Mandatory disclosure requirements for intermediaries webcast

Wednesday 23 May 2018

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Agenda .. with you today

Introduction

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Notes on CPE and polling questions

Continuing professional education (CPE) credits

North America

— We require that participants are registered, logged in and take part in at least four of the five polling questions and participate in at least 50 of the 60 minutes to qualify for CPE credits for today's webcast.

Outside North America

— We encourage you to participate in the questions, as you may be eligible for continuing education credits in your local jurisdiction.

Polling questions

— Polling questions will appear as we proceed through the presentation.

— As mentioned, in order to receive the CPE credit, we require that those participants take part in at least four of the five polling questions and participate in at least 50 of the 60 minutes to qualify for CPE credits for today's webcast.

Attendee questions

— You may submit questions in the *Ask a question* button on the left. We will answer as many questions as we can during Q&A. If we are unable to answer your question, someone from KPMG may reply via phone or email.

— For technical issues, please use the *Question Mark* button in the upper-right hand corner of the media player.

Your feedback

— When the webcast is over, the webcast player will automatically refresh to display an exit survey. Feel free to complete the survey, as your comments are very valuable to us.

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Background

Background

Public pressure and international developments

Revelations raising concerns

- ‘LuxLeaks’
- ‘Panama Papers’
- ‘Malta Leaks’
- Pressure from the European Parliament

Existing EU instruments

- Anti Tax Avoidance Directive (ATAD1&2)
- Common Reporting Standard (CRS) in the EU
- Mandatory automatic exchange of information on advance cross-border rulings
- CbCR– public requirement is in the works
- Directive on Double Taxation Dispute Resolution Mechanisms (DTDRM) in the EU
- AMLD4 – UBO registers
- EU blacklist

OECD BEPS

- Action 12 on Mandatory disclosure rules
- Design principles, not minimum standard
- Hallmarks should reflect specific country needs and risks
- Both national and cross-border arrangements
- Multilateral instrument
- OECD peer review for BEPS minimum standards

Background

DAC 6 scope

The latest in a series of EU initiatives in the field of automatic exchange of information in tax matters (DAC 1-5)

DAC 6 introduces:

- an obligation on **intermediaries** (or taxpayers), to disclose potentially aggressive tax planning arrangements, and
- the means for tax administrations to exchange information on these structures.

Reporting of:

- cross-border arrangements.
- that fall within a set of so-called "**hallmarks**" – some of which must be assessed in light of a **main benefit test**,
- within **30 days** of the arrangement being made available to the taxpayer.

The scope of the Directive on Administrative Cooperation:

- **all taxes** of any kind with the exception of: VAT, customs duties, excise duties and compulsory social contributions;
- includes local financial transaction taxes, stamp duties and insurance taxes.

How could a financial services company be within scope?

As a relevant taxpayer or other person likely to be affected by the reportable cross-border arrangement	As an intermediary (primary definition)	As an intermediary (secondary definition)
— If a relevant taxpayer or other person likely to be affected by the reportable cross-border arrangement then the financial institution could be named in disclosure by intermediaries. — If a relevant taxpayer the financial institution may also have a secondary obligation to make disclosure if there are no intermediaries (e.g. 'in house' arrangements) or intermediaries are exempted from disclosure by legal professional privilege.	— If the financial institution designs, markets, organises or makes available for implementation, or manages the implementation, of a reportable cross-border arrangement, then it may be required to make disclosure as an intermediary.	— If a financial institution 'knows or could reasonably be expected to know' that it has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement, then it may be required to make disclosure as an intermediary.

Internal processes must be able to capture all three scenarios

Background

Directive on Administrative Cooperation: DAC 6

Step 1

Is there a cross-border arrangement?

Step 2

Is that cross-border arrangement reportable?

Step 3

Who has the obligation to report?

