KPMG

Mandatory disclosure requirements for intermediaries

Summary & observations

KPMG's EU Tax Centre
June 2018

1 Introduction

On 25 May 2018, the Council of the European Union formally adopted new mandatory disclosure rules (MDRs) for qualifying intermediaries and relevant taxpayers. In short, as of 1 July 2020, intermediaries or — in some cases, taxpayers, will be required to disclose to their tax authorities information on reportable cross-border arrangements. *Despite this application date, reportable cross-border arrangements, the first step of which is implemented between 25 June 2018, and 1 July 2020, must also be reported, by 31 August 2020*.

The purpose of this commentary is to provide an overview of the new reporting requirements and to highlight areas of uncertainty. In line with KPMG's Global Principles for a Responsible Tax Practice[1], we support the European Union's efforts towards appropriate transparency and a fair and well-functioning internal market. However, the rules as drafted do raise questions of interpretation, the EU has not issued accompanying guidance and some matters, for example, defining the penalty regime, are left to Member States. We encourage tax authorities to consider the need for detailed local implementation guidelines that will provide greater certainty, assist in streamlining application of the new rules and facilitate compliance by intermediaries and taxpayers alike.

2 Background

The adoption of the new mandatory disclosure rules comes in the wake of recent revelations raising concerns regarding certain tax planning practices — the so-called "Lux Leaks", "Panama Papers" and "Malta Leaks", as a result of which both the OECD and the EU expressed the need for more stringent rules for promoters of such practices. In July 2016, the European Parliament called on the European Commission to introduce tougher transparency requirements for intermediaries. In parallel, the ECOFIN Council also asked the European Commission to bring mandatory disclosure rules in line with those proposed by the OECD in Action 12 of the Base Erosion and Profit Shifting (BEPS) project.

On 21 June 2017, the European Commission published its proposal for mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. While the European Commission recognizes that some cross-border transactions and structures are used for genuine reasons, it also notes[2] that others may not be legitimate. It is therefore considered necessary for intermediaries — or the relevant taxpayers — to be required to report to the tax authorities on qualifying cross-border arrangements which they make available to their clients.

The European Commission's proposal came in the form of an amendment to the Directive on Administrative Cooperation (the DAC) in the field of taxation and introduces an obligation on intermediaries and, in certain cases, taxpayers to disclose tax planning that is perceived as potentially aggressive. The Directive (DAC 6) also provides the means for tax administrations to exchange information on qualifying structures. This is the latest in a series of EU initiatives in the field of automatic exchange of information in tax matters, including information on tax rulings, country-by-country reporting (CbCR) and anti-money laundering.

3 Summary

As of 1 July 2020, qualifying intermediaries will be required to disclose information on reportable cross-border tax arrangements to their authorities within 30 days of the earlier of when the arrangement is made 'available for implementation', 'ready for implementation' or actually implemented. In the absence of an intermediary — for example, if the obligation is not enforceable upon an intermediary due to legal professional privilege, or in case the intermediary is located outside the EU or because an arrangement is developed in-house, *the obligation to disclose falls on the taxpayer*. A taxpayer is defined as any person that uses a reportable cross-border arrangement to potentially optimize their tax position.

As set out below, arrangements entered into after the Directive has entered into force on 25 June 2018 will also have to be disclosed, albeit with a delayed reporting requirement until August 2020.

Scope

The scope of DAC 6 stems from the original Directive on Administrative Cooperation and includes all taxes, of any kind, levied by (or on behalf of) a Member State, with the exception of VAT, customs duties, excise duties and compulsory social contributions. It therefore includes — but is not limited to — corporate and personal income taxes, inheritance and gift taxes, financial transaction taxes, stamp duties and insurance taxes. As detailed in section 4, DAC 6 is not limited to arrangements which directly lead to a reduction in a taxpayer's tax bill. The Directive also requires reporting of cross-border arrangements which may have the effect of undermining the reporting of financial account information and those that aim to make beneficial owners unidentifiable.

