

EU Mandatory Disclosure Rules (DAC6)

Welcome
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Agenda

Background

Reporting

Hallmarks and potentially reportable transactions

Getting ready for DAC 6 reporting

Background

Background

Introduction

Background

- The EU Council Directive 2018/822 (**DAC6**) amends the existing Council Directive 2011/16/EU¹⁾
- DAC6 is closely linked the **OECD/G20 BEPS Action 12** Final Report from 2015. Compared to the OECD *Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* (**OECD MDR**), the scope of arrangements covered by **DAC6 is much broader**
- The **goal** of the implementation of DAC6 is to **provide the tax authorities of EU member states with information** to enable them to promptly react against harmful tax practices and to close loopholes through enacting legislation or by undertaking adequate risk assessments and carrying out tax audits
- A **deterrent effect** shall be achieved through the disclosure of potentially aggressive cross-border tax planning at an early stage (i.e. before the disclosed arrangements are implemented)
- DAC6 imposes the **obligation to disclose** reportable cross-border arrangements (**RCBA's**²⁾) on EU Intermediaries
- DAC6 generally **applies to all kind of taxes** with the exception of VAT³⁾
- EU jurisdictions will need to implement this directive **into national law by 31.12.2019**
- **Local deviations** can be expected in relation to the actual implementation

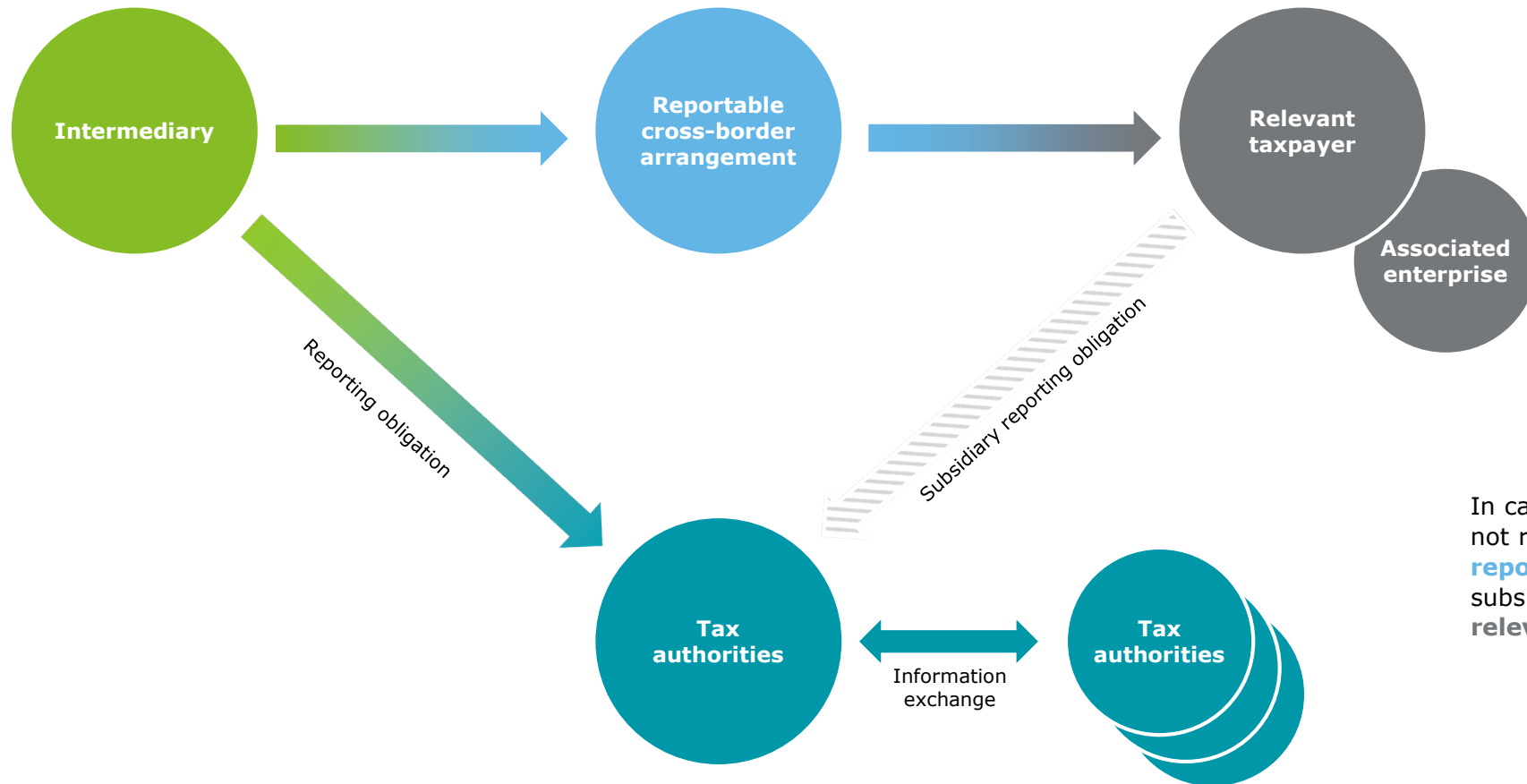
1) Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

2) Some countries might also request disclosure of domestic arrangements

3) Some countries will require disclosure of VAT arrangements

Background Overview

Generally, an **Intermediary** that designs, markets, organises, makes available for implementation or manages the implementation of a **reportable cross-border arrangement** for a **relevant taxpayer**, has an obligation to report the arrangement to the **local tax authorities** who will exchange this data with other **EU tax authorities**.

