EU mandatory disclosure requirements: state of play and practical insights on implementation

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April 2019

EU mandatory disclosure requirements

Agenda

1. Big picture implications
2. Background and basics
3. Local implementation: state of play
4. Practical considerations in complying with MDR
5. How to prepare and comply?

I. Big picture implications

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Critical implications

Mandatory

- Compliance with new disclosure obligations in the EU is mandatory for EU-based entities.
- EU taxpayers required to report if no EU intermediary or intermediary is exempt.

Local variations

EU-wide rule, but implementation left to each EU country

- some countries go beyond DAC 6
- you must consult each jurisdiction.

Penalties

- There are penalties for non-compliance.
- Some countries may apply severe (penal) sanctions.

Governance

- Intermediaries and taxpayers will need to have in place a system to understand and report selected transactions.
- Taxpayers may want to know and catalog what is being reported by their advisors and where — changes to contractual arrangements should be considered

II. DAC 6: background and basics

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Timeline

13 March 2018
Political agreement in ECOFIN

25 May 2018
Formal adoption by ECOFIN

25 June 2018
MDR directive comes into force

31 December 2019
Deadline to implement MDR locally

1 July 2020
MDR becomes applicable

31 August 2020
Deadline to file retroactive information

31 October 2020
First exchange of information

Mandatory disclosure requirements for intermediaries and relevant taxpayers

DAC 6 in a nutshell

Background

— the latest in a series of EU initiatives in the field of automatic exchange of information in tax matters (DAC 1–5)

Introduces

— an obligation to disclose “potentially aggressive tax planning arrangements”

— the means for tax administrations to exchange the information

EU mandatory disclosure rules

Scope

— all taxes of any kind with the exception of: VAT; customs duties; excise duties and compulsory social contributions

Reporting of

— cross-border arrangements

— that fall within a set of so-called ‘hallmarks’ (potentially together with a main benefit test)

— within 30 days

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Hallmarks with main benefit test

General hallmarks (A)	Specific hallmarks (B)	Cross-border transactions (C1)
A.1 The taxpayer undertakes to comply with a confidentiality condition A.2 Contingent fee A.3 Standardized documentation (including standard forms) is used	B.1 Acquisition of loss making company, discontinuation of main activity and using losses B.2 Conversion of income into a category taxed at a lower level/exempt B.3 Circular transactions resulting in the round-tripping of funds	Deductible payments to a related party: b) If the recipient is tax resident in a jurisdiction with no CIT, or 0% (or almost 0%) CIT rate c) If the payment benefits from a full exemption from tax d) If the payment benefits from a preferential tax regime

Main benefit test: the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a **tax advantage.**

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Hallmarks with no main benefit test

Cross-border transactions (C)

C.1 Deductible payments to a related party which is:

a) not tax resident in any jurisdiction

b) resident in a black-listed country (EU/OECD)

C.2 Deduction of the same depreciation on asset in multiple jurisdictions

C.3 Double tax relief claimed in multiple jurisdictions

C.4 Transfer of assets with significant differences in valuation

Automatic exchange of information and BO (D)

D.1 Circumvention of reporting obligation on automatic exchange of financial account information

D.2 Legal structure lacking substantive economic activity where beneficial owners are unidentifiable

Transfer pricing (E)

E.1 Unilateral safe harbor rules

E.2 Transfer of hard-to-value intangibles

E.3 Transfer of functions/risks/assets resulting in EBIT decrease >50% during the next 3 years

III. DAC 6 local implementation: state of play

Mandatory disclosure requirements for intermediaries and relevant taxpayers

EU-wide developments

European Commission:

- — working on implementation regulation
- — unique identification number to be assigned to each reported arrangement
- — no further interpretation guidelines.