Reportable cross-border arrangements

In order to be reportable, an arrangement must be cross-border and contain one of the hallmarks set out in an Annex to the Directive. The hallmarks (set out in categories A to E) cover a wide range of features that are considered to present an indication of a potential risk of tax avoidance, including — but not limited to — the use of substantially standardized structures, deductible cross-border payments to associated companies where the recipient benefits from certain tax advantages (for example, low corporate income tax rate or a preferential tax regime), transfer pricing arrangements involving the use of unilateral safe harbor rules and arrangements designed to circumvent automatic exchange of information and beneficial ownership.

The Directive also includes a "main benefits" test, which certain hallmarks must meet in order to trigger a reporting obligation.

The new EU-wide mandatory disclosure requirements have entered into force on 25 June 2018, which marks the date of their retroactive effect. Despite the 1 July 2020 application date, intermediaries and relevant taxpayers will be required to also file information on reportable cross-border arrangements the first step of which is implemented after 25 June 2018. Although information related to such arrangements must be reported by the end of August 2020, persons that could qualify as intermediaries or relevant taxpayers might want to consider collecting the necessary information as early as the date of entry into force.

Implementation

The Directive leaves it to the Member States to lay down rules on penalties applicable for infringements of the mandatory disclosure rules, with the only requirement being that any penalties are effective, proportionate and dissuasive.

Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 31 December 2019 at the latest. The provisions will be applicable from 1 July 2020.

Member States must also take the necessary steps to require intermediaries and relevant taxpayers to disclose information on cross-border arrangements — the first step of which is implemented between the date of entry into force of the Directive (25 June 2018) and date of application (1 July 2020) of DAC 6. Information on these reportable arrangements will have to be reported by 31 August 2020.

Automatic exchange of information

The reported information will be automatically exchanged each quarter by the competent authorities of each Member State via a central directory on administrative cooperation. The directory will be developed by the Commission by the end of 2019. The automatic exchange of information will take place within one month of the end of the quarter in which the information was filed, with the first information to be communicated by 31 October 2020.

4 The Council Directive

The text of the Directive includes a series of definitions and rules for the automatic exchange of information among tax authorities. In order to apply these in practice and determine whether an arrangement falls within the scope of DAC6, the following steps may be relevant:

1. Determine whether the arrangement has a cross-border dimension.
2. Assess whether the arrangement is reportable, i.e. whether it contains at least one of the listed hallmarks and, where applicable, meets the main benefit test.
3. Identify the person with whom the reporting obligation lies.
4. Establish what information must be filed with respect to the reportable cross-border arrangement.
5. Ascertain the reporting deadline.

The provisions of the Directive which are most relevant to each of these steps are set out in the following sections.

4.1 Cross-border arrangements

The definition of "cross-border arrangement" is set out below[3] but broadly speaking is where one of the parties to a transaction is resident in an EU Member State and another party to the transaction is resident in another jurisdiction (including non-EU Member States).

So, for example, an arrangement concerning interest income derived by a resident of a Member State from a loan granted to a person resident abroad (either within the EU or from a third country) meets the cross-border test and could potentially fall within scope of the reporting obligation.

It is also noted that an arrangement includes a series of arrangements. Presumably the purpose of this clarification is two-fold: (i) to ensure that qualifying cross-border arrangements are reported as early as possible, e.g. when the reportable cross-border arrangement is made available for implementation (see section 4.1.4 below for details on the reporting date) — rather than at the moment when the arrangement has been fully implemented; and (ii) to capture a series of arrangements even where only one of the steps meets the reporting criteria.

However, not all cross-border arrangements must be reported. In order for a reporting obligation to exist, a cross-border arrangement must contain at least one of the features that are considered to be an indication of potential risk of avoidance — referred to as 'hallmarks' and listed in Annex IV to the Directive.