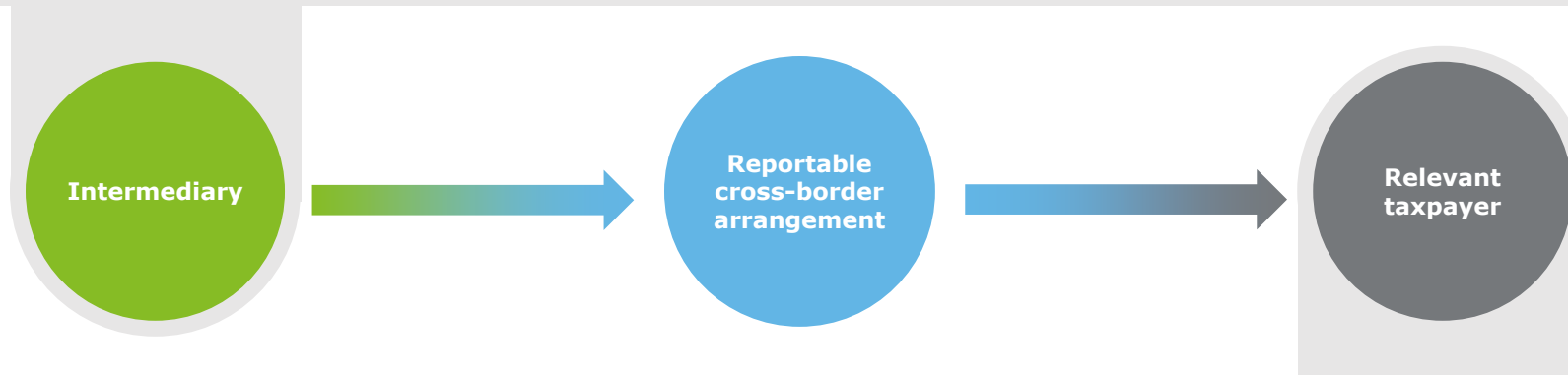


In case **no Intermediary** is involved or is not required to perform the reporting of the **reportable cross-border arrangement**, a subsidiary reporting obligation exists for the **relevant taxpayer**.

Background

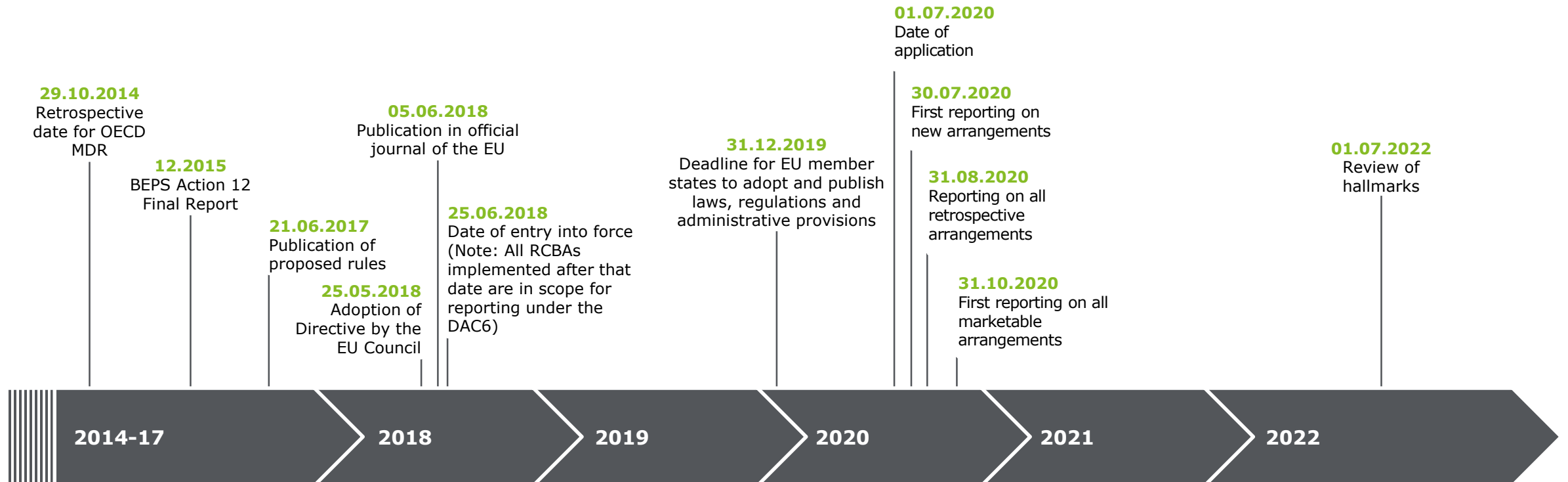
Potential impact for you

- An entity is in scope of DAC6 as an **Intermediary** where it acts as a promoter or service provider of an **RCBA** towards **relevant EU taxpayers**
- Focus on services provided
- Any entity is potentially in scope of DAC6 as an **Intermediary** where an entity in the EU implements, promotes or provides **RCBAs** to other group entities or third parties (e.g. suppliers)



- An entity is in scope of DAC6 as a **relevant EU taxpayer** where it benefits from an **RCBA**
- Focus on services received
- An entity is potentially in scope of DAC6 as a **relevant taxpayer** where it benefits from **RCBAs** promoted or provided by advisors, professional service providers and other **Intermediaries** (including other group entities)

