the identification of any other Member State that may be concerned by the cross-border arrangement having to be reported; – The identification in the Member States of any other person who may be concerned by the cross-border arrangement having to be reported, while indicating to which Member States that person is connected. The reporting will have to be made using a standard form and will be recorded in a secure central repository. The ACD communicated the practical details of this reporting, including a user guide which has been published on their website.	
10. Penalties	The law provides for a fine of up to EUR 250 000. This fine may be imposed in the case of: – failure to transmit information; – late transmission; – transmission of incomplete or inaccurate data; – absence of notification or late notification.	Article 15 of the Law
11. Reporting in the presence of branches in another Member State	The Law provides that, where there is a branch of a Luxembourg company in another Member State, reportable arrangements linked to that branch must be reported in Luxembourg by the company in Luxembourg, regardless of the fact that these arrangements have perhaps been reported in the other Member State as well (depending on how the transposition was effected in that other State). ACD has recently clarified that a foreign branch would be allowed to report instead of the company in Luxembourg using its own MyGuichet access. "As a permanent establishment does not, in principle, have a legal personality separate from that of the parent company, the declaration made by a permanent establishment of a company exempts the latter from making the declaration itself. On the other hand, if the foreign branch does not report in Luxembourg, it is always the company in Luxembourg that will be responsible for the failure to report if the reporting has to be made to the ACD.	Article 2 point 3 of the Law

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