



EU Mandatory automatic exchange of information in relation to reportable cross-border arrangements

2019

Evolution of the national and international tax environment

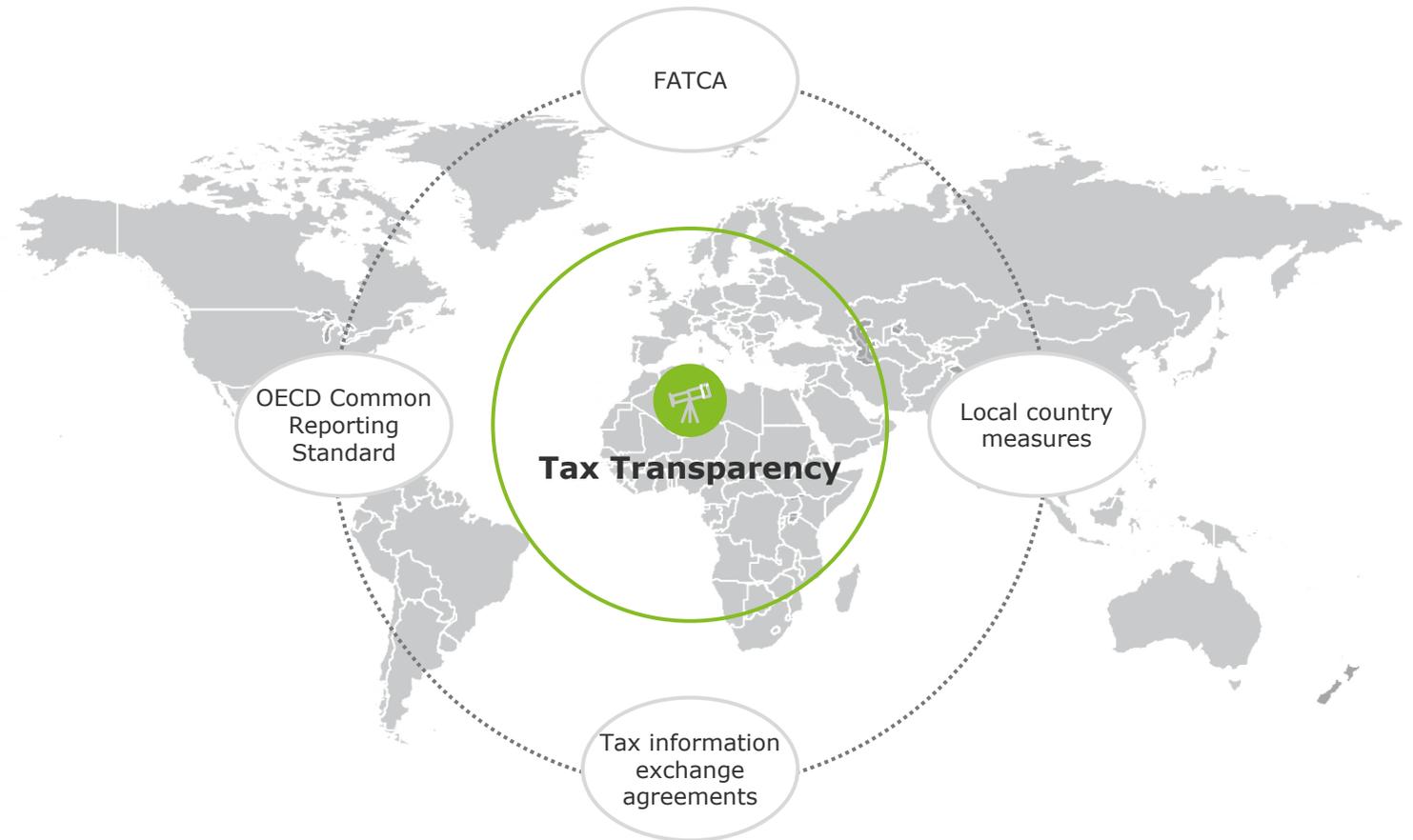
Contextual elements

A changing tax environment leading to a tax transparent world

*In light of the new legal tax framework and underlying consequences, **professionals have to implement new tax diligence measures.***