Background Timeline



Introduction

Reportable cross-border arrangements

Cross-border arrangement

RCBA

Contains at least one of the hallmarks

The term "cross-border arrangement" means an arrangement¹⁾ concerning either more than one EU member state or an EU member state and a third country where at least one of the following conditions is met:

- Not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction
- One or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction
- One or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment
- One or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction or
- Such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

A "hallmark" means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance. An EU Intermediary must report a cross-border arrangement that contains at least one the following:

- Generic hallmarks linked to the main benefit test
- Specific hallmarks linked to the main benefit test
- Specific hallmarks related to cross-border transactions
- Specific hallmarks concerning automatic exchange of information and beneficial ownership or
- Specific hallmarks concerning transfer pricing.

Note: The scope of the hallmarks and thus the arrangements covered by the DAC6 is broader compared to the OECD MDR. Only one of several hallmarks in the DAC6 addresses arrangements designed to circumvent reporting obligations under CRS or disclosure of beneficial ownership.

Note: The Directive shall not apply to value added tax and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States

1) According to the OECD MDR, the term "arrangement" includes an agreement, schema, plan or understanding, whether or not legally enforceable, and includes all the steps and transactions that bring it into effect.

Hallmarks and potentially reportable examples

Hallmarks

Introduction and overview

There are five main categories of hallmarks in the DAC6:



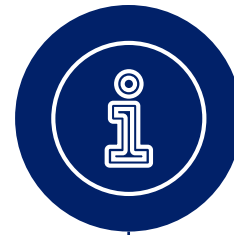
A. Generic hallmarks
linked to the
main benefit test



B. Specific hallmarks
linked to the main
benefit test



C. Specific hallmarks
related to cross-
border transactions



D. Specific hallmarks
concerning
automatic exchange
of information and
beneficial ownership



E. Specific hallmarks
concerning transfer
pricing

Hallmarks

Main benefit test relevance

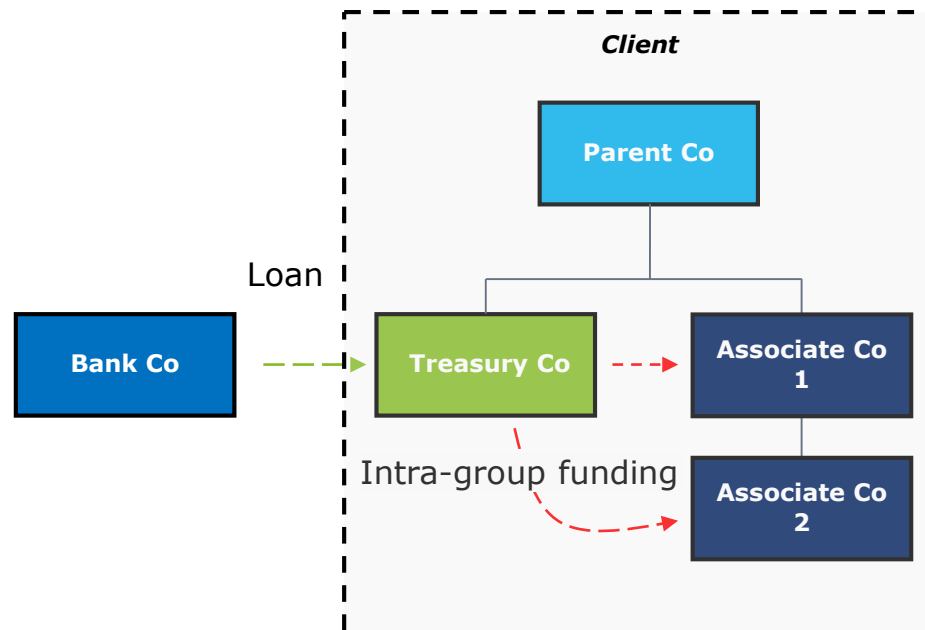
A. Generic hallmarks linked to the <u>main benefit test</u>	B. Specific hallmarks linked to the <u>main benefit test</u>	C. Specific hallmarks related to cross-border transactions	D. Specific hallmarks concerning automatic exchange of information and beneficial ownership	E. Specific hallmarks concerning transfer pricing
<p>Confidentiality: From a tax authority or other promoters.</p> <p>Contingent Fee: By reference to whether a tax advantage is obtained (or its size)</p> <p>Standardised documentation: involves the use of standardised documentation, including standard forms.</p>	<p>Losses: Offset to reduce taxable profits, including through transfer of those losses to another jurisdiction or by acceleration of the use of those losses.</p> <p>Conversion: Income into capital, gifts or other categories of revenue which are taxed at a lower level.</p> <p>Circularity: Transactions resulting in round-tripping of funds, namely through involving interposed entities without other primary commercial function.</p>	<p>Certain deductible cross-border payments (MBT): Hybrids or recipient stateless, low/preferentially taxed or exempt.</p> <p>Assets subject to depreciation in more than one country: Double dip</p> <p>Claiming double taxation relief more than once: More than one person can claim relief from double taxation in respect of the same item of income in different jurisdictions.</p> <p>Transfer of assets: Where material difference in amounts being treated as payable in consideration for the assets in the jurisdictions involved.</p>	<p>An arrangement or series of arrangements which circumvent EU Legislation (e.g. DAC) or agreements on automatic exchange of information, including agreements with non-EU countries, and have the effect of avoiding the reporting of income to the state of tax residence of the tax payer.</p> <p>OR</p> <p>An arrangements trying to hide beneficial owners.</p>	<p>Arrangements involving the use of unilateral safe harbour rules</p> <p>OR</p> <p>Arrangements involving the transfer of hard to value intangibles</p> <p>OR</p> <p>Arrangements involving an intra-group cross-border transfer of functions and/or risks and/or assets if the projected EBIT during the three year period after the transfer, of the transferor(s) are less than 50% of the projected annual EBIT of such transferor(s) if the transfer had not been made.</p>

