EU Mandatory Disclosure of Reportable Cross-Border Arrangements

Part 33-03-03

This document should be read in conjunction with
Chapter 3A of Part 33 of the Taxes Consolidation Act 1997

Document last updated March 2021

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

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1 Introduction

Council Directive 2011/16/EU ("the DAC")[1] provides for the sharing of taxpayer information between the tax administrations of EU Member States. The DAC was amended by Council Directive (EU) 2018/822 ("the DAC6")[2] to introduce a mandatory disclosure regime for certain cross-border transactions that could potentially be used for aggressive tax planning. It is intended that the information obtained will enable Member States to react promptly against harmful tax practices by closing loopholes in legislation, undertaking risk assessments and carrying out tax audits[3].

The EU mandatory disclosure regime comprises two steps. Under the first step, "intermediaries" and, in certain circumstances, "relevant taxpayers", are required to provide information regarding "reportable cross-border arrangements" to the tax authorities of Member States[4]. This includes information in relation to reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020 (the "lookback" reporting period). Under the second step, tax authorities automatically share the information they receive with all other Member States.

In Ireland, the disclosure regime is provided for by the following legislation:

- Chapter 3A of Part 33 of the Taxes Consolidation Act 1997 ("TCA 1997"); and
- the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012, as amended.

The disclosure regime became effective in all Member States on 1 July 2020. However, Ireland, along with many other Member States, exercised an option given in Council Directive (EU) 2020/876[5] to defer the first disclosures of information to 2021. The Directive was transposed into Irish law by the European Union (Administrative Cooperation in the Field of Taxation) (Amendment) Regulations 2020.

This Tax & Duty Manual provides general guidance on the operation of the EU mandatory disclosure regime in Ireland, with a focus on the first step.

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[1] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

[2] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[3] Recital 2 of the DAC6.

[4] For detailed guidance on the meaning of the terms "intermediary", "relevant taxpayer" and "reportable cross-border arrangement", see Chapters 2, 4 and 5.

[5] Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic.

2 Reportable cross-border arrangements

Under the new disclosure regime, intermediaries, and, in certain cases, relevant taxpayers, are required to file returns of information with Revenue regarding reportable cross-border arrangements. This chapter provides guidance on the meaning of the term "reportable cross-border arrangement". Guidance on the meaning of the terms "intermediary" and "relevant taxpayer" is provided in Chapters 4 and 5 respectively.

2.1 Arrangement (section 817RA(1))

The term "arrangement" is broadly defined and includes all types of arrangements, transactions, payments, schemes and structures, whether or not legally enforceable. For instance, a verbal agreement may constitute an arrangement.

The term includes arrangements comprising more than one step or part and a series of arrangements. For instance, one arrangement could comprise: entering into a loan agreement; the advance of the loan, successive payments of interest on the loan and the repayment of the loan principal.

2.2 Cross-border arrangement (section 817RA(1))

A "cross-border arrangement" is an arrangement that concerns an EU Member State and any other jurisdiction, where at least one of the following conditions is met:

(a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment ("PE") situated in that jurisdiction and the arrangement forms part or the whole of the business of that PE;
(d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a PE situated in that jurisdiction;
(e) such arrangement has a possible impact on the automatic exchange of information **or** the identification of beneficial ownership.

To come within the definition of a cross-border arrangement for the purposes of the conditions referred to in **points (a) to (d)**, one of the participants in the arrangement must have a nexus to an EU Member State and at least one other participant in the arrangement must have a nexus to another jurisdiction (which may be another EU Member State). A person will have a nexus to an EU Member State or another jurisdiction if –

- the person is tax resident there;
- the person has a permanent establishment situated there;
- the person carries on an activity in the jurisdiction without being resident for tax purposes or creating a PE situated there.

The condition referred to in **point (a)**, i.e. not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction, may apply where at least one of the participants in an arrangement is not tax resident in any jurisdiction.

To come within the definition of a cross-border arrangement for the purpose of the condition referred to in **point (e)**, i.e. an arrangement having a possible impact on the automatic exchange of information or the identification of beneficial ownership, only one participant in the arrangement need have a nexus to an EU Member State in order for the condition to be met.

2.2.1 Meaning of tax residence

A person will be **resident for tax purposes in a jurisdiction** in accordance with the concept of residence adopted in the domestic laws of that jurisdiction, e.g. by reason of domicile, residence, place of management or any other criterion of a similar nature. In Ireland, the rules for determining the tax residence of individuals are set out in Tax & Duty Manual (TDM) Part 34-00-01 and the rules for determining the tax residence of companies are set out in TDM Part 02-02-03.