Both generic hallmarks (in heading A) and specific hallmarks (in headings B to E) are listed. Certain hallmarks (in A, B and paragraph 1 of C, with exceptions — see below) can only be taken into account if a "main benefit" test is also satisfied.

4.1.1 The main benefit test

The main benefit test is met if it can be established that 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.

The main benefit test is broader than existing general anti-avoidance rules that currently exist in EU legislation (e.g. the General Anti-Abuse Rule in the Anti-Tax Avoidance Directive[4]), which are mostly based on jurisprudence of the Court of Justice of the EU. It also focuses on the benefit, not the purpose[5]. Under a very wide interpretation, it may imply that a structure which has been set up with the main purpose of mitigating double taxation, also falls within its scope. This is, of course, provided that the arrangement contains one of the hallmarks linked to the main benefit test.

It remains to be seen how each domestic tax authority chooses to interpret this test in practice. In the absence of harmonized implementation guidance, we will likely see varying interpretations across the European Union which will add an extra layer of complexity to an already intricate regime.

4.1.2 Hallmarks

4.1.2.1 Hallmark categories

The characteristics that present an indication of potential risk of tax avoidance, i.e. the hallmarks, are divided into five distinct categories:

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 (some of which are linked to the main benefit test)
D. Specific hallmarks concerning automatic exchange of information and beneficial ownership
E. Specific hallmarks concerning transfer pricing

A. Generic hallmarks in heading A include arrangements where:

1. The taxpayer undertakes to comply with a confidentiality condition (in relation to other intermediaries or the tax authorities).

2. The intermediary is entitled to a fee contingent on either the amount of tax advantage derived from the arrangement or on the advantage being obtained.
3. Standardized documentation (including standard forms) is used.

This is yet another section of the Directive that will be open to interpretation by local tax authorities. For example, it is common practice for a standardized approach to documentation to be adopted in relation to arrangements which are subject to tax reliefs that have a number of detailed conditions. Standard forms are designed to support taxpayer compliance and provide certainty that the conditions for the relief are documented and adhered to on a common basis across taxpayers applying for the relief.

There has been no clarification provided that hallmark A.3 does not apply to the implementation of such arrangements where the adoption of a standardized approach has clear advantages for taxpayers and taxing authorities alike. This will be something to watch for as the Directive is implemented locally and, hopefully, local guidance issued.

B. The specific hallmarks linked to the main benefit test in category B are:

1. Acquiring a loss-making company through contrived steps, discontinuing the main activity of such company and using its losses in order to reduce its tax liability.
2. An arrangement that has the effect of converting income into lower-taxed categories of revenue, such as capital or gifts.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds.

Interestingly, Hallmark B.2 refers to the effect (rather than the purpose) of an arrangement. This wording seems to suggest that a reporting obligation may exist even where a tax advantage is incidental to a cross-border investment decision but nevertheless sufficiently high in value as to qualify as one of the main benefits derived from an arrangement (hallmark B applies together with the main benefit test).

C. Category C.1 sets out hallmarks that relate to deductible cross-border payments made between two or more associated enterprises[6] where at least one of the following conditions applies:

a) The recipient is not resident for tax purposes in any jurisdiction; or

b) The recipient is resident for tax purposes in a jurisdiction that:

  i. does not impose a corporate income tax, or imposes a corporate income tax at a 0 percent rate or almost zero; or

  ii. has been blacklisted by the EU[7] or the OECD.

c) The payment benefits from a full exemption from tax in the recipient's jurisdiction.

d) The payment benefits from a preferential tax regime.

The arrangements covered by points b (i), c) and d) are subject to the main benefits test. It has also been clarified that the presence of the conditions described under these points cannot alone lead to the conclusion that the main benefit test is satisfied.

The hallmarks listed under sub-section C.1 are the features that gave rise to the most discussions in the Council working groups prior to the adoption of the Directive. Some Member States wanted to keep the language as broad as possible while others expressed their concern over a disproportionately high administrative burden that such a wide-ranging hallmark would cause.

