ACCOUNTANCY EUROPE.

TAX INTERMEDIARIES

Reporting cross-border tax planning

Factsheet

FACTS.

TAX

JUNE 2018

HIGHLIGHTS

Transparency is essential to developing fair and sustainable tax systems that ensure people's access to public goods. After Luxleaks and the Panama and Paradise Papers, the EC has been vigorously driving legislation to enhance tax transparency. Most recently by amending the *Directive on Administrative Co-operation in (direct) Taxation* to require tax intermediaries to report cross-border tax planning schemes that meet certain criteria, or *hallmarks*. It covers all EU based tax advisors regardless if they are part of a regulated profession or sector.

This factsheet aims to support professional accountants in applying this new Directive, that will enter into force on 25 June 2018. Member States have until 31 December 2019 to transpose these rules as a minimum standard; they may extend its provisions to reflect local circumstances. This means that the implementation of the rules may diverge considerably across Europe.

INTRODUCTION

On 13 March 2018 the European Union (EU) Member States reached political agreement to require tax intermediaries to report cross-border tax planning schemes that meet certain criteria, or *hallmarks*.

The original proposal was published by the European Commission (EC) on 21 June 2017. The speed with which political agreement was reached indicates the political importance of the issue for Member States, after Luxleaks and the Panama and Paradise Papers.

The proposals were formally adopted on 25 May and published in the Official Journal on 5 June, thus entering into force on 25 June 2018.

The legislative proposal is an amendment to the *Directive on Administrative Co-operation in (direct) Taxation* (*DAC*)[1]. As a directive, it must be transposed as a minimum standard by each Member State and its provisions may be extended by national governments to reflect local circumstances.

This factsheet provides a summary of the main provisions of the Directive. Due to their importance, Appendices 1 and 2, respectively, contain detailed descriptions of the information to be exchanged between tax authorities and of the hallmarks.

IN BRIEF

The Directive requires all **tax intermediaries** to report to national tax authorities such **cross-border** tax planning arrangements that include pre-defined **hallmarks**. The reporting by the intermediary to the tax authority must take place within a certain deadline – within 30 days from a defined triggering event. The tax authorities will then **automatically-exchange** the data with other EU tax authorities. Failure to report will lead to **penalties**.

KEY DATES

- 25 June 2018: entry into force of the proposal – transitional provisions come into effect (see below)
- 31 December 2019: Member State transposition deadline
- 1 July 2020: date of application of the provisions
- 31 October 2020: first automatic exchange between Member States to take place

Important Notice. Details of any tax planning arrangements that contain one or more of the hallmarks, and where the first step of implementation of the arrangement takes place on or after **25 June 2018** and before 30 June 2020, must still be reported. The latest due date for reporting to the relevant tax authority is 31 August 2020. Member States must transpose the Directive and set up national reporting requirements and systems but is important that tax practitioners are aware as soon as possible of these reporting obligations and keep suitable records. National reporting requirements will not be known until transposition but must include the information that Member States must transfer to each other, summarised in Appendix 1. This is the minimum level of information that should be retained by tax professionals.

DETAILS

WHO ARE 'TAX INTERMEDIARIES'?

All EU based providers of tax advice are covered by the Directive[2], including accountants, lawyers, the banking industry and individuals and organisations that are neither regulated nor a member of a professional body.

[1] See: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en

[2] 'intermediary' means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross border arrangement"

However, the taxpayer – rather than the intermediary – has to report directly to the tax authority when:

- the tax arrangement is developed in-house
- the tax intermediary is prevented from making the disclosure due to specific tax secrecy laws or more general legal professional privilege rules, as defined by national legislation
- the intermediary that provided the advice has no presence[3] in an EU Member State

WHAT CONSTITUTES A REPORTABLE 'CROSS-BORDER TAX ARRANGEMENT'?

The DAC specifically excludes VAT from its scope but otherwise reporting is required for any cross-border tax arrangement that contains at least one hallmark.

A **cross-border** arrangement must involve more than one EU Member State, or a Member State and a third country (i.e. a country that is not a member of the EU or European Economic Area (EEA)).

Moreover, at least one of the following conditions must be met:

- not all of the participants are tax resident in the same jurisdiction
- one or more participants are simultaneously tax resident in more than one jurisdiction
- one or more participants carries on a business through a permanent establishment in another jurisdiction and the arrangement forms part of all of the business of that permanent establishment.

WHAT ARE THE 'HALLMARKS'?