Illustrative example: Corporate Banking



Situation sketch

Corporate Banking



Situation

- Bank Co provides a credit facility/loan to a Treasury Co.
- Treasury Co utilises the monies received from the credit facility/loan within its group as it sees fit i.e. the monies are loaned to Associate Co 1 and Associate Co 2.
- Associate Co 1 and Associate Co 2 will pay interest to the Treasury Co.

Potential Impact/Points for consideration

Loan agreement between Bank Co and Treasury Co:

- Standardised documentation
- Confidentiality
- FATCA/CRS Reporting
- Should Bank Co be reasonably be expected to know whether the client's internal financing arrangements may have a main benefit or one of the main of obtaining tax advantage?

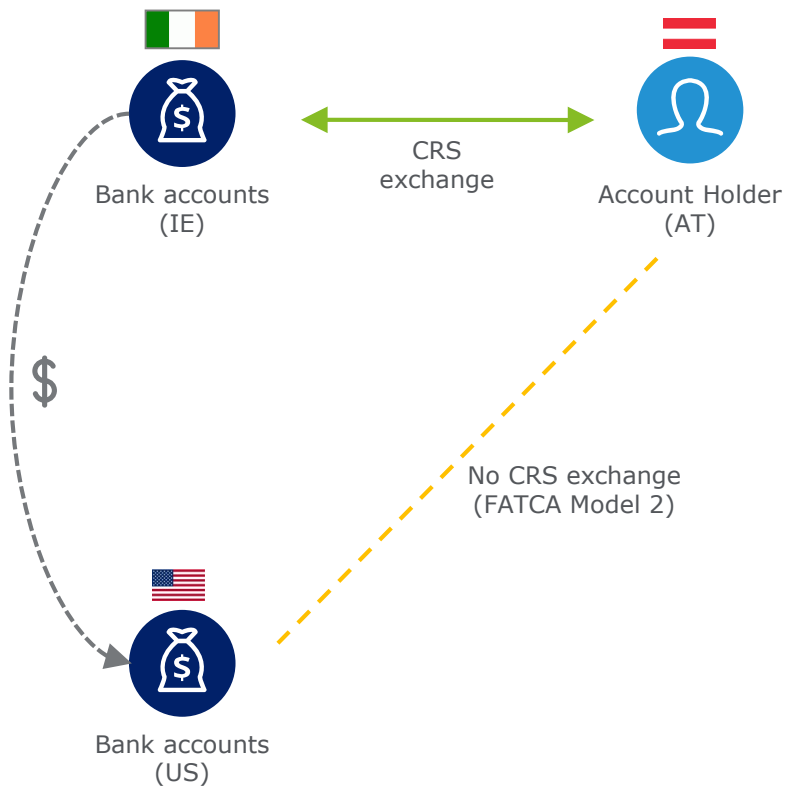
Internal client arrangements:

- Losses
- Circularity
- Payments between associates
- Transfer pricing of intra-group loan agreements

Illustrative example: FATCA/CRS – Moving accounts



Situation sketch



Situation

- Austrian client holds a deposit account in Ireland
- Funds are moved to deposit account in the USA
- A CRS exchange agreement exists between Ireland and Austria
- No CRS exchange agreement exists between Austria and the USA
- A FATCA Model 2 IGA is in place between Austria and the USA.

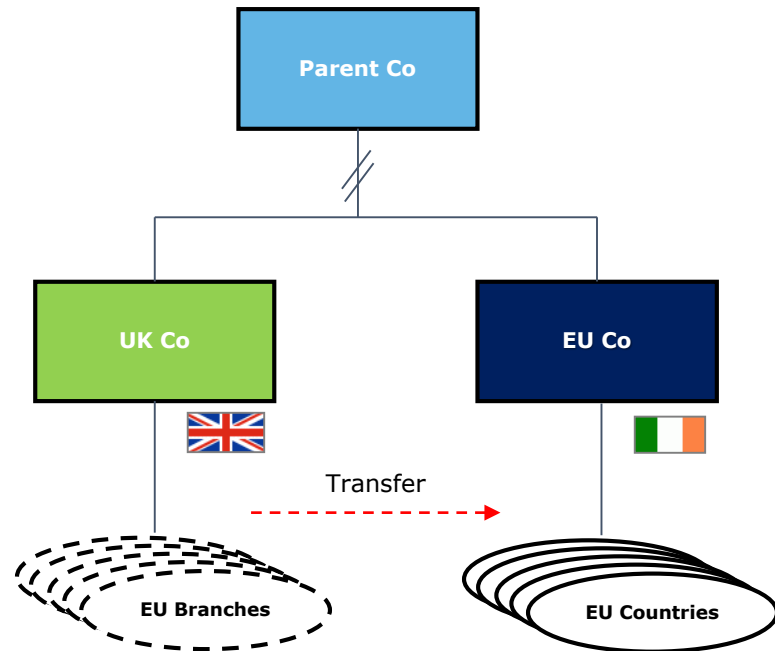
Potential Impact/Points for consideration

- Captured by hallmark, as new jurisdiction (US) does not have an exchange agreement with the tax residence of the account holder (Austria) and the original jurisdiction (Ireland) has an agreement
- No reporting requirement by the U.S. FI or the EU taxpayer
- Reporting required by Irish bank

Illustrative example: Group Restructuring – Transfer of Branches (Brexit)



Situation sketch



Situation

Pre-Brexit: UK Co is regulated by Financial Conduct Authority in the UK. UK Co distributes its products/services in other EU Member States/EEA through local branches under EU regulatory passporting regime.