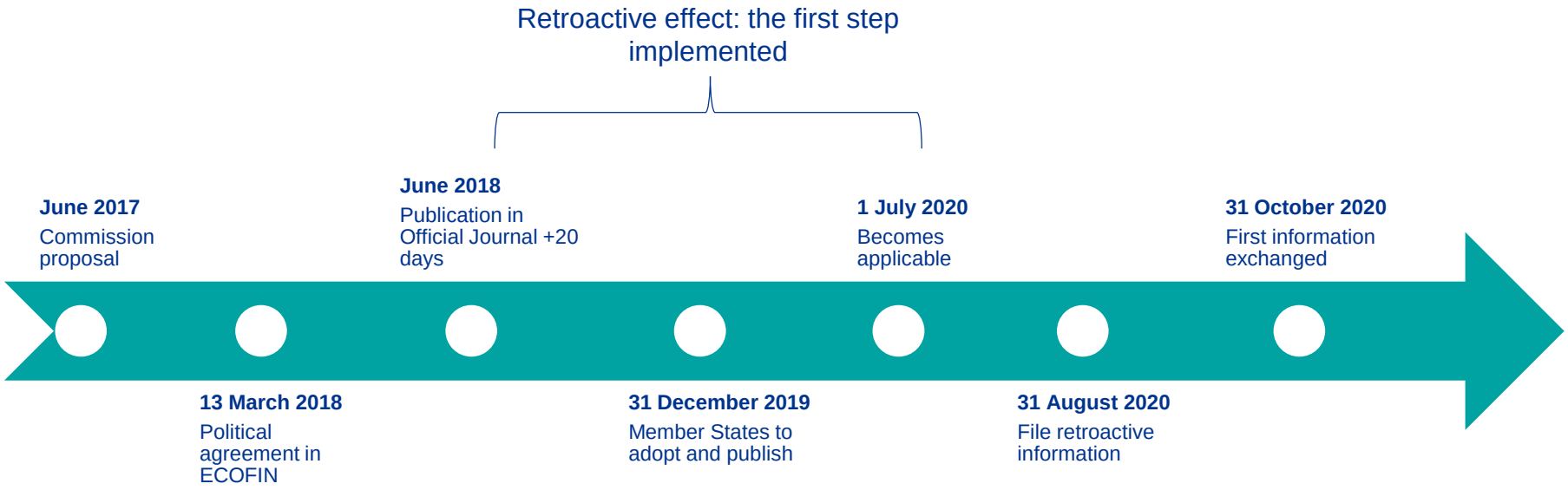
Step 4

What should be reported?

Reporting deadline: 30 days

Background

Timeline



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The Rules

The Rules

The basics

To be in scope an arrangement must be:

A. Cross-border, and

B. Reportable

The preamble to the Directive refers to the disclosure of “potentially aggressive tax planning arrangements”, but the requirements of the Directive itself appear much broader.

The basics - Cross-border arrangements

An arrangement concerning:

- more than one member state; or
- a member state and a third country;

Where at least one of the following conditions is met:

- not all participants in the arrangement are tax resident in the same jurisdictions;
- one or more of the participants is a dual tax resident;
- one or more of the participants carries on a business in another jurisdiction through a permanent establishment;
- one or more of the participants carries on a business in another jurisdiction without a permanent establishment;
- the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

The Rules

The basics

An arrangement is reportable if it is a cross-border arrangement which:

— has at least one hallmark, and
— in some cases satisfies a ‘main benefit test’.

It is important to distinguish those cases to which the main benefit test applies – for other hallmarks no evidence of a tax benefit is required.

The basics - The main benefit test

Main benefit test: 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.

- Widely drafted compared to existing EU provisions (e.g. ATAD) and EU case-law.
- May imply that a structure which has been set up with the main purpose of avoiding double taxation – an otherwise legitimate reason, also falls within its scope.