For example, in previous (draft) versions of the Directive[8], hallmark C.1 d) was limited to *harmful* preferential tax regimes. This reference was, however, removed from the final version of the text. The question then arises whether payments made under a preferential tax regime approved by the European Commission (for example, "innovation box" regimes implemented by some Member States) also fall within the scope of Hallmark C.1.d. Further guidelines on the interpretation of this hallmark would be welcome.

Categories C.2 to C.4

The remainder of section C deals with specific hallmarks related to cross-border transactions that are not linked to the main benefit test, including where:

C.2 The same asset is subject to depreciation in two or more jurisdictions.

C.4 Relief from double taxation is claimed in different jurisdictions in respect of the same item of income or capital.

C.5 An arrangement that includes transfers of assets and there is a material difference in the amount of consideration paid.

As these features are not subject to the main benefit test, their presence could lead to reporting even where it is clear that the arrangement complies with the intention of the law — for example where credit relief is being given to prevent double taxation.

The hallmarks listed in **Heading D** are those related to arrangements designed to circumvent automatic exchange of financial account (including under agreements with third countries) and beneficial ownership information (with reference to the definition in the Anti-Money Laundering Directive), which may have the effect of avoiding the reporting of income to the state of residence.

Heading E introduces specific hallmarks on transfer pricing, including:

E.1 Arrangements which involve the use of unilateral safe harbor rules.

E.2 Arrangements involving the transfer of hard-to-value intangibles.

E.3 Arrangements involving an intra-group cross-border transfer of functions, and/or risks, and/or assets, where the transfer results in a decline of 50 percent or more of the projected EBIT in the transferring jurisdiction, over a period of three years.

4.1.2.2 Evaluation of hallmark relevance

Member States and the Commission will evaluate the relevance of these hallmarks every two years after the entry into force of the Directive (1 July 2020). The Commission will then present a report to the Council, together with a legislative proposal, should the need arise for Annex IV to be amended.

4.1.3 Who bears the burden of disclosure?

4.1.3.1 Intermediaries

The primary obligation to disclose information on a reportable cross-border arrangement to the tax authorities rests with the "intermediary". Under the text of the Directive (Article 1, amending Article 3 b) 21 DAC), an intermediary is defined as "any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement".

It is important to note that not only persons that design and market reportable cross-border arrangements can qualify as intermediaries. The directive also defines[9] an intermediary as someone who provides "aid, assistance or advice" with regard to the arrangement. Although the Preamble to DAC6 makes reference to "certain financial intermediaries and other providers of tax advice"[10], the text of DAC6 doesn't refer to tax advisors in particular. A broad range of persons undertaking a broad range of activities may therefore fall under the definition. In cases where there is more than one intermediary, the obligation to report lies with all intermediaries involved in the arrangement unless proof that the arrangement has already been reported is available.

In order to qualify as an intermediary a person must also have a connection to an EU Member State[11]. This can include tax residency (including a permanent establishment) or registration with a professional association related to legal, taxation or consultancy services in a Member State.

The Directive leaves it to the Member States to lay down the rules on penalties applicable for infringements of the mandatory disclosure rules with the only requirement being that any penalties are effective, proportionate and dissuasive.

4.1.3.2 What if there is no EU intermediary?

There may be instances where an EU-based intermediary is not involved in a reportable cross-border transaction (for example, if the intermediary is located outside the EU or because an arrangement is developed in-house) or where a waiver for legal professional privilege applies[12]. In such cases, the obligation to disclose falls on any other intermediaries involved in the arrangement or, in their absence, on the relevant taxpayer[13].

Intermediaries that benefit from a waiver for legal professional privilege must notify the relevant taxpayer, or another intermediary to which the obligation is passed on, of their disclosure responsibility. The Directive does not impose any penalties for failure to do so but requires Member States to ensure that the notification is made.