Post-Brexit: UK Co being regulated by the Financial Conduct Authority in the UK is no longer regulated by a EU/EEA regulator. Therefore, it can no longer distribute its products/services in other EU Member States/EEA through local branches under EU regulatory passporting regime.

EU Co is set up and all activities of the UK Co's EU branches are transferred to EU Co

Potential Impact/Points for consideration

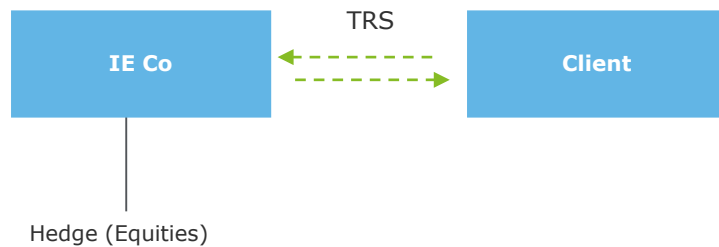
- Transfer of assets where there is material difference in the amount being treated as payable in consideration (e.g. UK values on the basis of cost to replicate and EU jurisdiction values on discounted cash flow basis)
- Transfer of hard to value intangibles (no comparable exits and projected future cash flow derived from the transferred intangible is uncertain)
- Cross border transfer of functions/risk/assets and projected EBIT expected to fall by more than 50% in UK Co

Illustrative example: Total return swap and securities lending

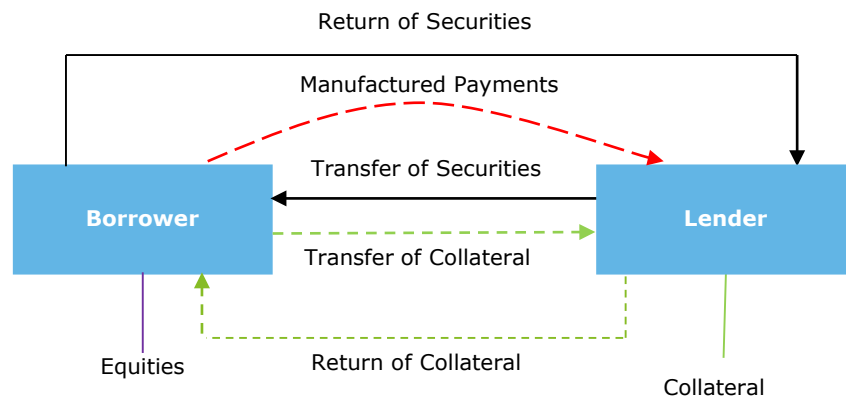


Situation sketch

Total return swap



Securities Lending



Situation

- The Client/Lender is not entitled to treaty relief when holding long position in Equities. Therefore, it enters into a TRS with the IE Co or a lending arrangement with the Borrower. The IE Co and the Borrower are entitled to treaty relief.
- The IE Co/Borrower hold Equity/Securities borrowed over dividend declaration/payment date and make substitute payment to the Client/Lender.
- Query whether return/fees paid by the IE Co/Borrower to the Client/Lender reflects or incorporates any element of a fee related to a tax benefit?
- Query whether TRS or Securities Lending arrangement triggers standardised documentation hallmark?

Potential Impact/Points for consideration

This is a fairly standard arrangement and is intended to demonstrate the potential reach of this hallmark which could have extensive scope.

Where tax advice was sought and recommended by an advisor, the advisor, fund manager and fund (depending on jurisdiction) may have reporting obligation in respect of the arrangement as an intermediaries.

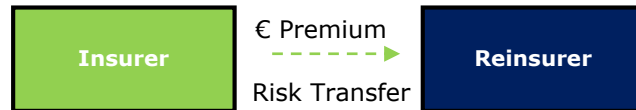
- Confidentiality?
- Standardised documentation?
- Contingent fees?
- Circularity?
- Hybrids?
- Claiming double taxation relief in more than one jurisdiction?
- Circumvent FATCA/CRS?

Illustrative example: Reinsurance with low tax jurisdiction



Situation sketch

Intra-group transfer of risk



Situation

- Due to commercial/regulatory/financial reasons, the group decides to transfer the insurance risk to a reinsurance company
- Irish insurer enters into reinsurance arrangement with low tax jurisdiction.