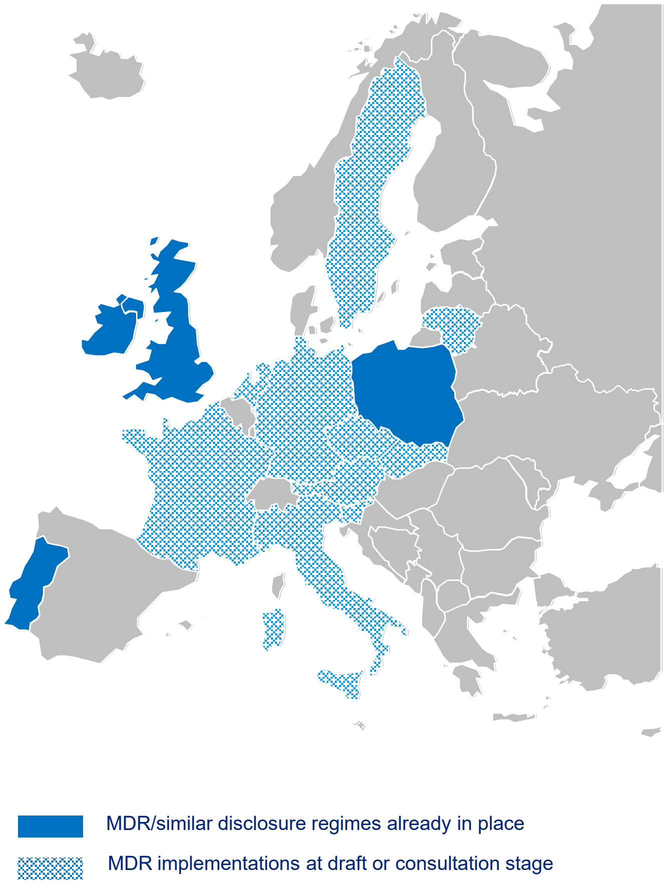
TAX3 Committee:

- — Final report calls for reporting obligation to be extended to purely domestic cases.

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Local implementation – highlights

- **Austria:** draft legislation expected in April–June 2019. Limited to cross-border and direct taxes. Legal professional privileges upheld, however, advisors may still file information on reportable cross-border arrangements if they are authorized by their clients. Penalty could be up to 50,000 euros (EUR).
- **Czech Republic:** first draft submitted for consultation in March 2019. Mostly 1:1 implementation of DAC6; legal professional privilege applies.
- **France:** first draft recently circulated for comments – deadline March 29, 2019. The major part of the draft mirrors the Directive.
- **Germany**: official legislative process has not started, but two unofficial drafts were under discussion. A revised draft bill was presented by the German legislator on 30 January 2019. This third draft bill includes a reporting obligation for domestic arrangements. Penalty up to EUR25,000 for incomplete or late reporting is being considered.
- **Italy**: legislative decree expected by end of March, followed by a second decree on hallmarks and guidelines (expected June 2019). Administrative penalty ranging from EUR2,000 to EUR21,000. The cross-border arrangement is to be considered as reportable even when the tax benefit arises in a third state — if effective exchange of information with Italy, provided that at least one of the participants is resident in Italy.
- **Lithuania:** draft law published end of November 2018.
- **Netherlands**: public consultation on draft law January 2019 — bill expected end of June. Up to intermediary to decide on 'potential' aggressive arrangements (avoidance of double taxation not reportable). The firm, not the individual advisor, has reporting obligation.
- **Poland**: MDRs apply as of 1 January 2019. Significantly broader scope (includes domestic arrangements and VAT). Criminal penalty for failure to report or inform the taxpayer of up to approx. EUR4.6 million. Discussions on implementation guidelines ongoing.
- **Slovakia:** draft MDR implementation bill subject to comments. Expected to be approved by Government in March 2019. Legal professional privilege upheld.
- **Slovenia**: draft MDR implementation bill subject to public consultation by 20 January 2019.
- **Sweden**: the Swedish MDR Committee has presented its draft proposal to the Swedish government on 15 January 2019. Certain domestic arrangements may be included.



Mandatory disclosure requirements for intermediaries and relevant taxpayers

Local implementation spotlight on the Netherlands

KPMG

19 December 2018 internet consultation: proposal aligned with DAC 6.

Highlights of points clarified:

Intermediaries:

— it is the firm — not individual advisors, that has a reporting obligation

— do not have a due diligence obligation and will only be required to report based on the information that is available to them

— required to decide whether an arrangement is ‘potentially’ aggressive.