For a cross-border scheme to be reportable, it must contain one or more of the hallmarks listed in Annex IV of the Directive, reproduced in Appendix 2 below.

Some hallmarks only apply if "the main benefit or one of the main benefits" expected to be obtained from the arrangement is a tax advantage. This is to be decided "having regard to all relevant facts and circumstances".

The "one of the main benefits" test was added later in negotiations, and considerably expands the scope of the main benefit test. There is no guidance for how this should be applied in practice by Member States. Therefore, there could be significant differences in interpretation of this concept across the EU.

It is difficult to be certain which of the hallmarks could be of greatest significance to the profession but it likely to be certain hallmarks in Categories B, C and E.

In respect of Category B hallmarks, it is interesting that reporting schemes designed to convert income to capital are a feature of many existing nation disclosure schemes, so this could be a significant requirement.

Category C hallmarks relate to specific cross-border arrangements that are already a subject of the OECD's BEPS Actions and the EU's Anti-Tax Avoidance Directive.

Category E hallmarks cover specific transfer pricing arrangements. This is a specialised area, but the lack of a main benefits test could result in this being a significant area of reporting.

It is not anticipated that the hallmarks contained in Categories A and D will be important. Category A hallmarks relate to marketable arrangements (see below for more information) and Category D hallmarks relate to schemes to avoid disclosure of beneficial interests and to avoid the impacts of automatic exchange of financial account information. The profession is not widely involved in promoting such schemes.

[3] i.e is not resident for tax purposes, has no permanent establishment, is not incorporated or governed by the laws of a Member State

WHAT INFORMATION HAS TO BE REPORTED?

The Directive does not specify what information the intermediary or taxpayer must report to the tax authority. However, the Directive does specify the information that Member States must exchange between each other.

Therefore, this information is the minimum that tax intermediaries or taxpayers will have to report to their national tax administrations. On top of the EU-level minimum information requirements, national legislators may impose additional disclosure requirements. However, whilst these additional disclosures will have to be made to the relevant national tax authority, they would not be exchanged with other authorities.

A full list of the reportable minimum information can be found in Appendix 1.

Additionally, where the intermediary is bound by secrecy obligations, the intermediary must notify another intermediary of the reporting requirements – presumably this would apply if the other intermediary was not similarly bound by the secrecy obligations. If there is no other intermediary, the intermediary bound by secrecy obligations must notify the relevant taxpayer of their obligation to report the arrangement.

Where there could be multiple reporting obligations, the intermediary is exempt from filing information if they have proof that the same information has been filed in another Member State.

WHAT ARE THE REPORTING DEADLINES?

The standard reporting deadline is 30 days from whichever of the following occurs first:

- the day after the arrangement is **made available** for implementation
- the day after the arrangement is **ready** for implementation, or
- the day that the **first step** in implementation has been made

BESPOKE VS. MARKETABLE ARRANGEMENTS

The Directive also makes a distinction between a “marketable arrangement” and a “bespoke arrangement”.

Marketable arrangements are cross-border arrangements “designed, marketed, ready for implementation or made available for implementation without the need to be substantially customised”. They are also variously referred to as “off-the-shelf” or “pre-packaged” schemes.

Bespoke arrangements are everything else.

The initial reporting requirements are the same for both types of arrangement. However, for marketable arrangements, the intermediary must provide quarterly updates to tax authorities on certain disclosable items.

TAXPAYER REPORTING

Taxpayers who must report have the same reporting obligations and deadlines as intermediaries.

WHO ARE THE REPORTING AUTHORITIES?

For both when intermediaries and taxpayers report, the Directive defines a ‘hierarchy’ for which Member State’s tax authority the disclosures must be made. This is to cover cases where the intermediary or taxpayer is liable to file information with the competent authorities of more than one Member State.

For example, for both intermediaries and taxpayers the reporting should, a priori, be made to the Member State of their tax residence. Next in line is the Member State where the intermediary or taxpayer has a permanent establishment, and so on and so forth. The full ‘hierarchy’ can be found in Article 8ab Para 3 of Directive 2011/16/EU for intermediaries, and Article 8ab Para 7 for taxpayers.

AUTOMATIC EXCHANGE

Member States must transmit the required information within one month of the end of each calendar quarter to a central directory, which the EC is obliged to develop by 31 December 2019.

This directory will be accessible for all Member States and the EC, albeit certain personal information will not be available to the EC.

PENALTIES

Member States are obliged to introduce "effective, proportionate and dissuasive" penalties where intermediaries or taxpayers have failed to comply with their reporting requirements. Such penalty regimes will be specific to each Member State.