The tax residence of an intermediary is not relevant for the purpose of determining whether there is a cross-border arrangement, unless the intermediary is also a participant in the arrangement.

2.2.2 Meaning of participant

The **participants** in an arrangement will be those persons that play an active role in it. For instance, where an arrangement is a contract, the participants in the arrangement will be those persons who are party to the contract. However, a person does not need to play a major role in an arrangement in order to be a participant in it. For example, a parent company would be regarded as a participant in an arrangement where a shareholders' resolution or other consent is required in order for an arrangement to proceed between its subsidiary company and another party. This interpretation is consistent with the broad meaning given to the term "arrangement" (see Chapter 2.1). A person that provides advice to another person in relation to the other person's participation in an arrangement would not themselves be a participant in the arrangement simply by virtue of providing that advice. However, the person may come within the definition of "intermediary" in relation to the arrangement (see Chapter 4). A person may be a participant in an arrangement without also coming within the definition of "relevant taxpayer" (see Chapter 5).

2.2.3 Examples

The following are examples of arrangements meeting the conditions referred to in points (a) to (d):

Point (a): Where a participant in an arrangement is resident for tax purposes in Ireland and the other participant in the arrangement is resident for tax purposes in India, the condition referred to in point (a) is met.

Point (b): Where a company is tax resident in both Ireland and the USA and it participates in a transaction with a company that is tax resident in Ireland, then the condition referred to in point (b) is met.

Point (c): A medical supplies company that is tax resident in the France appoints a dependant agent in Ireland. Given its level of activity in Ireland, in particular the agent's authority to conclude contracts in the name of the company, the French company has a PE in Ireland under the terms of the Ireland-France Double Tax Convention.[6] If the company sells medical supplies to a customer that is tax resident in Ireland, the transaction will come within the definition of "cross-border arrangement" as the condition referred to in point (c) is met (i.e. the French company carries on a business in Ireland through a PE and the arrangement forms part or the whole of the business of that PE).

Point (d): A medical supplies company that is tax resident in the US appoints a dependant agent in Ireland. The US company is not tax resident in Ireland under Ireland's tax residence rules and, given its level of activity in Ireland, it has no PE in Ireland under the terms of the Ireland-US Double Tax Convention. However, the agent is carrying on activities in Ireland on behalf of the company. Therefore, if the US company participates in a transaction with, for example, a company that is tax resident in Ireland, the transaction will come within the definition of "cross-border arrangement" because the condition under point (d) is met. If the medical supplies company had made supplies of goods to customers in Ireland, but had no presence on the ground there, then the condition would not be met.

For examples of arrangements meeting the condition referred to in **point (e)** (i.e. arrangements having a possible impact on the automatic exchange of information or the identification of beneficial ownership), please refer to Chapter 2.9 and the OECD **Model Mandatory Disclosure Rules for addressing CRS Avoidance Arrangements and Opaque Offshore Structures** and related commentary[7].

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[6] Article 5(4) of the Ireland/France Convention deals with dependent agents. A dependent agent of a French enterprise who has and habitually exercises in the State, an authority to conclude contracts in the name of the enterprise, constitutes a PE here (unless their activities are limited to the purchase of goods or merchandise for the French Enterprise).

[7] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris.

2.3 Marketable arrangement (section 817RA(1))

A "marketable arrangement" is a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised[8]. The key feature of a marketable arrangement is that it is available for use without a need for substantial customisation. Additional reporting requirements apply in relation to reportable cross-border arrangements that also come within the definition of a marketable arrangement. These are covered in Chapter 4.8.

2.4 Reportable cross-border arrangement (section 817RA(1))

A "reportable cross-border arrangement" is a cross-border arrangement that bears a specific characteristic called a "hallmark". The hallmarks are listed in Annex IV of the DAC and are characteristics or features that are commonly seen in tax avoidance arrangements. They are grouped into the following five 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; and
E. Specific hallmarks concerning transfer pricing.

2.5 Main benefit test

The hallmarks under category A, category B and points (b)(i), (c) and (d) of paragraph 1 of category C (see Chapters 2.6 - 2.10) will be taken into account for the purpose of determining whether an arrangement comes within the definition of a reportable cross-border arrangement only where they fulfil the "main benefit test"[9]. The main benefit test will be satisfied if it can be established that a "tax advantage" is the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person[10] may reasonably expect to obtain from an arrangement.