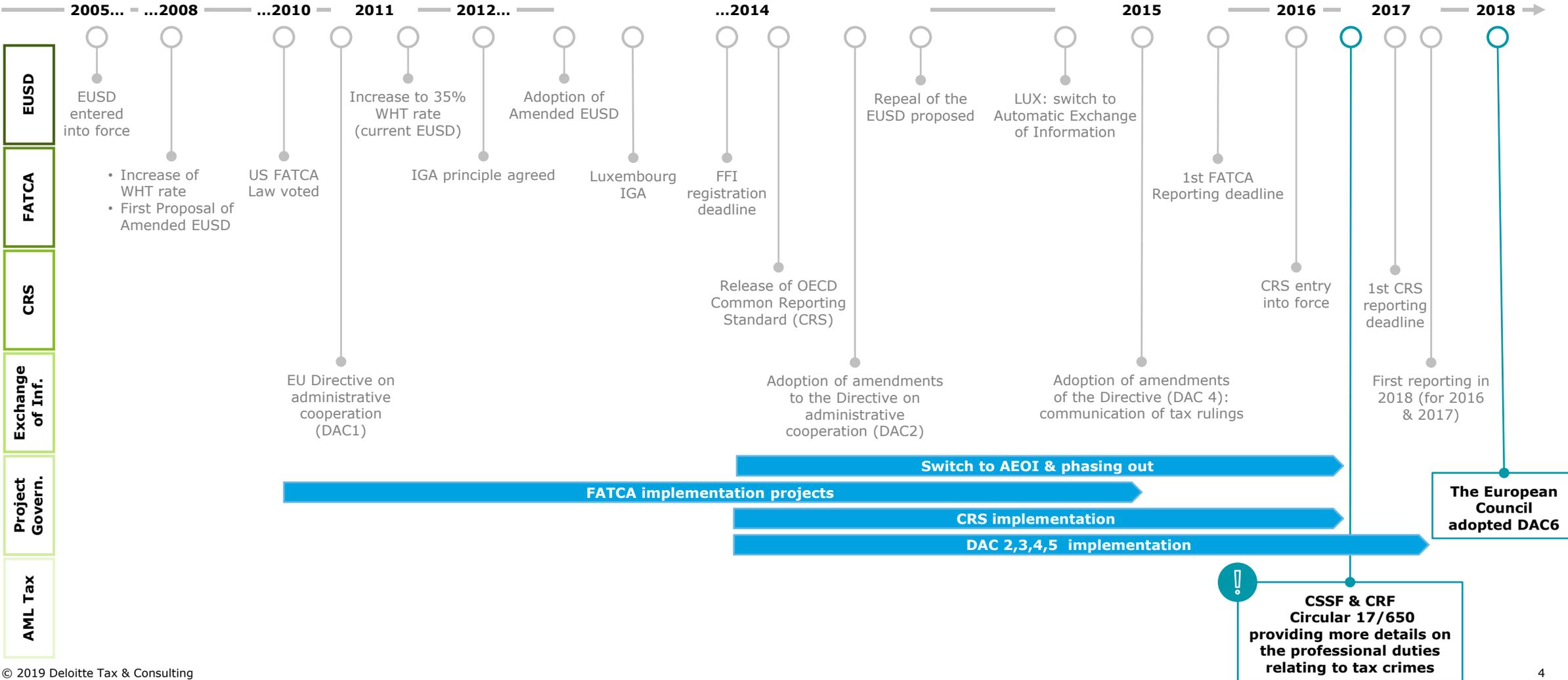
*The world has changed towards **emphasizing on tax transparency.***

*Today's legal and regulatory framework aims at **providing Tax authorities with all necessary information** to draw their conclusions and subsequently issue legislative changes.*



Legal framework

A fast evolving environment...