TRANSPOSITION ISSUES

Tax intermediaries of all EU Member States will be affected by this Directive. Even those Member States that already have advance disclosure of tax planning schemes are likely to have to change their national schemes to reflect the hallmarks relating to cross-border arrangements.

The Directive is only a minimum standard that Member States must transpose. Therefore, Member States' implementation of the rules may diverge considerably in areas such as the penalty regimes and the information that must be provided to tax administrations. At least the following three practical issues may arise:

1) With regard to the disclosure requirements in particular, Member States have wide flexibility for expanding the requirements of the Directive ('gold-plating'). At least two Member States that have no existing advance disclosure scheme are considering introducing a scheme to cover domestic tax arrangements.

2) Member States may also have different interpretations of certain key concepts, either in the process of transposition or by subsequent interpretation by national courts of law. In particular, concepts such as "made available" and "ready for implementation" are not well defined in the Directive. There are potential translation issues in certain jurisdictions when it comes to defining "legal professional privilege'".

3) Member states may interpret the main benefit test differently. Tax outcomes are an important factor in many cross-border commercial decisions. It thus remains to be seen how strong a weighting will be given when deciding whether tax is the main benefit, or one of the main benefits of a commercial transaction.

WHAT'S NEXT?

The Member States and the EC must evaluate the relevance of the hallmarks in Annex IV every two years starting 1 July 2020. The EC is then obliged to report its findings to Council accompanied by a legislative proposal which could amend, add or delete hallmarks.

Moreover, the EC has stated that the deterrent effect of the Directive could be enhanced if the obligation to disclose information to the tax authorities was extended to auditors that are engaged to sign off on a taxpayer's financial statements. This could be the subject of a future legislative proposal.

The EC maintains that auditors come across considerable amounts of data during the statutory audit. In the EC's view, auditors may discover arrangements that could qualify as aggressive tax planning.

APPENDIX 1 – INFORMATION REQUIRED FOR EXCHANGE

The information that the tax authority must exchange:

- information to identify the taxpayer, including
  - name, date place of birth (for individuals)
  - residence for tax purposes and tax identification number
  - where appropriate, persons that are associated enterprises to the relevant taxpayer
- details of the hallmarks that make the tax planning reportable
- a summary of the reportable cross-border arrangement, including the name of the scheme (if any) and a general description of the relevant business arrangements or activities – excluding information of a sensitive nature
- the date on which the first step of implementation has or will take place
- details of the national provisions that give rise to the report
- the value of the reportable cross-border arrangement
- the Member State of the relevant taxpayer and details of any other Member State likely to be affected
- identification of any other person likely to be affected by the arrangement and the Member State to which they are linked.

APPENDIX 2 - ANNEX IV HALLMARKS

PART I. MAIN BENEFIT TEST

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the 'main benefit test'.

That test will be satisfied 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.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

PART II. CATEGORIES OF HALLMARKS

A. GENERIC HALLMARKS LINKED TO THE MAIN BENEFIT TEST

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
   a. the amount of the tax advantage derived from the arrangement; or
   b. whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. SPECIFIC HALLMARKS LINKED TO THE MAIN BENEFIT TEST

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. SPECIFIC HALLMARKS RELATED TO CROSS-BORDER TRANSACTIONS

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
    a. the recipient is not resident for tax purposes in any tax jurisdiction;
    b. although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
        i. does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
        ii. is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;
    c. the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
    d. the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;
2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

D. SPECIFIC HALLMARKS CONCERNING AUTOMATIC EXCHANGE OF INFORMATION AND BENEFICIAL OWNERSHIP

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:
    a. the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
    b. the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
    c. the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
    d. the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
    e. the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;

f. arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
    a. that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
    b. that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
    c. where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

E. SPECIFIC HALLMARKS CONCERNING TRANSFER PRICING

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles. The term 'hard-to-value intangibles' covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
    a. no reliable comparables exist; and
    b. at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

Avenue d'Auderghem 22-28, 1040 Brussels

+32(0)2 893 33 60

www.accountancyeurope.eu

@AccountancyEU

Accountancy Europe

ABOUT ACCOUNTANCY EUROPE

Accountancy Europe unites 51 professional organisations from 37 countries that represent **1 million** professional accountants, auditors, and advisors. They make numbers work for people. Accountancy Europe translates their daily experience to inform the public policy debate in Europe and beyond.

Accountancy Europe is in the EU Transparency Register (No 4713568401-18).