2.5.1 Tax advantage (section 817RA(1))

The term "tax advantage" is defined broadly so as to include the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and the deferral of tax or the avoidance of an obligation to deduct tax.

[8] Section 817RA(1) TCA 1997 and Art. 3 of the DAC.

[9] The term "main benefit test" is defined in Annex IV of the DAC.

[10] For the meaning given to the term "person", please refer to Appendix I.

2.5.2 Scope of taxes covered (section 817RB)

A tax advantage may be obtained or intended to be obtained in respect of any tax levied by, or on behalf of, an EU Member State, with the exception of value-added tax, customs duties, excise duties and compulsory social security contributions. Fees for documents issued by public authorities and consideration due under a contract are excluded from the scope of taxes covered by the disclosure regime.

2.5.3 Application of main benefit test

The main benefit test applies a reasonable awareness test. The specific language used in the Directive refers to scenarios where the main benefit or one of the main benefits a person (having regard to all facts and circumstances) "**may reasonably expect** to derive from an arrangement is the obtaining of a tax advantage."

Accordingly, in the context of a cross-border arrangement, what is important is whether it would be (i) reasonable to (ii) expect to derive a tax advantage as a main benefit from such arrangement.

(i) the word "reasonably" is based on the common law "reasonable man test."[11] The reasonable man test asks what a "reasonable person of ordinary prudence" would do in a given situation - It is an objective test.
(ii) the word expect, in this context, is a verb which means to regard something as likely to happen.

Therefore, what is not important, in the context of this test, is the particular facts or circumstances of the participants as that would be a subjective test. Rather, what is important, in the context of this test, is whether a hypothetical reasonable person could expect to obtain tax benefits from the arrangement and that such benefits would be a main benefit of that arrangement.

The test involves asking a hypothetical question of what a reasonable person would reasonably expect, given the facts of a particular arrangement.

The main benefit test requires an objective comparison of the value or significance of an expected tax advantage vis-à-vis any other benefit likely to be obtained from an arrangement. Such a comparison is to be carried out in the context of the arrangement itself and the range of benefits expected to arise from it.

If, having carried out such a comparison, it is determined that a tax advantage is the main benefit or one of the main benefits that is likely to be obtained from the arrangement, then the test will be satisfied. If, on the other hand, it is the case that a tax advantage is one of a number of benefits that are likely to be obtained from an arrangement, but not a main benefit, then the tax advantage will be simply be the "icing on the cake" and the test will not be satisfied[12].

[11] Refer to TDM Part 33-01-01 for a discussion on the objective test.

[12] *Commissioners of Inland Revenue v Sema Group Pension Scheme Trustees*, 74 TC 593 at 637.

For further guidance on the application of the main benefit test, paragraph 4.7 of Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU) and Revenue TDM Part 33-01-01 "Main purpose tests" may be of assistance.

Where it is apparent that an arrangement bears a hallmark that is linked to the main benefit test, it will be necessary to establish whether a tax advantage is a main benefit that a person may reasonably expect to obtain from the arrangement. If a tax advantage (or expected tax advantage) is not a main benefit of the arrangement, then it will not come within the definition of a reportable cross-border arrangement. Equally, an arrangement bearing a hallmark that is not linked to the main benefit will come within the definition of a reportable cross-border arrangement regardless of whether it is linked to the obtaining of a tax advantage.

Guidance on the interpretation and application of the hallmarks is provided in Chapters 2.6 – 2.10. It is important to bear in mind that the disclosure regime is intended to apply to cross-border transactions that could **potentially** be used for aggressive tax planning. As such, it is likely that cross-border arrangements that are not used for aggressive tax planning will be reportable because they bear a hallmark that is listed in one (or more) of the above categories.

2.6 Hallmark category A: Generic hallmarks linked to the main benefit test

A cross-border arrangement bearing a category A hallmark will not be reportable unless a tax advantage is the main benefit, or one of the main benefits, that a person may reasonably expect to obtain from the arrangement.

It is likely that a marketable arrangement, being a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised, will bear at least one of the hallmarks listed in this category. Additional reporting requirements apply in respect of marketable arrangements, and these are covered in Chapter 4.8.

Hallmark A.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.

This hallmark applies where a taxpayer or a participant in an arrangement agrees to comply with a condition of confidentiality that places a limit on the taxpayer's or participant's disclosure of how the arrangement could secure a tax advantage vis-à-vis other intermediaries and/or the tax authorities.

