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# The transparency agenda: Some current issues

*“DAC 6”*

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# General Mechanics of DAC 6

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## Who is an Intermediary?

- INTERMEDIARY:

Main definition: *“any person that design, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement”*

- An Intermediary shall meet one of the following conditions:
  - Be resident for tax purposes in a Member State;
  - Have a PE in a Member State through which the services with respect to the arrangement are provided;
  - Be incorporated, or governed by the laws of, a Member State;
  - Be registered with a professional association related to legal, taxation or consultancy services in a Member State;

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An example: an M&A transaction involves a number of players:

- Accountants
  - Lawyers and in-house lawyers
  - Lending Banks
  - Private equity funds
  - Investment banks
  - Corporate service companies
  - Any other service provider involved
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- The regulation has no curve-out.
  - Intermediaries are “in” as long as they have connections with the operation and the EU territory

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- All intermediaries are obliged to report the relevant information
- Intermediary may avoid reporting only if it can prove that another intermediary already provided for the report of the same information
- Member States can exclude from reporting those intermediaries that by doing so would breach the professional secrecy
- The professional secrecy exemption is a very delicate matter → If not well managed may harm competition among EU and non EU professionals

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Object of the communication – What is reportable?

- Definition of ARRANGEMENT: constitutes a broad concept considering any common understanding as to a course of action whether or not binding
- The arrangement has to be “CROSS-BORDER”: the arrangement is cross border when it concerns more than one Member State or a Member State and a Third Country when (for example):
  - Not all participants in the arrangements are resident in the same jurisdiction  
→ *ItalianCo grants a loan to a French affiliate*
  - One or more participants is resident in more than one jurisdiction  
→ *ACo established in EU2 and effectively managed in EU1*
  - One or more participant carry on business in another jurisdiction through a PE and the arrangement involves the PE → *Italian Co is granted a loan from the UK branch of and Italian bank*



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Object of the communication – What is reportable?

- In general, any transaction having tax implication for another Member State is within the scope of the DAC 6
- Purely domestic arrangements are not targeted by this regulation
- Cross-border arrangement is “REPORTABLE” if it falls into one of the **Hallmarks** → categories defining particular characteristics identified as potentially indicative of aggressive tax planning
- No *de minimis* rule in the Directive

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Object of the communication – What is reportable?

- MAIN BENEFIT Test: Hallmarks of Category A, B, C.1 (b)(i), (c), (d) can be applied and hence originate a duty to report if the Main Benefit Test is fulfilled.

*Test is satisfied if it is possible to establish that the main benefit or one of the main benefit deriving from the arrangement is to obtain a tax advantage!*

- Concept difficult to apply (high component of subjectivity)

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## What to report about the Reportable Cross-Border Arrangement (RCBA)

- Identification of the intermediary, relevant taxpayer and if appropriate the taxpayer associated enterprises;
- Details regarding all hallmarks who rendered the arrangement as reportable
- Date and other details regarding the timing of the RCBA
- Details regarding the national provisions constituting the base of the RCBA
- Identification of the relevant taxpayer Member State and of the other Member States involved



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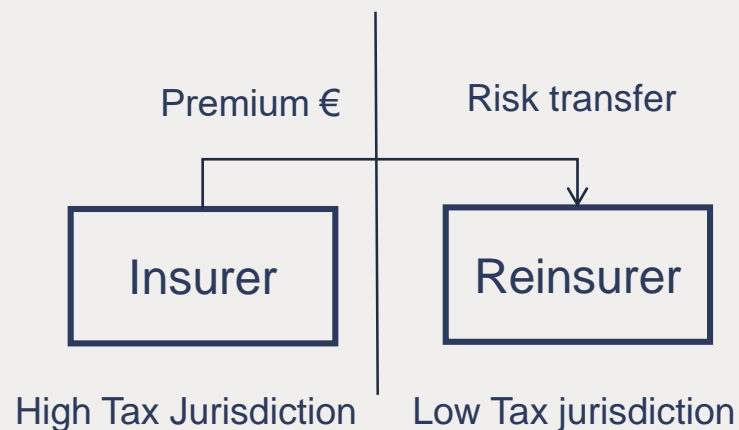
## HALLMARKS - Classification

Category A	Category B	Category C	Category D	Category E
Generic Hallmarks Connected to MBT	Specific Hallmarks Connected to MBT	Specific Hallmarks connected to Cross border transactions	Specific Hallmarks connected to AEOI	Specific Hallmarks connected to TP
Confidentiality	Loss Buying	Deductible payments	Arrangements reducing requirements for AEOI	Safe Harbours
Arrangement effectiveness – success fee	Converting income into capital	Depreciation		Transfer of Hard to Value Intangibles
Standardized structure	Circularity	Claiming of DT relief		Transfer of assets, risks and functions
		Transfer of assets		

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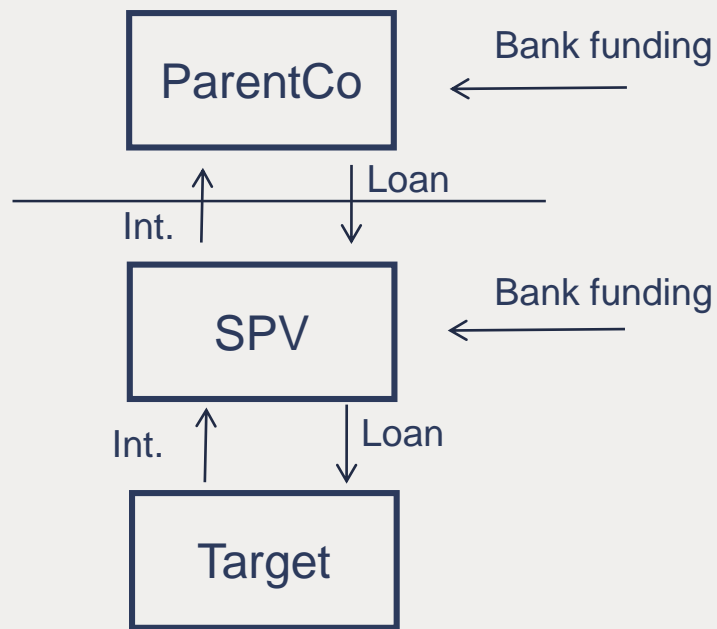
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Some examples:



Possible requirement of disclosure under Category C Hallmarks (premium is a deductible payment)

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Possible requirement of disclosure under Category C Hallmarks (series of cross-border payments)