Mandatory disclosure requirements for intermediaries

Summary & observations

KPMG's EU Tax Centre
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1 Introduction

On 25 June 2018, the new mandatory disclosure rules (MDRs) for qualifying intermediaries and relevant taxpayers entered into force in the European Union (EU). In short, under Council Directive (EU) 2018/822 (commonly referred to as "DAC6"), as of 1 July 2020, EU-based intermediaries or — in some cases, taxpayers, are required to disclose to their tax authorities information on reportable cross-border arrangements within 30 days from a defined reporting trigger. According to the original reporting timeline, the deadline for reporting cross-border arrangements, the first step of which was implemented between 25 June 2018, and 1 July 2020, was 31 August 2020.

On 3 June 2020, the Council formally adopted an amendment to DAC6 allowing Member States an option to defer by up to 6 months the time limits for the filing and exchange of information under the original DAC6. The amendment — Council Directive (EU) 2020/876 (hereinafter "the DAC6 Deferral Directive"), entered into force on 27 June 2020. As at 1 September 2020, most EU Member States had opted for a 6-month deferral of reporting deadlines, with the notable exceptions of Austria (3-month extension), Finland and Germany (no deferral).

As at the date of this publication, the only EU Member States that had not completed DAC6 transposition into national law were Cyprus and Spain. For these two countries, deferral of the reporting timeline is therefore inevitable. All other EU Member States, as well as the UK and Gibraltar, have introduced MDRs into domestic law, with most following the minimum standard set by the Directive. Mandatory disclosure rules are also emerging outside of the EU, for example in Mexico.

2 Background

The adoption of the new mandatory disclosure rules comes in the wake of concerns over the past few years regarding certain tax planning practices — the so-called "Lux Leaks", "Panama Papers" and "Malta Leaks", as a result of which both the Organisation for Economic Co-operation and Development (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 Economic and Financial Affairs (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 recognized that some cross-border transactions and structures are used for genuine reasons, it also noted[1] 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, that have a nexus in an EU Member State,to disclose tax planning that is perceived as potentially aggressive. The Directive (DAC6) 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.

DAC6 was formally adopted by the Council of the EU on 25 May 2018 and entered into force on 25 June 2018, with a 1 July 2020 application date. EU Member States were given until 31 December 2019 to transpose the provisions of DAC6 into their domestic law. Several Member States failed to do so and only completed the transposition process in 2020 or are yet to finalize implementation of DAC6. Note that the Directive does not set a deadline for Member States to publish interpretation and application guidelines. Whether and when such guidelines are made available and the depth of guidance provided is the choice of each Member State and therefore varies — at times substantially, across the EU.

3 Summary

As of 1 July 2020, qualifying intermediaries are 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.

Although implementation is one of the trigger points, it is not a condition for a cross-border arrangement to be reportable. In practice, this may mean that where alternative scenarios are being considered, even the option that is decided against and therefore not implemented may be reportable.

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*.

As set out below, arrangements entered into after the Directive has entered into force on 25 June 2018 also have to be disclosed, albeit with a delayed reporting requirement until August 2020 (or February 2021, for countries that opted for a 6-month deferral).

The EU MDRs apply to intermediaries and taxpayers that have a connection with an EU Member State, by virtue of, for example, residence or a branch in an EU country or (see section 4.3.1 for details). Note, however, that Poland applies a broader interpretation of nexus, which may mean that taxpayers and intermediaries based outside of the EU might have a reporting obligation in Poland. Taxpayers that have operations in or derive income from Poland should therefore give careful consideration to the Polish MDRs and their possible implications.

Scope

The scope of DAC6 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 value-added tax (VAT), customs duties, excise duties and compulsory social security 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. To date, Poland and Portugal are the only two Member States that have broadened the scope to include — in certain situations, taxes that are otherwise excluded from the minimum standard set by DAC6, such as VAT.

As detailed in section 4, DAC6 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.

Implementation

As previously noted, DAC6 establishes a compulsory minimum standard that Member States are allowed to broaden when applying or interpreting the MDRs. Several essential terms are not defined in the text of the Directive but have been clarified by some Member States in local law or guidance. In practice, the absence of harmonized definitions of terms such as "arrangement", "tax advantage", "main benefit", "participant" etc., may lead to differences in interpretation among Member States. It is therefore crucial that each arrangement is analyzed from the perspective and based on the law and guidance of each relevant EU Member State.