Directive of Administrative Cooperation 6 (“DAC 6”)

Introduction

Introduction

Base Erosion and Profit Shifting (BEPS)...A stepping stone



BEPS refers to tax planning strategies that exploit **gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations** where there is little or no economic activity

Developed in the context of the OECD/G20 BEPS Project, the **15 actions** set out here equip governments with **domestic and international instruments to address tax avoidance**, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created



Introduction

Overall context and key features

Why



- Implementation of the recommendations of the OECD BEPS Action 12 on “Mandatory Disclosure Scheme” inspired in part by the existing requirements in US, Canada, UK, Ireland, Portugal
- Pressure from certain stakeholders following Panama and Paradise Papers

What



- Reporting to EU tax authorities of certain cross-border tax arrangements – “potentially aggressive tax arrangements” – that meet pre-defined criteria (generic and specific hallmarks)
- Automatic exchange of reported arrangements between EU tax authorities

Who



- Intermediaries involved, except covered by legal professional privilege or non-EU intermediaries
- In case there are exceptions as above or if there are only in-house experts involved, taxpayers will be the ones to report

When



- As from July 2020, reporting to tax authorities within 30 days after the arrangement is made available/ready for implementation or first step in implementation has taken place
- Practical effect between 25 June 2018 and 1 July 2020 to be reportable by 31 August 2020

Directive of Administrative Cooperation 6 (“DAC 6”)

How do the new obligations work?

How do the new obligations work?

Automatic exchange of information



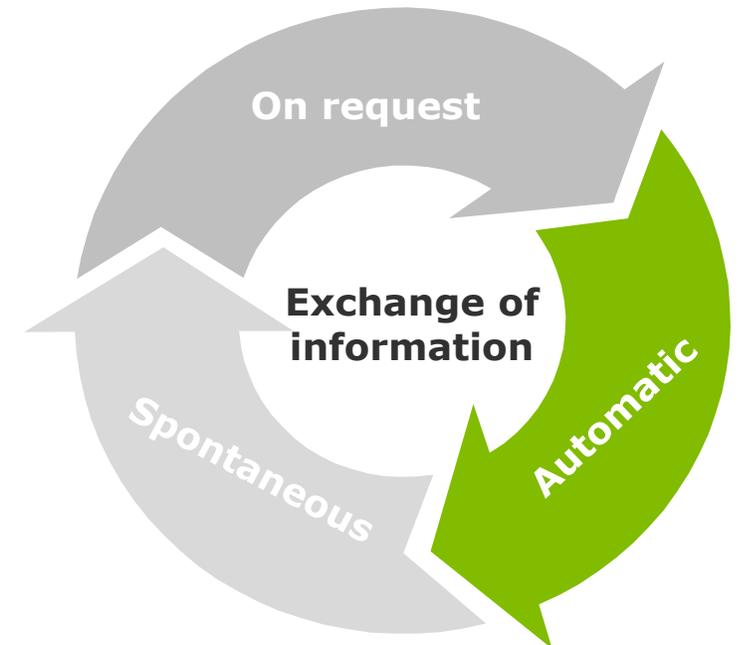
DAC 6 requires mandatory reporting and the automatic exchange of information by the tax authorities of EU Member States for certain cross-border arrangements - **2-step approach**:

STEP 1

An obligation on intermediaries / relevant taxpayers to inform tax authorities about certain cross-border arrangements that could potentially be used for aggressive tax planning

STEP 2

Following the disclosure to the national tax authorities, information shared automatically among Members States



How do the new obligations work?

Types of taxes covered

In scope...



Under Article 2, DAC (as amended) **shall apply to all taxes of any kind levied by**, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities

Not in scope...