The main benefit test:

— should be interpreted to mean that structures set up to avoid double taxation should not be reportable

— refers also to tax advantage in non-EU Member States.

Local implementation — spotlight on Poland

Basics

— **Cross-border arrangements within the meaning of DAC6, but also:**

  — domestic arrangements, including those related to VAT and excise duties — subject to 'qualifying taxpayer' test.

— **Legal professional privilege may apply.**

— **'Promoters' based outside of the EU also targeted.**

Penalties

— **Non-fulfilment of reporting obligation** in the correct manner will constitute a criminal offence and will be subject to a fine of up to approx. EUR4.6 million.

— **Administrative fine** of up to EUR2.3 million for qualifying promoters that fail to implement an internal MDR procedure.

Timeline

— **Entered into force on 1 January 2019** — transitional period for 2018 arrangements.

— **Guidelines published on 31 January 2019**.

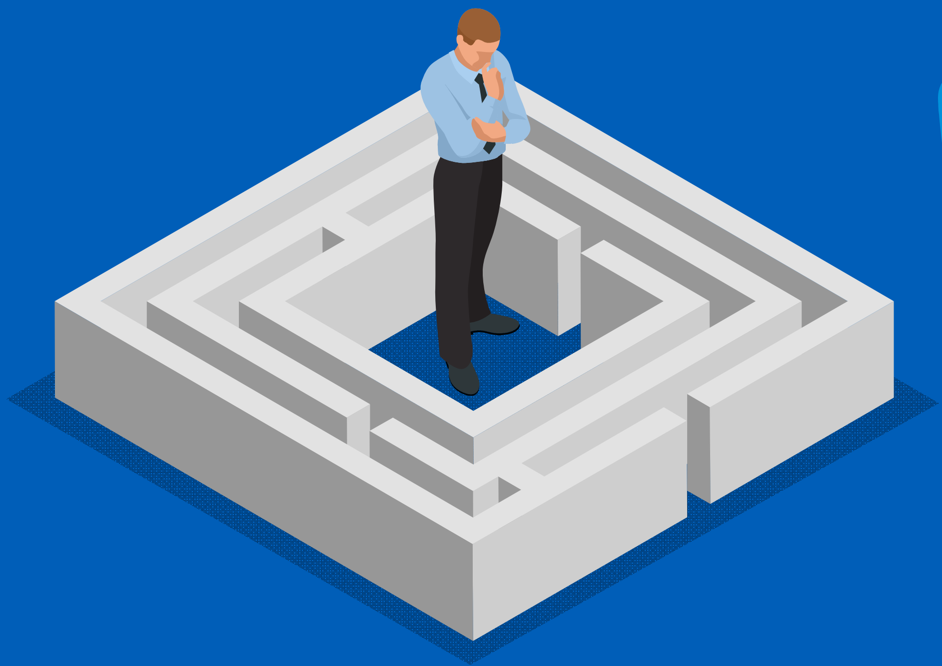
IV. Practical considerations in complying with MDR

Mandatory disclosure requirements for intermediaries and relevant taxpayers

The challenge

the scope might vary across jurisdictions, i.e. an arrangement may not be reportable in one Member State but qualify in another

legal professional privilege might apply, therefore switching the reporting obligation onto the taxpayer



penalties for non-compliance vary but can be very high (see Polish example)

timeline for implementation might vary; DAC6 only sets a minimum standard and latest implementation date

Mandatory disclosure requirements for intermediaries and relevant taxpayers

What taxpayers should consider doing now

Assess your situation

- Perform an analysis of known business or corporate functions to identify potential transactions that may be reportable.
- Assess the impact on potential products and services offered by each business area.
- Determine whether changes to contractual arrangements (e.g. with external providers) needed.

Anticipate and organise for compliance

- Leverage existing governance frameworks.
- Design and implement specific policy framework (incl. controls and training) across the business.
- Consider who will have review and sign-off capabilities and whether they have the right skills, or require training.
- Consider merits of using technology solutions for MDR compliance, including to help catalog potentially reportable arrangements entered into from 25 June 2018.