Potential Impact/Points for consideration

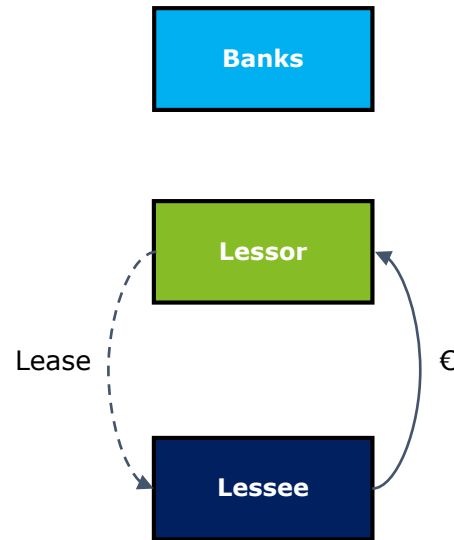
- Arrangements involving cross-border payments and transfers (including to third party reinsurers) may require disclosure under Category C and/ or Category E hallmarks.

Illustrative example: Cross-border leasing transactions



Situation sketch

Cross-border leasing transactions



Situation

- Lessor leases an asset to an overseas lessee

Potential Impact/Points for consideration






- Arrangements under which depreciation is claimed in relation to the same asset in different jurisdictions?
- Cross-border payment to a low tax jurisdiction would also need consideration.
- Arrangements involving entities without substance or substantive economic activity (regardless of main purpose test).

Legislating for DAC6

Legislating for DAC 6

An overview

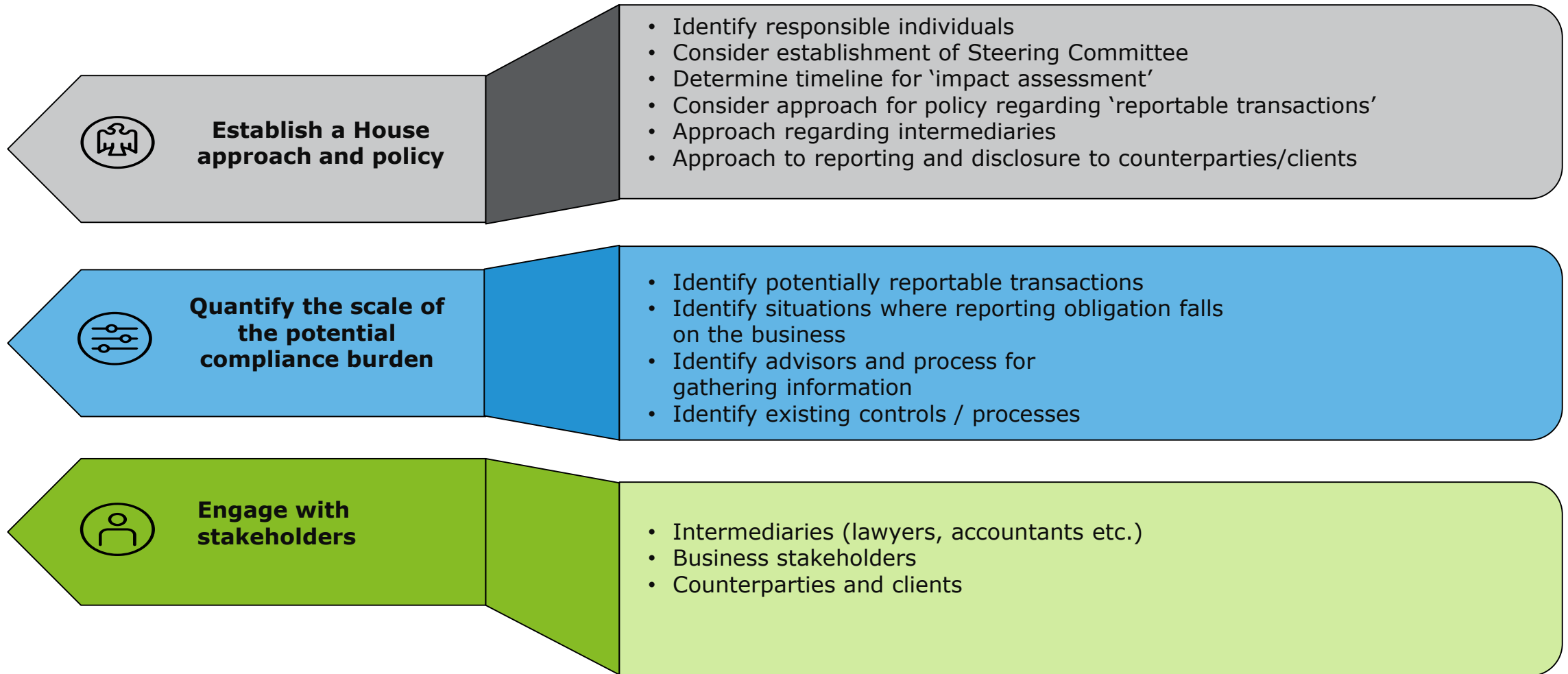
- DAC6 is based on an EU Directive, which needs to be implemented into local law
- Based on the currently available local legislation, including public and non-public consultation drafts, it is already clear that jurisdictions *will* locally deviate, for example by including domestic arrangements, expanding the scope to also cover VAT or extending the retroactive element of DAC6
- A Deloitte pan-European DAC6 expert group ensures close alignment and direct lines of communication between all EU countries and allows us to involve our local colleagues when and where necessary to obtain relevant advice or support
- Due to our network we further have direct access to DAC6 related resources and material in all relevant jurisdictions
- We are represented in most countries' consultation groups and can provide informal updates
- Leveraging our pan-European network and DAC6 expert group, we are offering bespoke monitoring services of laws, regulations and other pieces of guidance across the EU member states and provide country summaries (see below).