Under Article 2, DAC (as amended) **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
- Compulsory social security contributions payable to a Member State or a subdivision of the Member State or to social security institutions established under public law

In practice, DAC 6 covers notably:



**CORPORATE
TAX**



**INDIVIDUAL
TAX**



**INHERITANCE
TAX**

How do the new obligations work?

Reportable cross-border arrangement

Reportable cross-border **arrangement** means “any **cross-border arrangement** that contains at least one of the **hallmarks** set out in Annex IV”

No characteristics of an “arrangement”, only the following indication:

“an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part”

A **cross-border arrangement** is defined by its geographic scope:

“Cross-border arrangement means an arrangement concerning **either more than one Member State or a Member State and a third country** where at least one of the following conditions are met:

- a. not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- b. one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- c. ...”

A **hallmark** is defined as follows:

“means a characteristic or feature of a cross-border arrangement that presents **an indication of a potential risk of tax avoidance**, as listed in Annex IV”

2 types of reportable cross-border arrangements:

- **Bespoke arrangement:** “any cross-border arrangement that is not marketable arrangement”
- **Marketable arrangement:** “a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customized”

How do the new obligations work?

Intermediaries

An intermediary means...

Any person that designs, markets, organizes or makes available for implementation or manages the implementation of the reportable cross-border arrangement

OR

Any person that knows or could be reasonably expected to know that the person has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to the activities mentioned above (however, the person has the right to be evidenced that such person did not know and could not reasonably be expected to know)

...But only if it is either:

- A tax resident in an EU Member State
- Have a PE in a EU Member State through which the services related to the arrangements are provided
- Incorporated in or governed by the laws of a EU Member State
- Registered with a professional association related to legal, taxation or consultancy services in a EU Member State



Waiver in case of legal professional privilege preventing from disclosing information*

* Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations (based on the Luxembourg draft law, lawyers would benefit from the professional privilege).

How do the new obligations work?

Intermediaries but also relevant taxpayers...

Intermediary(ies)

- “Primary” obligation to report lies on intermediary(ies) except where shift is possible
- Order to follow where information would be filed in more than one Member State: tax residence, permanent establishment through which the services with respect to the arrangements are provided, etc.
- A Member State may give the right to a waiver where the reporting obligation would breach the legal professional privilege under its national law
- Specific rule where there are several intermediaries: filing by each intermediary except if evidence, in accordance with national law, that the required information has already been reported

Relevant taxpayer(s)

- Relevant taxpayer: “ means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement”
- A relevant taxpayer, and not the intermediary, is likely to need to report to the tax authorities directly in three situations:
 - All involved intermediaries are based outside EU
 - The EU intermediary(ies) involved benefit from a legal professional privilege
 - There is no intermediary (in-house schemes...)
- Order to follow where information would be filed in more than one Member State: tax residence; permanent establishment benefiting from the arrangement...
- Order to follow where there are several taxpayers (agrees the reportable arrangement with the intermediary; manages the implantation of the arrangement. Exemption from filing if proof, in accordance with national law, that the same information has already been filed by another taxpayer

How do the new obligations work?

15 hallmarks



The cornerstone of DAC 6

Whether a transaction is reportable depends on certain criteria referred to as “hallmarks” (“*marqueurs*”): “means a characteristic or feature of a cross-border arrangement that presents **an indication of a potential risk of tax avoidance**, as listed in Annex IV”



Broad scope of topics covered by the hallmarks

Generic hallmarks, specific hallmarks, hallmarks concerning automatic exchange of information and beneficial ownership, hallmarks concerning transfer pricing



Some of them in connection with the “main benefit test”

“the main benefit or **one of the main benefits** a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage”

How do the new obligations work?