Monitor local implementation and adapt accordingly

- Monitor implementation into local tax legislation in relevant EU jurisdictions. Re-asses catalogued arrangements before the reporting deadline.
- Assess whether proposed internal governance and compliance framework meets local requirements.

Practical considerations: relying on disclosure

Disclosure

What should intermediaries consider when relying on disclosure made by another intermediary?

— Assess whether they have more information and knowledge that the party that disclosed - multiple disclosures may be needed.

— Determine whether local statutory standards are broader:
  - — Differences in local information requirements under EU MDR,
  - — Local market practice in terms of how information is disclosed may vary.

Practical considerations: client relationship

Scope of work

For both parties to consider…

— To what extent the MDR assessment should be included in the scope of work.

Transparency

Terms of business should clearly state…

— That a reporting obligation may arise;

— Whether the disclosure by the intermediary is shared with the client.

V. How to prepare and comply?

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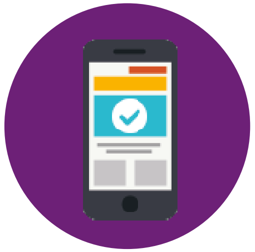
How to prepare and comply?

Phase 1 — the provision of training

targeted training and briefing materials

Phase 2 — evaluation workshops/initial risk assessment

risk assess the various business functions



Phase 3 — detailed review

review reports of potentially reportable transactions

Phase 4 — governance structure assistance

Phase 5 — gap analysis for local implementation

subsequent analysis of how each Member State has implemented MDRs

service enabled by technology

A technology solution… triage, track and report

KPMG is developing an EUMDR/DAC6 technology solution which is being designed to assist intermediaries and tax payers determine whether their organization has any reporting obligations under these regimes, and can track the decision making process and then assist with reporting for in-scope transactions.

Why use a tool and not simply an excel spreadsheet?

There are a number of advantages to using a technology based solution:

— the solution is being designed to provide a 'smart questionnaire' which will include bespoke or jurisdiction specific questions including any domestic requirements, helping determine whether an arrangement should be reported (or where further information is required to determine this)

— a secure audit trail will show who did what and when and allow the decision making process to be evidenced