Arrangements involving the use of such confidentiality conditions will be reportable where:

- the confidentiality condition has the effect of limiting disclosure of the expected tax advantage vis-à-vis other intermediaries and/or the tax authorities,

- it is reasonable to conclude, from an objective standpoint, that the confidentiality condition is intended to secure a tax advantage vis-à-vis other intermediaries or the tax authorities, and

- a tax advantage is the main benefit or one of the main benefits which, having regard to all the relevant facts and circumstances, a person may reasonably expect to obtain from the arrangement.

For an arrangement to bear this hallmark, it is not necessary that the confidentiality condition refer explicitly to the limitation on disclosure. It is only necessary that the confidentiality condition has the effect of limiting disclosure of the expected tax advantage vis-à-vis other intermediaries or the tax authorities.

Such a limitation on disclosure protects the tax advisor's strategies and may enable further use of the same scheme or transaction. Keeping certain details of the operation or aspects of such arrangements confidential from a tax authority, may reduce the risk of challenge or enquiry, or prevent a Member State from taking legislative or other steps to prevent the arrangements from working. Equally, a tax advisor may wish to keep details of the arrangements from other intermediaries to protect their competitive advantage, to reduce competition from other intermediaries who might set up similar schemes and to reduce the risk of details of the scheme being reported to a tax authority by others.

Examples of confidentiality conditions

- non-disclosure agreements;
- discouraging potential users from taking external advice;
- use of promotional material referring to non-disclosure;
- discouraging users from keeping promotional material or other details of how the arrangement operates;
- discouraging users from communicating directly with Revenue or another tax authority.

The use of confidentiality conditions will not automatically trigger reporting. For instance, non-disclosure agreements are commonly used to protect commercial secrets and business know-how, and non-disclosure obligations may be imposed on persons by regulatory requirements such as those which might be imposed on a listed company seeking advice in relation to a takeover. The use of such agreements will not trigger reporting unless it is reasonable to conclude, from an objective standpoint, that the confidentiality condition is intended to secure a tax advantage vis-à-vis other intermediaries or the tax authorities and the tax advantage is the main benefit or one of the main benefits which, having regard to all the relevant facts and circumstances, a person may reasonably expect to obtain from the arrangement.

Hallmark A.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.

This hallmark is intended to apply to all forms of compensation that an intermediary is entitled to receive in connection with an arrangement, including fees, interest and remuneration for finance costs, whether received directly or indirectly.

The key feature of the hallmark is that the intermediary's fee (or other form of compensation) for providing a service in relation to a cross-border arrangement is linked to a tax advantage being obtained. It will be a matter of fact whether this is the case.

Examples of fees (or other form of compensation) linked to tax advantage

- A fee agreement where the taxpayer has minimal upfront expenses and no payment to the intermediary is required unless and until the taxpayer obtains or retains a tax benefit.
- A fee agreement where the taxpayer pays the intermediary a percentage of a tax benefit/refund.
- A premium fee may be due for the scheme, as opposed to a normal fee. This fee should be attributable to the tax advantage and not to other factors, such as the skill or reputation of the adviser.

Hallmark A.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.

For an arrangement to bear this hallmark, it must –

- have substantially standardised documentation **and/or** substantially standardised structure, and
- be made available to more than one person without a need to be substantially customised for implementation.

Such documentation and/or structures will be “substantially standardised” if they are pre-prepared and require little, if any, modification to suit an individual client. It will be a matter of fact whether such documentation and/or structures are made available to more than one person without a need to be substantially customised.

This hallmark is intended to capture what are often referred to as “mass-marketed” or “off-the-shelf” schemes. The fundamental characteristic of such schemes is their ease of replication. Essentially, the client purchases a finished tax product that requires little, if any, modification. To modify it would not require a client to receive significant additional professional advice or services. Such products are primarily tax driven and it is therefore highly unlikely that the product would be sold without the expected tax benefit.

Many types of documentation and structures can be substantially standardised and made available for use by more than one person. Examples of these are set out below. However, for the hallmark to be met, there must be a link between the documentation and/or structure in question and the tax advantage that was obtained or expected to be obtained. As such, while a group may use standard documentation for all group loans, there is unlikely to be a link between the fact the documentation is standardised and any tax benefit that might arise meaning the Hallmark is unlikely to be met.