15 hallmarks - Main benefit test

Hallmarks categories

Category A

- Confidentiality clause
- Success fee
- Standardized documentation and/or structure

Category B

- A loss-making company acquired and the use of losses
- Conversion of income into other categories of revenue taxed at a lower level
- Round tripping of funds using conduits/entities without substance

Category C (part)

- Deductible cross-border payments to associated enterprises subject (when received) to a zero or almost zero tax rate, a full tax exemption, or a preferential tax regime

Category C (part)

- Payment to an enterprise that is (i) stateless or (ii) in a non-cooperative jurisdiction
- Depreciation in more than one jurisdiction
- Relief for double taxation
- Transfer of assets with a material difference in the price used for tax purposes

Category D

- EU legislation or any equivalent agreements on the automatic exchange of financial account information circumvented
- Non-transparent legal or beneficial ownership chains used

Category E

- Unilateral transfer pricing safe harbor rules used
- Transfers of (rights to) hard-to-value intangibles
- Restructuring resulting in significant profit shifts (50% of EBIT) following the transfer of functions and/or risks and/or assets between associated enterprises

Main benefit test



Main benefit test

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



Not subject to main benefit test

Hallmarks which on its own merit will trigger a reporting obligation

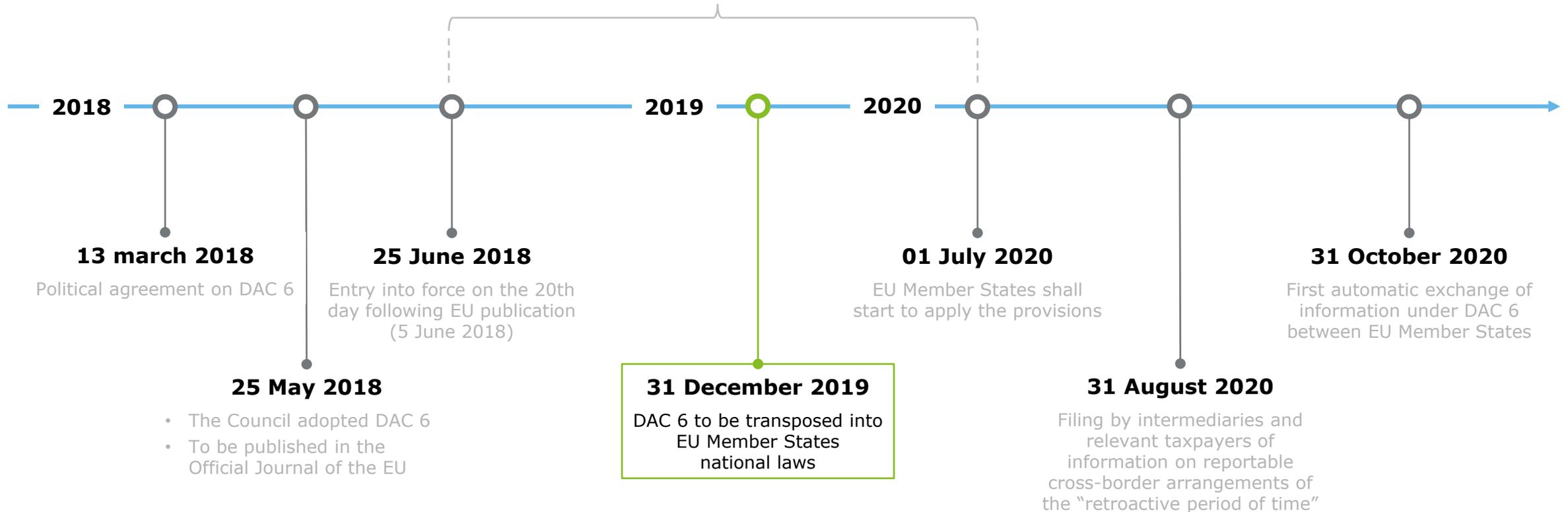
Reporting time frame

"Unusual" timeline for a tax directive



Retroactive effect

Arrangements the first step of which was implemented between the date of entry into force and the date of application of DAC 6





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