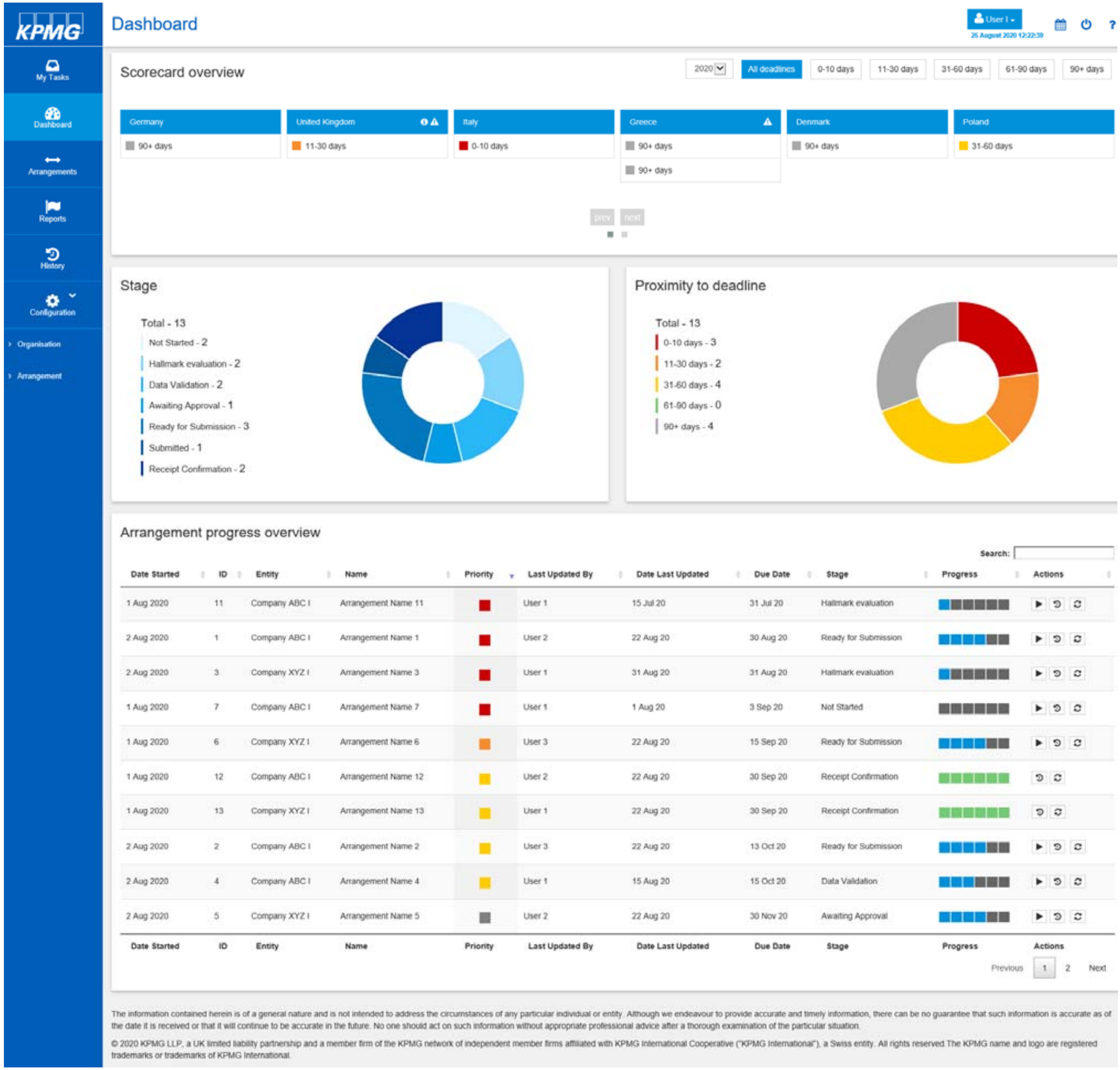
— management will have a centralised view of the global status that can be filtered by tax, jurisdiction, year, proximity to the reporting deadline (with clear RAG status to manage those transactions reaching their reporting deadline)

— management information reporting and drill down analytics will help provide the ability to view or compare different data sets to identify trends or risks associated with the reporting, including assessment by:

  — arrangements reported

  — arrangements per tax, per jurisdiction, per hallmark

— KPMG is developing a technology solution to help support member firm clients which is expected to be available later in 2019.



Dashboard
User I
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My Tasks
Dashboard
Arrangements
Reports
History
Configuration
Organisation
Arrangement
Scorecard overview
2020
All deadlines
0-10 days
11-30 days
31-60 days
61-90 days
90+ days
Germany
90+ days
United Kingdom
11-30 days
Italy
0-10 days
Greece
90+ days
90+ days
Denmark
90+ days
Poland
31-60 days
prev
next
Stage
Total - 13
Not Started - 2
Hallmark evaluation - 2
Data Validation - 2
Awaiting Approval - 1
Ready for Submission - 3
Submitted - 1
Receipt Confirmation - 2
Proximity to deadline
Total - 13
0-10 days - 3
11-30 days - 2
31-60 days - 4
61-90 days - 0
90+ days - 4
Arrangement progress overview
Search:
Date Started | ID | Entity | Name | Priority | Last Updated By | Date Last Updated | Due Date | Stage | Progress | Actions
1 Aug 2020 | 11 | Company ABC I | Arrangement Name 11 | User 1 | 15 Jul 20 | 31 Jul 20 | Hallmark evaluation
2 Aug 2020 | 1 | Company ABC I | Arrangement Name 1 | User 2 | 22 Aug 20 | 30 Aug 20 | Ready for Submission
2 Aug 2020 | 3 | Company XYZ I | Arrangement Name 3 | User 1 | 31 Aug 20 | 31 Aug 20 | Hallmark evaluation
1 Aug 2020 | 7 | Company ABC I | Arrangement Name 7 | User 1 | 1 Aug 20 | 3 Sep 20 | Not Started
1 Aug 2020 | 6 | Company XYZ I | Arrangement Name 6 | User 3 | 22 Aug 20 | 15 Sep 20 | Ready for Submission
1 Aug 2020 | 12 | Company ABC I | Arrangement Name 12 | User 2 | 22 Aug 20 | 30 Sep 20 | Receipt Confirmation
1 Aug 2020 | 13 | Company XYZ I | Arrangement Name 13 | User 1 | 22 Aug 20 | 30 Sep 20 | Receipt Confirmation
2 Aug 2020 | 2 | Company ABC I | Arrangement Name 2 | User 3 | 22 Aug 20 | 13 Oct 20 | Ready for Submission
2 Aug 2020 | 4 | Company ABC I | Arrangement Name 4 | User 1 | 15 Aug 20 | 15 Oct 20 | Data Validation
2 Aug 2020 | 5 | Company XYZ I | Arrangement Name 5 | User 2 | 22 Aug 20 | 30 Nov 20 | Awaiting Approval
Date Started | ID | Entity | Name | Priority | Last Updated By | Date Last Updated | Due Date | Stage | Progress | Actions
Previous 1 2 Next
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Mandatory disclosure requirements for intermediaries and relevant taxpayers