Accordingly, a tax return, which simply captures information in relation to a transaction that has already taken place, or a checklist used by an intermediary setting out how to implement a cross-border arrangement, may not fall within the types of documentation that are caught by this hallmark.

Similarly, the use of documentation in certain routine financial transactions, that is standardised for regulatory or other legal reasons and, crucially, is not linked to a tax advantage, will not bring such transactions within this hallmark.

Examples of documentation that could be used to obtain a tax advantage

- Contracts
- Agreements
- Special resolutions
- Debt instruments
- Swap agreements

Examples of structures that could be used to obtain a tax advantage

- Offshore wealth management schemes
- Employee benefit trusts

- Stock-lending arrangements
- Life assurance products/reinsurance arrangements
- International pension fund arrangements

A strict application of hallmark A.3 is likely to result in a significant volume of transactions which are not used for tax avoidance being reportable to Revenue. To alleviate the administrative burden this may place on intermediaries and taxpayers, Finance Act 2020 introduced section 817RI. The section provides that the use of certain tax reliefs and exemptions will not trigger reporting under this hallmark where the relief or exemption in question –

- benefits from equivalent reporting exclusions under Ireland's domestic mandatory disclosure regime,
- is provided for in legislation,
- involves some degree of Revenue oversight, certification or approval, and
- is used in a routine fashion for **bona fide** purposes.

Examples of such reliefs and exemptions include approved Profit-Sharing Schemes, approved Salary Sacrifice Arrangements and approved Retirement Benefit Schemes.

A complete list of the exemptions and reliefs that are excluded from the scope of hallmark A.3 on this basis, is set out in Schedule 33 TCA 1997 and reproduced in Appendix II.

It should be borne in mind that the exclusion of such reliefs and exemptions from the scope of hallmark A.3 does not preclude the possibility that such schemes might be disclosable under another hallmark.

2.7 Hallmark category B: Specific hallmarks linked to the main benefit test

Hallmark B.1

An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a lossmaking 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.

This hallmark applies where a participant in an arrangement takes the following contrived steps –

- the participant acquires a loss-making company,
- the main activity of the loss-making company is then discontinued, and
- the participant uses the losses of the company to reduce its tax liability.

Steps will be “contrived” where they are pre-planned and artificial. An arrangement will bear this hallmark where it can be established that the main benefit or one of the main benefits that the participant may reasonably expect to obtain from the arrangement is the reduction in its tax liability. Whether an arrangement falls within this hallmark will be evident from the facts of the case.

This hallmark could apply in a situation where a profitable company that is tax resident in a jurisdiction that consolidates foreign PE income (including losses), takes contrived steps that comprise acquiring another company which maintains a loss-making PE, the main activity of the other company is then discontinued and the profitable company makes use of the accumulated losses of the PE to set off against profits in future years.

In Irish law, the use of trading losses acquired via this type of arrangement is disallowed by virtue of section 401 TCA 1997.

Hallmark B.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.

Hallmark B.2 captures arrangements that –

- have the effect of converting an existing or prospective income stream into another category of revenue (including capital and gifts),
- the other category of revenue is taxed at a lower level or is exempt from tax, and
- the lower level of tax or tax exemption is one of the main benefits that a person may reasonably expect to obtain from the arrangement.

In assessing whether an arrangement bears this hallmark, the key test to apply will be whether, viewed objectively, an amount that would normally be taxed as income is instead taxed in another category of revenue that attracts a lower rate of tax or is tax exempt. As such, normal commercial transactions are unlikely to be caught by this hallmark.

To establish whether the other category of revenue is taxed at a lower level or is exempt from tax, it will be necessary to quantify the amount of tax that would have been payable had the conversion of income not taken place and then compare it with the amount of tax that is payable, if any.

As with all category B hallmarks, the main benefit test must be satisfied for this hallmark to be met. In this context, the test will be satisfied if it can be established that the lower level of tax or tax exemption is the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to obtain from the arrangement.

The following types of arrangements could be used to convert income into another category of revenue that is taxed at a lower level or is exempt from tax –

- a fund that is a “wrapper” for an investment in an underlying asset or assets,
- a self-directed pension plan,
- stock lending and repo transactions,
- the conversion of a loan into share capital,
- a finance lease,
- a share-based remuneration scheme, and
- the disposal of the right to an income stream.