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. Penalties vary substantially among Member States and can be as high as EUR 870,000 (applicable in 2020 for the Netherlands) or the equivalent of EUR 5.5 million (applicable in Poland in certain circumstances).

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 based on a schema developed by the European Commission. 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 for countries that have not opted for a deferral of the reporting deadlines.

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.

Each of these steps should be assessed based on the legislation and guidance available in each of the jurisdictions relevant to the arrangement. In light of the differences in interpretation, it is possible that the outcome of this assessment will be different in different Member States. An arrangement or details thereof may therefore be reportable in one EU Member State but not the other.

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[2] 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).

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 in 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. 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 (to be interpreted in accordance with guidance available in the respective jurisdictions) or set out in local law.

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 considered if a "main benefit" test is also satisfied.

4.2 Is the arrangement reportable?

4.2.1 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[3]), which are mostly based on jurisprudence of the Court of Justice of the EU. It also focuses on the benefit, not the purpose.[4] 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.

The interpretation of the main benefit test — including of the term "tax advantage" and whether this covers benefits that arise in a non-EU jurisdiction, are subject to clarification and interpretation by each EU Member State, which adds an extra layer of complexity to an already intricate regime.

4.2.2 Hallmarks

4.2.2.1 Hallmark categories

The characteristics that are considered to 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 is 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.

It is for each Member State to clarify, for example, whether hallmark A.3 applies to the implementation of such arrangements where the adoption of a standardized approach has clear advantages for taxpayers and taxing authorities alike. This is something to consider in light of local guidance.

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[5] 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[6] 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[7], 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. Local guidelines on the interpretation of this hallmark should therefore be consulted.

The definition of the term "almost zero" for the purposes of hallmark C1 b(i) also varies among Member States, with most interpreting this to mean a rate between 0 and 1 percent, while others opting for higher rates (4 percent in Germany and 5 percent in Poland, for example).

With respect to the EU or OECD black list it is not clear from the Directive whether the list on the date that the reporting deadline of 30 days is triggered is the relevant list or that this could also include changes to the list during the time that the arrangement is in place. Furthermore it is also unclear what is meant with the OECD-list, as the OECD does not have a list of so-called non-cooperative countries mentioned in the Directive.

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

C.4 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 earnings before interest and taxes (EBIT) in the transferring jurisdiction, over a period of 3 years.

Most Member States refer to the Transfer Pricing Guidelines issued by the OECD when interpreting terms relevant for the purposes of Hallmarks in Section E. For example, some countries (including Germany, the Netherlands and the UK) have clarified that safe harbor rules that have been agreed upon at international level (e.g. the OECD guidance on mark ups for low value-adding intra-group services) are not considered unilateral safe harbor rules within the meaning of hallmark E1.

4.2.2.2 Evaluation of hallmark relevance

Member States and the Commission will evaluate the relevance of these hallmarks every 2 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.

4.3 Who bears the burden of disclosure?

4.3.1 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[8] 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"[9], 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.

What is considered sufficient proof for these purposes is determined by each Member State. In practice, it is possible that this exemption for reporting, where the arrangement has already been reported by another party, may be difficult to obtain, in particular where intermediaries have access to different levels of information, where the assessment of whether an arrangement is reportable may differ or where the required information is different.

In order to qualify as an intermediary a person must also have a connection to an EU Member State.[10] 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. For details on the penalty regimes applicable in individual Member States, please refer to the MDR Country Summaries available on KPMG's MDR Updates page.

4.3.2 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.[11] In such cases, the obligation to disclose falls on any other intermediaries involved in the arrangement or, in their absence, on the relevant taxpayer.[12]

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 a deadline for this notification (the term "without delay" is used), or provide for penalties for failure to do so but requires Member States to ensure that the notification is made.

Some Member States have however established a clear deadline (3 days in Croatia, 7 days in Malta, 10 days in Luxembourg and Germany) and will impose a penalty for failure to make this (for example Bulgaria, Croatia, Czech Republic, Ireland, Luxembourg, Netherlands, Poland and Romania). 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.