Where the reporting obligation falls on the relevant taxpayer and it arises in more than one Member State, the information should only be filed with the competent authority of the Member State where the relevant taxpayer (in this order):

a) is resident for tax purposes, or

b) has a permanent establishment (emphasis on the permanent establishment that benefits from the arrangement), or

c) receives income or generates profits (and a) and b) do not apply), or

d) carries on an activity.

The situation might therefore arise that a relevant taxpayer has a reporting obligation in a jurisdiction where they are neither tax resident nor operating through a permanent establishment.

Where there is more than one relevant taxpayer, the reporting obligation rests with the taxpayer that agreed the reportable cross-border arrangement with the intermediary or, in its absence, with the taxpayer that manages the implementation of the arrangement.

4.1.4 What is the reporting deadline?

The person(s) with whom the reporting obligation lies is required to file the information with the relevant authorities within 30 days, beginning on:

a) the day after the reportable cross-border arrangement is *made available* for implementation to that relevant taxpayer, or

b) is *ready* for implementation by the relevant taxpayer, or

c) when *the first step* in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

Persons that do not qualify as an intermediary but have provided assistance with respect to a reportable cross-border arrangement — the secondary definition mentioned above — will be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

4.1.5 What information should be disclosed?

A standard form for the exchange of information will be developed by the European Commission and will include[14]: the identification of the taxpayers and intermediaries involved; the hallmark(s) that generated the reporting obligation; a summary of the arrangement; details of the relevant domestic tax rules; the date on which the first step in the implementation was made; the value of the arrangement; and identification of any other person or Member State likely to be affected by the arrangement.

National tax authorities of all Member States have access to the directory. However, the exchanged information will not be made available to the public and the Commission will only have access to it insofar as needed for the monitoring of the functioning of the Directive. The Commission will therefore not have access to the identification of intermediaries, relevant taxpayers and any other person likely to be affected by the arrangement (all of which is reportable), nor to information on the reportable cross-border arrangement.

It is noted that absence of reaction by a tax administration to a cross-border arrangement that was reported will not imply their acceptance of the validity or tax treatment of that arrangement.

The Directive only provides a list of details that must be exchanged among Member States and does not address the question of what information should be filed by qualifying intermediaries and relevant taxpayers. It is expected that this will include — at a minimum — the information to be exchanged. Member States may, however, require additional information from those with whom the reporting obligation lies.

4.1.6 When will DAC6 enter into force?

The ECOFIN Council adopted the new rules on 25 May 2018 and the final text of the Directive was published in the Official Journal of the EU on 5 June 2018. Member States must implement the Directive into their domestic legislation by the end of 2019 and its provisions will become applicable on 1 July 2020.

Intermediaries and relevant taxpayers will be required to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force (25 June 2018) and the date of application of the Directive (1 July 2020).

Once the Directive becomes applicable, the reported information will be automatically exchanged quarterly by the competent authorities of each Member State via a central directory on administrative cooperation in the field of taxation. The directory, as well as all the standard forms and linguistic arrangements, will be developed by the Commission by the end of 2019 at the latest. The automatic exchange of information will take place within one month from the end of the quarter in which the information was filed, while the first information will be communicated by 31 October 2020.

5 Food for thought

The EU has not issued accompanying guidance to the text of the Directive, other than the comments made in its Recital. It remains to be seen whether some Member States choose to publish guidance for local implementation of DAC6. Any additional guidelines would certainly be welcome as there are a number of areas and definitions that may lead to uncertainties when applying these rules in practice. A series of items that intermediaries and taxpayers may wish to keep in mind when discussing local implementation of the requirements with their local tax authorities have been set out below.