Example

In Ireland, Approved Profit-Sharing Schemes allow companies to give shares to their employees as part of their remuneration packages, up to a maximum value of €12,700 per year tax-free. Such schemes are intended to be used by employers to reward, motivate and retain their employees and, where used as intended, any related tax benefits will be incidental within the context of the overall remuneration package and the main benefit test will not be satisfied. However, where such schemes are not used as intended, with the result that the related tax benefit is a main benefit within the overall remuneration package, then the main benefit test will be satisfied.

Hallmark B.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.

This hallmark captures cross-border arrangements involving circular transactions that result in the round-tripping of funds, such that the jurisdiction from where the funds originate is one and the same as the ultimate destination jurisdiction. Such a round-tripping of funds will be facilitated by the use of –

- interposed entities that serve no primary commercial function (in the context of the relevant arrangement[13]) other than facilitating the round-tripping of funds; or
- transactions that offset or cancel each other (or have similar features).

[13] It is possible for an entity to have a general commercial function but be interposed into a transaction to facilitate a circular flow of funds (and in turn a tax advantage when analysing the main benefit test). An example of this would be a back to back circular transaction arranged through a third party regulated bank. Although the regulated bank itself will have clear commercial function, in the context of the specific arrangement it does not.

An arrangement bearing these characteristics will come within this hallmark only if a tax advantage is the main benefit or one of the main benefits that a person may reasonably expect to obtain from it. It will be clear from such an arrangement whether the round-tripping of funds serves little or no commercial purpose and has been done primarily in order to obtain beneficial tax treatment that would not otherwise be available.

Interposed entities may be associated enterprises[14] and/or unconnected parties, but they may also be unrelated entities, for example, those that are participating in the transaction for a fee. Whether or not entities serve a primary commercial function other than facilitating the round-tripping of funds will depend on the facts of the case.

This hallmark could capture, for example, arrangements involving the routing of domestic funds through offshore entities in order to access preferential tax treatment that is only available to investors from other jurisdictions.

An elaborate arrangement of this type was considered in the Irish case *Revenue Commissioners v O'Flynn Construction Ltd*[15]. In this case, O'Flynn Construction Ltd bought in Export Sales Relief (ESR) from another company via an elaborate arrangement involving over 40 steps, which allowed it to make tax-free payments to its shareholders. At the time, ESR was available to companies engaged in the manufacture of goods for export, an activity which the company was not itself engaged in.

At a simpler level, this hallmark could capture back-to-back transactions involving the effective round-tripping of funds, where the main benefit test is satisfied.

2.8 Hallmark category C: Specific hallmarks related to cross-border transactions

The hallmarks in category C are aimed primarily at hybrid mismatch arrangements. Broadly speaking, hybrid mismatch arrangements are arrangements that exploit differences between the tax systems of different jurisdictions resulting in a double deduction mismatch outcome (where an expense is deductible for tax purposes twice) or a deduction without inclusion mismatch outcome (where a payment is deductible but the person that receives the payment does not see it as taxable). In Irish law, rules to address hybrid mismatches are provided for in Part 35C TCA 1997.

Hallmark C.1

An arrangement that involves deductible cross-border payments made between two or more associated enterprises[16] where at least one of the following conditions

[14] For the meaning of "associated enterprises", please refer to Chapter 7.

[15] *Revenue Commissioners v O'Flynn Construction Ltd* [2011] IESC 47.

[16] For the meaning of "associated enterprises", please refer to Chapter 7.

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.

This hallmark will apply to arrangements involving cross-border payments between associated enterprises which are deductible for tax purposes, where at least one of the conditions set out under points (a) to (d) above is met. The conditions set out under points (b)(i), (c) and (d) will not be taken into account unless it is reasonable to conclude that a tax advantage is the main benefit or one of the main benefits that a person may reasonably expect to derive from an arrangement bearing such a characteristic.

For guidance on the meaning of "resident for tax purposes", refer to Chapter 2.2.1.

2.8.1 Hallmark C1: Tax transparent entities

Where the recipient of a deductible cross-border payment is transparent for tax purposes, the entity may be "looked through" for the purpose of determining whether this hallmark is met.

Where, having looked through a tax transparent entity, more than one jurisdiction regards the payment as having been received by an entity that is resident for tax purposes in each of those jurisdictions, the arrangement will not bear hallmark C unless at least one of the conditions under points (a) to (d) occurs for each of those jurisdictions. For instance, if an entity is tax resident in two jurisdictions and the payment benefits from a full exemption from tax in jurisdiction (1) (i.e. the condition in point (c) occurs), but none of the conditions occur for jurisdiction (2), then the arrangement will not bear this hallmark.