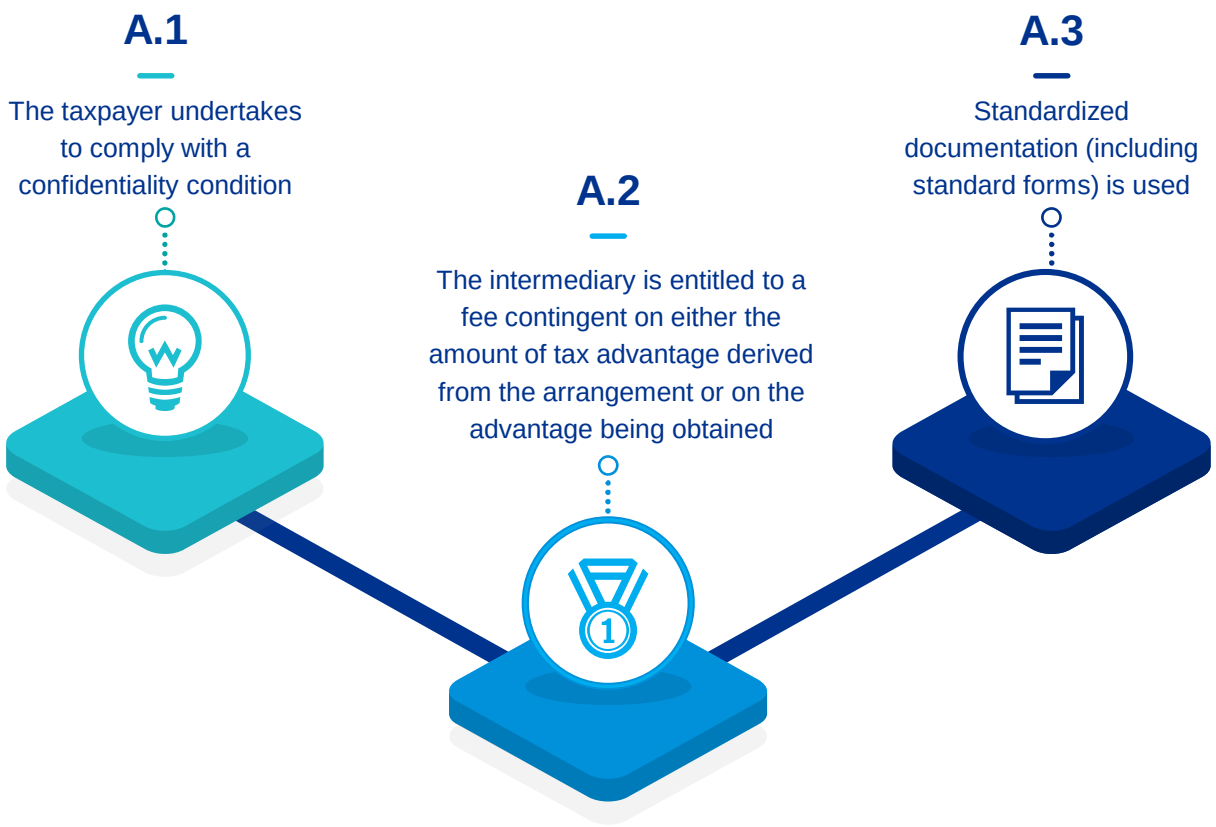
ATAD GAAR

- 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.
- For the purposes of paragraph one, 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.

The basics - Generic hallmarks linked to the main benefit test

Heading A

Generic hallmarks linked to the main benefit test



The basics - Specific hallmarks linked to the main benefit test

Heading B

Specific hallmarks linked to the main benefit test

B.1

Acquisition of loss making company, discontinuation of main activity and using losses

B.2

Conversion of income into categories that are taxed at a lower level (e.g. capital, gifts, etc.)

B.3

Circular transaction resulting in the round-tripping of funds

The basics - Specific hallmarks related to cross-border transactions

C.1 Cross-border (deductible) payments between associated enterprises, where at least one of the following conditions occurs:

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 CIT at a 0 percent or almost zero rate, or

   ii. is on list of countries that have been blacklisted by the EU 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 in the recipient's jurisdiction.

*Specific hallmarks under (b)(i), (c) and (d) of category C.1 may only be taken into account where they fulfil the 'main benefit test'.