5.1 Definitions and procedure

5.1.1 Arrangement

Although the recital to the Directive refers several times to "aggressive tax planning", "aggressive tax arrangements" and "aggressive tax practices" these terms, or indeed the concept of "arrangement", are not defined in the text of DAC6. Should, for example, the latter term be interpreted as meaning potentially aggressive tax planning schemes with a cross-border element, as suggested in the Introduction to the 9 March 2018 text[15] on which the ECOFIN reached political agreement or does it need to be interpreted more widely to mean any arrangement that has a hallmark? Additional guidance on this term would be useful in determining reportable items where it is not clear from the strict wording whether or not it is caught.

5.1.2 Reportable information

The Directive does not explicitly confirm that the information on reportable cross-border arrangements that Member States' tax authorities will require to be filed is that listed under paragraph 14 of article 8ab.1, i.e. the information to be exchanged via the Central Directory. While, with respect to intermediaries, it is noted that "information that is within their knowledge, possession or control" must be filed, the text is not as unambiguous when it comes to what details relevant taxpayers are expected to submit. Further clarification on this point would be welcome in order to avoid the reporting of irrelevant information.

5.2 Hallmarks

5.2.1 Hallmark A

As regards the application of Hallmark A — Generic hallmarks linked to the main benefit test, tax authorities might consider it appropriate to provide further guidance and, potentially, carve outs[16] for:

(i) general contractual terms whereby a client agrees to keep advice confidential;

(ii) situations where an intermediary's fee is contingent on, e.g. the success of an application with the tax authorities or a judgement by a relevant court;

(iii) standardized documentation approved by the local authority (e.g. those related to approved employee share option plans, where applicable).

5.2.2 Hallmark C

With reference to Hallmark C.1(b)(i), further direction might be needed in interpreting the phrase "corporate tax at the rate of […] almost zero". Should this, for example, be interpreted as a rate of below 1 percent or should some other measure be applied?

5.2.3 Hallmark E

A more explicit definition of the term "safe harbor rules" could be considered for the purposes of Hallmark E.1. For example, in its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the OECD suggest a 5 percent mark-up under the simplified approach for Low Value Adding Services[17], assuming that a jurisdiction chooses to follow the OECD's guidelines, will this be considered a safe harbor rule?

Further guidance on the calculation of the amount of earnings before interest and taxes (EBIT) for the purposes of Hallmark E.3 would also be valuable. One option would be to adapt the definition of EBITDA as laid down in Council Directive (EU) 2016/1164[18] — the ATAD. Furthermore, taxpayers could benefit from clarification on which figures should be used as projected annual EBIT. For example, should this be based on the company's budget as at the end of the previous financial year?

5.3 Concluding remarks

The items discussed here are only a few of the concepts the interpretation of which might lead to uncertainties and inconsistent application and which Member States' authorities could consider when implementing DAC 6 locally. The underlying message is that, in the absence of EU-wide guidelines on the application of DAC6, substantial guidelines will be needed from local tax authorities. It is important that discussions between stakeholders and regulators begin as early on in the legislative process as possible.

Endnotes

1. Our Principles for a Responsible Tax Practice bring to life KPMG's values and our Global Code of Conduct in a way that is meaningful for the every day situations we face as tax professionals.

   — We act lawfully and with integrity and expect the same from our people, our firms' clients, tax authorities and other parties with whom we interact. Above all else, in every respect our work shall be fully compliant with relevant legal, regulatory and professional requirements.

   — We are committed to providing clients with high quality tax advice tailored to their particular circumstances.

   — We shall explain clearly and objectively to our clients the technical merits and the sustainability of any tax advice we give.

   — Whenever relevant and practical to assess, we may discuss with clients any likely impact of any tax advice we give on relevant communities and stakeholders and any potential reputational risk.

   — We shall make recommendations to clients only where:

   i. we consider, at least on the balance of probabilities, that the relevant interpretation of law is correct; or

   ii. it otherwise clearly meets the applicable local professional standards.

   — We shall only advise clients to enter into, or assist them to implement, transactions or arrangements on the basis that they have any substance required by law, as well as any business, commercial or other non-tax purpose required by law.