Country Overview		Law	Regulations	Guidance	Comments
	Germany	Consultation draft	n/a	n/a	<ul style="list-style-type: none"> • Consultation draft law to implement DAC6 under discussion with "working group" • Potential deviations on definition of Intermediary. An arrangement number will be issued by the tax authority. • Penalties up to 25k EUR • Certain domestic arrangements appear to be in scope, apparently only to hallmarks meeting main benefit test
	Italy	Draft	n/a	n/a	<ul style="list-style-type: none"> • Consultation on draft ended end of 2018 • Italian FIs for CRS purposes will be Intermediaries • Reporting will partially be retroactive back to 29 October 2014 (in analogy with OECD MDR) • It appears that arrangements where the tax advantage is outside the EU are also in scope
	Luxembourg	n/a	n/a	n/a	<ul style="list-style-type: none"> • Currently no implementation timeline available
	Spain	n/a	n/a	n/a	<ul style="list-style-type: none"> • Consultation with limited stakeholders ongoing • Appear willing to extend reporting to domestic arrangements
	UK	n/a	n/a	n/a	<ul style="list-style-type: none"> • UK will fully implement DAC6 alongside DOTAS / Not impacted by BREXIT • Consultation on draft law expected early 2019 / Government working group has been established • Publication of «good» or non-reportable arrangements expected next summer following the consultation period

Getting ready for DAC6

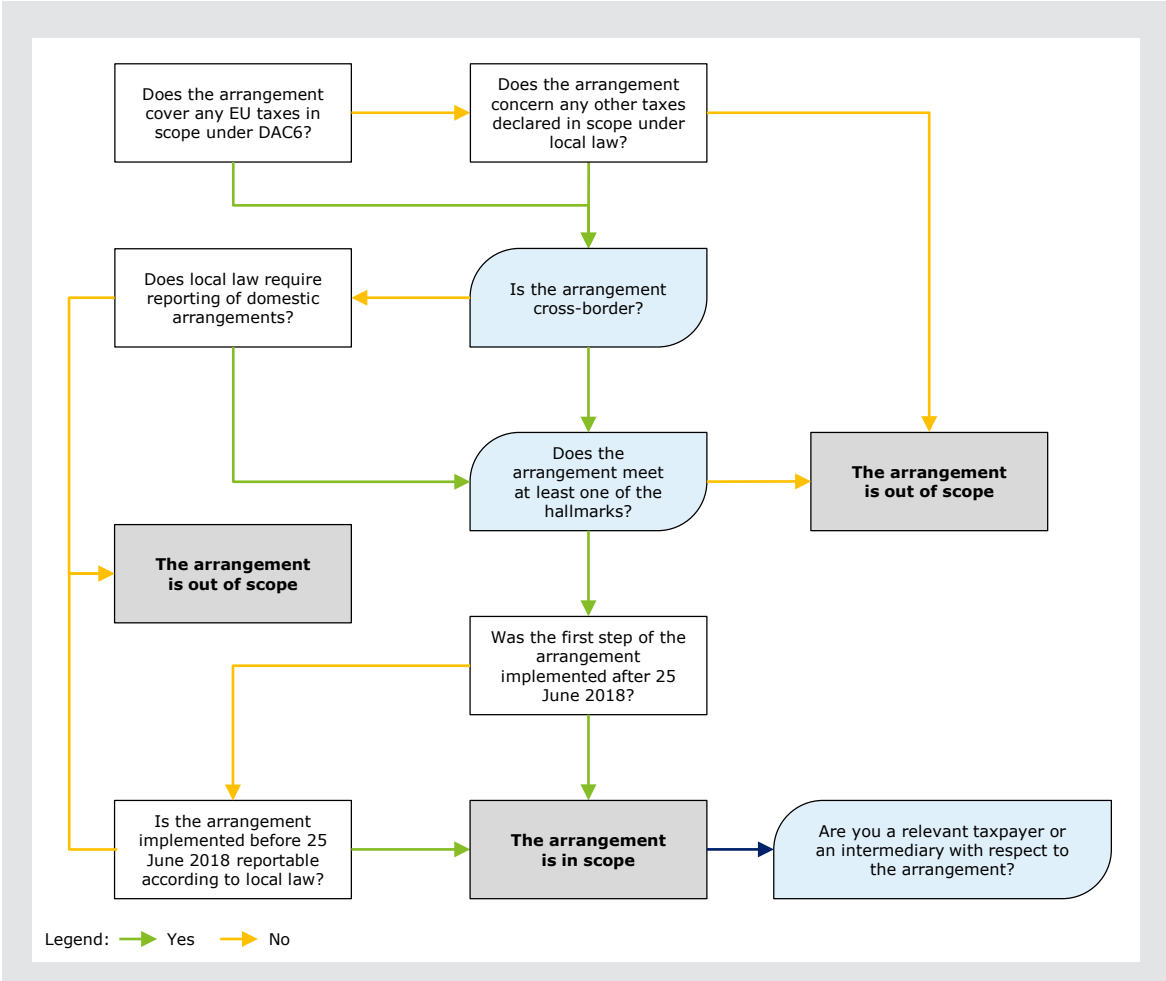
EU Mandatory Disclosure Rules (also known as "DAC6")

Getting ready for DAC6 reporting (1)