The basics - Specific hallmarks related to cross-border transactions

The following countries appeared on the **EU 'blacklist'** as updated 13 March 2018:

- American Samoa
- Bahamas
- Guam
- Namibia
- Palau
- Samoa
- Saint Kitts and Nevis
- Trinidad and Tobago
- US Virgin Islands

The basics - Specific hallmarks related to cross-border transactions

Not linked to the main benefit test

Heading C. Specific hallmarks related to cross-border transactions

C.2 Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

C.3 Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

C.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.

The basics - Other specific hallmarks not linked to the main benefit test

Hallmark D

Specific hallmarks concerning *automatic exchange of information and beneficial ownership:*

D.1 An arrangement which may have the effect of undermining the reporting obligation (automatic exchange of financial account information)

D.2 Arrangements that aim to make beneficial owners unidentifiable

Specific hallmarks on *transfer pricing*

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

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

E.3 Arrangements involving the intra-group transfer of functions and/or risks and/or assets, where the transfer results in projected annual EBIT of the transferor(s) (during three years after the transfer) of less than 50 percent of the projected annual EBIT if the transfer had not been made.

Hallmark E

The basics: who?

- Definitions:
  - **Intermediary:** any EU-established or resident person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.
  - Intermediary also includes “any person that [...] knows or could be reasonably expected to know that they have undertaken to provide aid, assistance or advice with respect to [...] reportable cross-border arrangement.”.
  - **Taxpayer** 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. Includes individuals.

- **Is there a waiver for legal professional privilege?**

  Yes, if reporting obligation would breach the legal professional privilege under the national law of the Member State.
- **Is the obligation limited to tax advisors?**

  No. The definition is very broad and applies to any person that designs, implements or is aware of the implementation of reportable cross-border arrangements.
- **What if there is no intermediary?**

  The obligation falls on the taxpayer. If multiple taxpayers – obligation lies with (1) the taxpayer that agreed the reportable arrangement with the intermediary, (2) the taxpayer that manages the implementation.

  In-house tax department of a taxpayer that is involved in implementing any reportable arrangements could have a reporting obligation under the secondary definition. Consider need for confirmation and proof from advisor that information has been reported.
- **What if there are multiple intermediaries involved?**

  Reporting obligation lies with all intermediaries involved, unless proof of reporting is provided.
- **What if the intermediary is non-EU?**

  Obligation falls on the taxpayer.

The basics: how?

— **Standard form:**

a) Identification of the taxpayers and intermediaries involved,

b) Details of the hallmarks that generated the reporting obligation,

c) A summary of the arrangement,

d) The date on which the first step in implementing the reportable arrangement was made (will be made)

e) Details of the relevant domestic tax rules,

f) The value of the arrangement,

g) The identification of the member state of the relevant taxpayer(s) and any other member states which are likely to be concerned by the reportable cross-border arrangement,

h) The identification of any other person in a member state likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

— **How is the information used?**

The member state's tax authority exchanges the information via a centralized directory.

— **Who will have access to the information?**

National tax authorities of all member states have access to the directory. The exchanged information will not be made public.

— **Will the Commission have access to the information?**

The Commission will only have access to it insofar as needed for the monitoring of the functioning of the Directive, i.e. excluding 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.

The basics: when?

Intermediaries/ taxpayers: within **30 days**, beginning on:

— the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or
— is ready for implementation by the relevant taxpayer, or
— when the first step in its implementation has been made in relation to the relevant taxpayer,

whichever occurs first.

Intermediaries under secondary definition (point 21 of article 3, second paragraph):

— within **30 days** beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

The basics: penalties

— Left up to member states. Effective, proportionate and dissuasive.

Administrative or punitive?

— Will vary by member state. Look to penalties for failure to comply with other DAC requirements, (e.g. CbCR).

Scope?

— Where waiver applies, penalties for failure to notify any other intermediary or the relevant taxpayer?

The Rules

Local implementation

- Various points left up to member states to decide on (e.g. penalties, waivers).
- Some member states are considering applying the new rules to domestic arrangements.
- Discussions with local authorities ongoing.