   — We shall not advise clients to enter into transactions with the purpose of securing a tax advantage clearly and unambiguously contrary to the relevant legislation and shall not assist them to implement such transactions. If, in our view, the language of the legislation is uncertain, we shall consider the intention of the relevant legislators when advising clients.

   — We support a relationship with tax authorities aimed at building mutual trust and respect which will enable constructive dialogue and responsiveness by all parties, facilitate compliance and reduce or assist in early resolution of disputes.

   — We shall comply with all our disclosure requirements and advise our clients to do the same.

   — When advising clients on entering into transactions we shall do so on the understanding that all material facts will be known to the tax authorities.

2. European Commission Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (https://ec.europa.eu/taxation_customs/sites/taxation/files/intermediaries-proposal-2017_en.pdf): "Whilst some complex transactions and corporate structures may have entirely legitimate purposes, it is also clear that some activities, including offshore structures, may not be legitimate and in some cases, may even be illegal."

3. *"Cross-border arrangements"* are defined "an arrangement that concerns either more than one Member State or a Member State and a third country where at least one of the following conditions is met":, if at least one of the following conditions is met:

   a) not all participants in the arrangements are tax resident in the same jurisdictions;

   b) one or more of the participants is a dual tax resident;

   c) one or more of the participants carries on a business in another jurisdiction through a permanent establishment (PE) — and the arrangement is related to the business of that PE;

   d) one or more of the participants carries on a business in another jurisdiction without a permanent establishment;

   e) the arrangements has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

4. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market: "Article 6 General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law."

5. See, by comparison, the Principal Purposes Test resulting from the OECD BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

6. For the purposes of DAC6, "associated enterprise" means a person who is related to another person in at least one of the following ways:

a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;

b) a person participates in the control of another person through a holding that exceeds 25 percent of the voting rights;

c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 percent of the capital;

d) a person is entitled to 25 percent or more of the profits of another person.

7. For the purposes of hallmark C.1 b) ii. please note that as at 25 May 2018, the following countries were on the EU blacklist ("EU list of non-cooperative jurisdictions"): American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago, US Virgin Islands. The list is subject to ongoing monitoring and review (see http://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ for the most current list).

8. Council of the EU Presidency note 6804/18 of 9 March 2018.

9. The definition is also extended to *"any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could reasonably not be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, a person may refer to all relevant facts and circumstances as well as available information and its relevant expertise and understanding".*

10. Paragraph 5 of the Preamble.

11. In order to be an intermediary, a person shall meet at least one of the following additional conditions:

a) be resident for tax purposes in a Member State;

b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;

c) be incorporated in, or governed by the laws of, a Member State;

d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.

12. The Directive allows (Article 8ab.5) Member States to give intermediaries the right to a waiver from the reporting obligation where filing the required information would breach for legal professional privilege they are entitled to under domestic law. Member States must ensure that exempt intermediaries notify the relevant taxpayer or another intermediary to which the obligation is passed on, of their disclosure responsibility.

13. A "relevant taxpayer" is defined as *"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".*

14. Article 8ab, paragraph 14.

15. The text can be accessed on the Council's website at the following address: http://data.consilium.europa.eu/doc/document/ST-6804-2018-INIT/en/pdf

16. See the Guidance on the UK Disclosure of tax avoidance schemes (DOTAS) published HM Revenues and Customs.

17. See paragraph D.2.4. — paragraph 7.61 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017.

18. "Article 4(2) The EBITDA shall be calculated by adding back to the income subject to corporate tax in the Member State of the taxpayer the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortisation. Tax exempt income shall be excluded from the EBITDA of a taxpayer."

Contacts

KPMG's EU Tax Centre and the KPMG network of EU tax law specialists can help you understand the complexities of EU tax law and how this can impact your business.

If you would like more information about how KPMG can help you, feel free to contact one of the following advisors, or, as appropriate, your local KPMG contact.

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