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.

4.4 What information should be disclosed?

A standard form for the exchange of information has been developed by the European Commission and includes[12]: 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.

4.5 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.

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 is therefore necessary to refer to any implementation guidance published by each Member State. A series of items that intermediaries and taxpayers may wish to keep in mind when assessing their reporting obligations under DAC6 have been set out below.

5.1 Definitions and procedure

5.1.1 Cross-border 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. Several Member States refer in local guidance to the European Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU), which defines arrangement as "any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event." The Commission's Recommendation also refers to "an artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit". These definitions are however not harmonized and by no means exhaustive. Intermediaries and taxpayers should therefore assess these terms on a case by case basis, in light of the facts and circumstances of each scenario and consider the possibility that an arrangement that they may not view as "aggressive" could qualify as such in the view of the tax authority making the assessment and in light of local law and guidance.

Note importantly that the term "participant" (as used in the definition of a cross-border arrangement) is not defined in the Directive and is therefore subject to interpretation. For instance, it is for each Member State to clarify whether, or under which circumstances, an arrangement between two local subsidiaries of a foreign parent or a domestic transaction concerning shares in a foreign entity could qualify as cross-border.

5.1.2 Tax advantage and main benefit test

As was previously mentioned, it is up to each Member State to provide a definition of the term "tax advantage". In its 2012 Recommendation, the European Commission invites national authorities to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s). It then goes on to list examples of situations where a tax benefit may arise, including (but not limited to an amount not included in the tax base, the taxpayer benefits from a deduction, a loss for tax purposes is incurred, no withholding tax is due or foreign tax is offset.

While some Member States have provided guidance along the same lines, in the absence of a DAC6 definition of the term, local guidance should always be consulted.

As regards the interpretation of the main benefit test, most Member States seem to favor an objective interpretation of the test, whereby the outcome of an arrangement rather than the intent of the taxpayer is relevant to the assessment. Other factors to be taken into account can include the weight of the tax advantage when compared to other benefits arising from the arrangement, whether determined as a numerical value (50 percent is being considered in Italy) or in more abstract terms (in Germany, the taxpayer should be able to demonstrate that the tax advantage fades into the background when the arrangement as a whole is considered).

It is also up to each Member State to decide whether a so-called "policy filter" applies when assessing the main benefit test, i.e. where the outcome of a cross-border arrangement is in line with the intent of the legislator, the test would not be met and the arrangement would therefore not be reportable.

5.1.3 Reporting obligation and reportable information

Taxpayers should give careful consideration to situations where a group entity or a central function (e.g. tax or treasury) could qualify as an intermediary, rather than a taxpayer. Several Member States (including France and the UK), have introduced provisions to this effect in local guidance.

It is also important to bear in mind that, although the primary reporting obligation is with the intermediaries involved, taxpayers should consider their own reporting obligations in light of local guidance. Some Member States may require taxpayers to fill in the gaps where the information reported by the advisor(s) involved does not give the full image of the reportable cross-border arrangement.

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. Some countries will, for example, require extensive information on the taxpayer's associates or group structure. The level of information required should therefore be assessed based on the schema applicable in each relevant jurisdiction.

As previously noted, where there is proof that the arrangement has already been reported, intermediaries and/ or taxpayers may be exempt from their reporting obligation. What is considered sufficient proof for these purposes is determined by each Member State. In practice, it is possible that it may be difficult to rely on this theoretical exemption, in particular where different parties have access to different levels of information, where the assessment of whether an arrangement is reportable may differ or where the required information is different.

5.2 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 taxpayers and intermediaries should consider when assessing their MDR reporting obligations in EU Member States. The underlying message is that, in the absence of EU-wide guidelines on the application of DAC6, significant differences in interpretation are likely to arise, which might lead to obligations beyond those that are immediately obvious based on a reading of the Directive.

For more information on DAC6 implementation, including local guidance and reporting arrangements in different EU Member States, please refer to *KPMG's DAC6 transposition and reporting overview*.

Endnotes

1. 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."

2. "*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."

3. 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."

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

5. 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.

6. 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).

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

8. 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*."

9. Paragraph 5 of the Preamble.

10. 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.

11. 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.

12. 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*".

13. Article 8ab, paragraph 14.

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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