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Asset Management

Gareth Bryan

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KPMG in Ireland

Example – Asset Management

C.1(a) – deductible cross-border payments

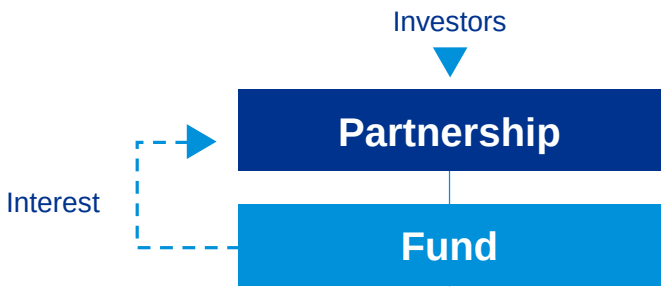
Hallmark C.1(a)*

"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"

How could this hallmark affect PE investment structures?

— Private equity investments are often structured through LLCs (where there are US investors) and / or partnerships (both of which may be 'enterprises')
— Tax deductible payments of interest by an EU resident company to a 25 percent+ related US LLC or a partnership may be caught because the LLC is not US tax resident – this is potentially the case even though the members of the LLC might be taxed immediately on the interest.

*Note: this hallmark does not apply the "main benefit" test



Example – Asset Management

C.1(b), (c)(i) – deductible cross-border payments

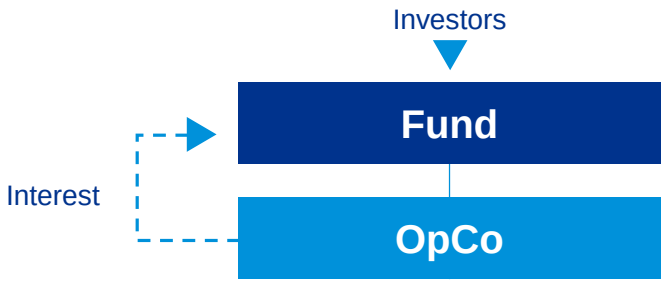
Hallmark C.1(b), (c)(i)*

"An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs…
(b)i although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero
(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes"

*Note: this hallmark applies the "main benefit" test

How could this hallmark affect PE/Alternative investment structures?

- Private equity investments are often structured through tax exempt funds or offshore holding companies in tax-free jurisdictions.
- These investments might include shares in EU subsidiarity companies and may have some shareholder debt.
- Tax deductible payments of interest by an EU resident company to such a vehicle may be caught because of the exempt status of the recipient – this is potentially the case even though the investors might be taxed on distributions or taxed immediately under CFC or similar rules.



Example – Asset Management

C.2 – double deduction of depreciation

Hallmark C.2*

"Deductions for the same depreciation on the asset are claimed in more than one jurisdiction"

How could this hallmark affect Alternative investment fund structures?

- Alterative investment funds might own tax depreciable assets in subsidiary operating companies (e.g. a windfarm).
- Tax depreciation claimed on capital expenditure where profits deemed also to arise to another person (e.g. under a CFC regime). The fact that income is also taxed in both countries is not taken into account.
- In private equity structures with US investors, check–the-box elections are often made – these result in the US investor getting a proportionate share of US tax depreciation on assets.

*Note: this hallmark does not apply the "main benefit" test

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Banking

Paul Freeman

Banking Tax

KPMG in the UK

Example – Banking

Hallmark A.3: Standardised documentation

Hallmark A.3*	How could this hallmark affect regulated financial services industries (banking, insurance, asset management)?
"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."	— Documentation related to financial products may be standardised because the products are retail products sold to consumers, i.e. adherence to regulatory requirements and consumer protection requirements. — If the product is provided to a non-resident, or the financial institution operates through a branch network, then the product could constitute a cross-border arrangement. — A financial product may offer a tax advantage — if this is a main benefit of the product it could become reportable. There is no exclusion for advantages intended to be available under the relevant local tax regime. — This hallmark potentially applies not just to tax advisors but to the in-house teams of financial institutions who routinely provide internal advice in the form of review and sign off on new financial products.