Where, having looked through a tax transparent entity, it is established that there is more than one recipient of the payment, then separate tests will be required for each of those recipients to determine whether any of the conditions under points (a) to (d) occur. Where one or more of the conditions occurs for at least one of the recipients, then the arrangement will come within the definition of a reportable cross-border arrangement.

2.8.2 Hallmark C1: The condition in point (a)

The condition referred to **point (a)** applies to so-called “stateless entities”. An example of a stateless entity is an entity which is established in a jurisdiction that determines tax residence based on effective management and is effectively managed in a jurisdiction that determines residence based on establishment. Under these circumstances, the entity would not be resident anywhere for tax purposes.

2.8.3 Hallmark C1: The condition in point (b)(i) (linked to main benefit test)

The condition referred to in **point (b)(i)** applies to entities that are established in low or no tax jurisdictions (including those which do not have a domestic concept of tax residence such as Monaco). A rate of “almost zero” will be taken to mean a statutory rate of less than 1%. A payment that is made to a recipient that is tax resident in a jurisdiction that imposes a corporate tax rate of 1% or more will not fall within this hallmark, even if the payment itself is taxed at an effective rate of zero or less than 1% due to the characteristic of the payment or the recipient entity.

2.8.4 Hallmark C1: The condition in point (b)(ii)

The condition referred to in **point (b)(ii)** refers to two lists:

1. Third-country jurisdictions which have been assessed by Member States collectively as being non-cooperative; and
2. Third-country jurisdictions which have been assessed within the framework of the OECD as being non-cooperative.

When applying point (1), the appropriate list to use is the EU list of non-cooperative jurisdictions for tax purposes, as adopted by the Council of the European Union and published in the Official Journal of the European Union[17]. As of the date of publication of this document, there is no list within the meaning of point (2) above.

2.8.5 Hallmark C1: The condition in point 1(c) (linked to main benefit test)

The condition in **point 1(c)** refers to payments which benefit from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes. An example of this could be a dividend which is deductible for tax purposes for the payer but is tax exempt in the hands of the recipient because the payment is eligible for a dividend participation exemption in the jurisdiction where the recipient is resident for tax purposes. The condition will not apply to a payment received by a recipient that is a tax-exempt person because of its status (e.g. as a tax-exempt pension fund) and not due to the characterisation of the payment.

[17] Refer to Appendix III for details of what countries are, or have been, on the list. See also: https://www.revenue.ie/en/companies-and-charities/international-tax/eu-list-of-non-cooperative-jurisdictions/index.aspx.

2.8.6 Hallmark C1: The condition in point (d) (linked to main benefit test)

For the purposes of the condition referred to in **point (d)**, a "preferential tax regime" means a regime that offers some form of tax preference in comparison with the general principles of taxation in the relevant country. For the purpose of this condition, the tax preference may refer to preferential terms for the payment of taxes[18]. It is important to note that this hallmark applies to all preferential tax regimes, and not just those which are considered harmful.[19] Ireland's Tonnage Tax and Knowledge Development Box regimes are preferential tax regimes, however, neither is considered harmful.

2.8.7 Hallmark C1: When to assess whether hallmark C.1 is met

In order to determine whether an arrangement bears hallmark C.1, it will be necessary to examine its characteristics at the following points in time:

(a) when the arrangement is made available for implementation,
(b) when the arrangement is ready for implementation,
(c) when the first step in the implementation of the arrangement has been made.

If, at any of these points in time, it can be established that the arrangement bears hallmark C.1, then it will come within the definition of a reportable cross-border arrangement. For example, if at the time this type of arrangement is ready for implementation, the arrangement involves the intended recipient not being resident for tax purposes in any tax jurisdiction, then the arrangement will bear hallmark C.1 as the condition referred to in point (a) occurs and it will come within the definition of a reportable cross-border arrangement. This will be the case regardless of whether, at the time the arrangement is made available for implementation, the condition referred to in point (a) occurred.

It is important to note that the arrangement will bear hallmark C.1 where, at any of these points in time, at least one of the conditions in points (a) to (d) occurs.

2.8.8 Hallmark C1: When to assess whether hallmark C.1 met for lookback reporting period

In applying hallmark C.1 to the "lookback" reporting period (i.e. the period from 25 June 2018 to 30 June 2020), it will be necessary to examine the characteristics of the arrangement at the point in time when the first step in its implementation was taken. For example, if the first step in this type of arrangement was taken on 1 July 2018 and the intended recipient is not resident for tax purposes in any tax

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[18] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. Ch. 3.