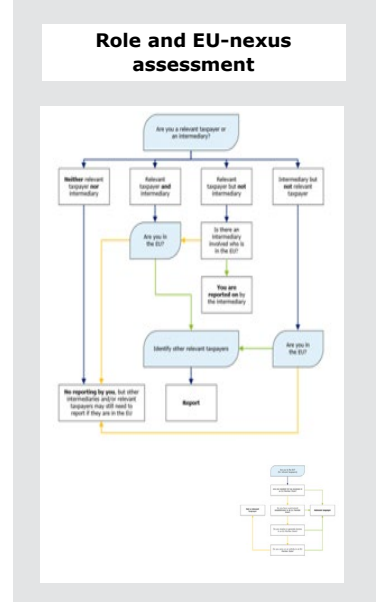
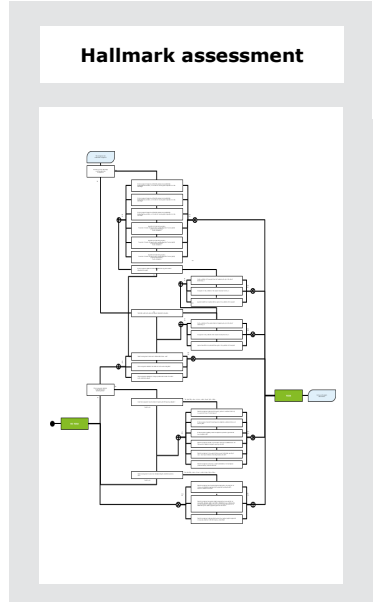
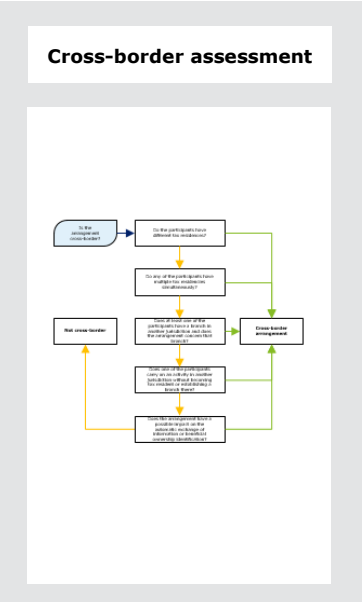


Our solutions

General assessment of an arrangement


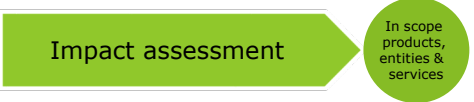
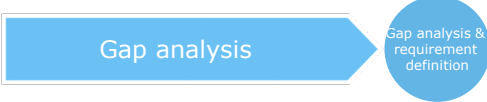




- The myInsight – DAC6 module will include a set of decision trees that will guide you through the process to determine whether you participate in a reportable cross-border arrangement under DAC6 and, if yes, whether it needs to be reported by you or a third party
- Most steps of the decision tree on the left side comprise of a set of more detailed questions, which are reflected in separate decision trees as indicated below



Our offering

Overview of a DAC6 project

Phases of a DAC6 implementation project	Goals
Initiation workshop 	<ul style="list-style-type: none"> • Understand DAC6 • Define Stakeholders
Impact assessment 	<ul style="list-style-type: none"> • Identify and document impacted products, entities and services (PSE)
Gap analysis 	<ul style="list-style-type: none"> • Compare legal requirements to existing processes • Define process & IT change requirements • Determine required «clean-up» exercises and populations
Monitoring 	<ul style="list-style-type: none"> • Identify local laws and guidance • Log changes to legislation • Define impact on current project and previous assessment
Implementation 	<ul style="list-style-type: none"> • Run «clean-up» exercises for relevant populations • Implement new procedures and systems • Training and communication
Timeline <div style="display: flex; justify-content: space-around; width: 100%;"> 2019 2020 </div>	

Other services and products

Deloitte's *myInsight* platform

Workflow management:
Define and track compliance and consulting tasks

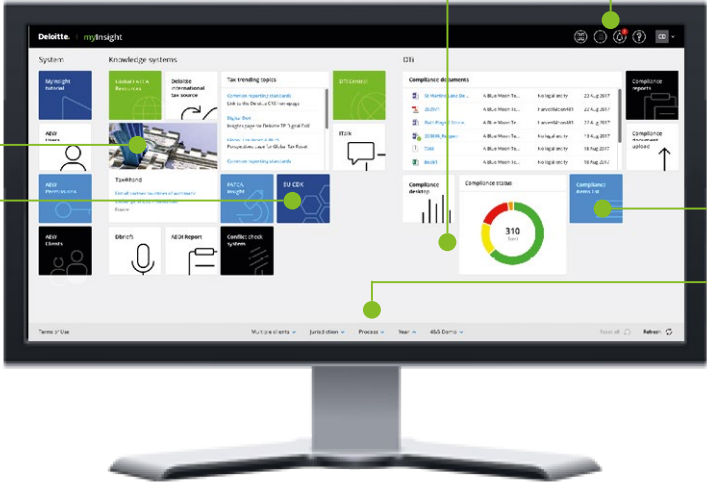
Real-time notifications:
Timely messages and new content alerts

Knowledge management:
Capture, organize, store, and share vital information

Customizable experience:
Tailorable interface to your specific preferences and usage

Connectivity:
Workspaces for borderless collaboration with colleagues and Deloitte teams

Data visualization:
Flexible filtering by jurisdiction, process, and year



Closing remarks



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