*Note: this hallmark applies the "main benefit" test

Example – Banking

C.3 – double deduction of credit

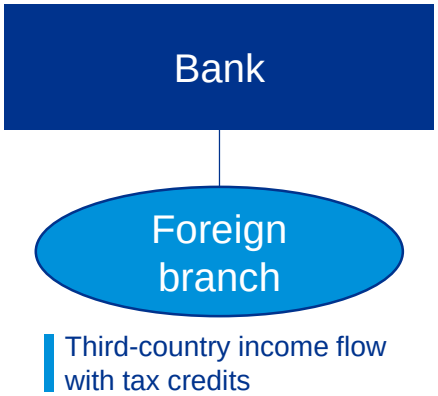
Hallmark C.3*

"Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction"

How could this hallmark affect regulated financial services industries (banking, insurance, asset management)?

— Regulated entities (such as banks and insurance companies) often operate in foreign countries through a branch. If the profits of that branch are taxed in both countries and a foreign tax credit were claimed in both then this hallmark could apply.

*Note: this hallmark does not apply the "main benefit" test



Example – Banking

Hallmark D: Automatic exchange of information and beneficial ownership

Hallmark D*	How could this hallmark affect regulated financial services industries (banking, insurance, asset management)?
"An arrangement which may have the effect of undermining the reporting obligation under the laws implementing … automatic exchange of information" ***"An arrangement involving a non-transparent legal or beneficial ownership chain"***	— The preamble to the directive encourages reference to be had to the OECD guidance on its equivalent rules for this hallmark. — 'The model rules are not intended to impose any additional due diligence rules on a Service Provider beyond those that would ordinarily be undertaken for commercial or regulatory purposes and do not require Service Providers to have or apply a level of expertise beyond that which is reasonably required to provide the Relevant Services. For example, the definition would generally not capture Financial Institutions when carrying out routine banking transactions (e.g. money transfer, custody etc.), because the nature of their involvement and the information readily available to them would typically not meet the "reasonably be expected to know" standard.'

*Note: this hallmark does not apply the "main benefit" test

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Insurance

Brian Daly
Global Head of Insurance Tax
KPMG International

Example – Insurance

C.1(a) – deductible cross-border payments

Hallmark C.1(a)*

"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….

How could this hallmark affect companies in the insurance industry?

- Often insurance companies will pay reinsurance premiums to reinsurance companies based in Bermuda
- Tax deductible reinsurance premiums paid by an EU resident company to a 25 percent+ related Bermudan reinsurance company may be caught as Bermuda does not have a concept of residence
- There is no exclusion for the fact that Bermuda is used for non-tax reasons, (e.g. local expertise and regulatory reasons)

*Note: this hallmark does not apply the "main benefit" test

Example – Insurance

B.2 – converting income into capital, gifts or other categories of lower taxed income

Hallmark B.2*	How could this hallmark affect companies in the insurance industry?
"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"	— Certain life insurance products may provide for a deferral in exit taxes, (e.g. for 10 years), which would not apply if an investment was made in the equity directly — the rate of exit tax in the product may be lower than the rate on a direct investment in the equities. In addition, there may be other advantages, (e.g. inheritance tax advantages). — Is the main benefit or one of the main benefits a tax advantage? — Note: there is no exclusion for the fact that there are often other reasons for investing in the product notwithstanding that the main benefit or one of the main benefits is a tax advantage. — Could tax authorities provide an exclusion where the tax benefit is not as a result of the cross-border nature of the transaction?

*Note: this hallmark applies the "main benefit" test

Example – Insurance

C.4 – Cross-border asset transfers – material difference in amount treated as payable

Hallmark C.4	How could this hallmark affect companies in the insurance industry?
"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"	— Could this hallmark apply to portfolio transfers where the transferor and the transferee treat the amount of consideration differently? — What is 'material'?

*Note: this hallmark does not apply the "main benefit" test

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Panel Q&A

Introduction

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