KPMG resources

- Dedicated website accessible from kpmg.com/eutax
- Summary and observations
- Recorded WebEx sessions
- Euro Tax Flashes
- Guidance from your local KPMG advisor
- Frequent contacts with regulators in EU member states

KPMG: working together with our network of EU tax law specialists throughout the European Union.

Questions?

Thank you

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Appendix slides

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Local implementation — Other EU jurisdictions (B-I)

Belgium	Draft law expected during the course of 2019 — most likely after October elections. Professional privilege being considered, but a final decision has not been made yet.
Bulgaria	Draft law expected during the course of 2019.
Croatia	Implementation process expected to start during the course of 2019.
Cyprus	The Ministry of Finance will have draft legislation ready for consultation shortly (was expected February 2019, but likely first weeks of March) and will start working on the implementation guidelines. MDR sub-committee created (chaired by KPMG).
Denmark	Timeline of implementation process not yet known. First draft will most likely be published after June elections.
Estonia	Draft law expected during the course of 2019.
Finland	The Ministry of Finance has announced it is preparing for the implementation process. Draft law expected during summer 2019. May follow Swedish implementation.
Greece	Discussions with Ministry of Finance, however timeline of implementation process not yet known yet.
Hungary	Timeline of implementation process not yet known.
Ireland	Draft law expected during the course of 2019, most likely towards the end of the year.

Mandatory disclosure requirements for intermediaries and relevant taxpayers

Local implementation – Other EU jurisdictions (L-U)

Latvia	Draft Law expected during the course of 2019.
Lithuania	Currently only draft legislation transposing the core provisions of the DAC6 directive (2018/822/ES) into the Lithuanian Law on Tax Administration is available as one single article with the clauses authorizing the Lithuanian tax authorities to set the implementation rules. These provisions are general ones which would only establish the requirement for intermediaries/taxpayers to report certain cross-border arrangements. Based on the draft, they would generally mirror the text of the directive. The detailed reporting rules (timelines, the right of intermediaries to a waiver due to legal professional privilege, hallmarks applicable, volume of information etc.) are yet to be prepared by the tax authorities. No officially published draft is currently available.
Luxembourg	Draft law expected during the course of 2019.
Malta	Interested constituted bodies have provided comments to the Revenue authorities. Draft legislation expected during the course of 2019.
Portugal	Draft law expected during the course of 2019.
Romania	Draft legislation expected in the summer of 2019 and discussion during autumn Parliament session.
Spain	December 11, 2018: the Spanish Tax Authorities launched a public consultation for the transposition of the DAC6 into national legislation, without publishing draft legislation. Unclear whether professional privilege for lawyers will be upheld.
UK	Draft law and guidance for public consultation expected in the first half of 2019.

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