[19] This interpretation was confirmed at a meeting of Working Party IV – Direct Taxation, which was held on 24 September 2018.

jurisdiction on that date, then the condition referred to in point (a) is met and the arrangement will bear the hallmark C.1.

The EU list of non-cooperative jurisdictions for tax purposes changes over time and it is acknowledged that there were significant changes to the list during the lookback reporting period. Therefore, in order to determine whether the condition referred to in **point (b)(ii)** is met **for the lookback reporting period**, filers may refer to the list as it stood on the date that the first step in its implementation was taken **and** the list published on 7 October 2020. If the jurisdiction is not included on the list on both dates, then the condition referred to in **point (b)(ii)** is not met. The following are three examples of how this will work:

- If the first step in the implementation of such an arrangement was made on 1 July 2018 and the intended recipient was tax resident in Panama on that date, the arrangement will not fall within hallmark C.1(b)(ii) because Panama was not on the list on that date.

- If the first step in the implementation of such an arrangement was made on 1 May 2020 with Oman, the arrangement will not fall within hallmark C.1(b)(ii) because Oman not on the list on 7 October 2020.

- If the first step in the implementation of such an arrangement was made on 1 July 2018 with Palau, the arrangement will fall within hallmark C.1(b)(ii) because Palau is on the list on both 1 July 2018 and on 7 October 2020.

Hallmark C.2

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

Hallmark C.3

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

Hallmarks C.2 relates to the concept of double deduction[20] and Hallmark C.3 relates to the concept of double tax relief[21].

Hallmarks C.2 and C.3 apply to cross-border transactions that give rise to a conflict in ownership of an asset, which results in taxpayers in more than one jurisdiction

[20] Where Ireland is one of the countries in which a deduction is claimed, it is likely that Chapter 2 of Part 35C will operate so as to neutralise any mismatch outcome.

[21] Where Ireland is one of the countries in which double tax relief is claimed, it is likely that Chapter 6 of Part 35C will operate so as to neutralise any mismatch outcome.

claiming tax deductions for depreciation[22] or amortisation in respect of the same asset (hallmark C.2) and/or claiming relief from double taxation in respect of the same item of income (hallmark C.3). Ownership, in this context, means the economic owner of the payment flows, for tax purposes, on the underlying asset as opposed to legal ownership of the asset itself.

Where a cross-border transaction results in deductions for depreciation or amortisation in respect of the same asset, or relief from double taxation in respect of the same item of income being claimed in more than one jurisdiction, but there is no conflict in ownership of the underlying asset and the income against which the deduction is claimed is included in both jurisdictions, then the transaction will not bear hallmark C.2 or C.3.

Examples of the types of cross-border arrangements that could bear these hallmarks are set out below.

Example 1 – cross-border arrangement bearing hallmark C.2

A leasing arrangement. Two jurisdictions operate different rules regarding who has ownership of the leased assets and, therefore, the right to depreciate the assets rests with more than one person: in one jurisdiction, the right to depreciate is with the legal owner (e.g. the lessor), whilst in the other, with the economic owner (e.g. the lessee) (whether this is based on the asset itself or on the right to use the asset). In such situations, the same asset, in substance, may be depreciated in both jurisdictions (i.e. by both the legal owner and the economic owner).

Example 2 – cross-border arrangement bearing hallmark C.3

An arrangement involving securities lending[23]. The transferee (the borrower under the arrangement) agrees to return the transferred securities (or their equivalent) plus any dividends or interest received on those securities during the term of the loan. The transferor's jurisdiction taxes the arrangement in accordance with its substance, disregarding the transfer and treating the transferor as if it continued to hold the underlying securities, while the transferee's jurisdiction treats the transfer in accordance with its form and taxes the arrangement as the purchase and sale of securities. Where both countries allow for double tax relief for the same foreign tax, a mismatch arises.

Example 3 – cross-border arrangement bearing hallmark C.3

An arrangement involving a collateralised loan structured as a repo[24] over shares. The transferor's jurisdiction taxes the arrangement in accordance with its substance

[22] In an Irish context, such deductions are provided for under Part 9 "Principal Provisions Relating to Relief for Capital Expenditure (ss. 268-321)".

[23] The taxation of such transactions in Ireland is as set out in Chapter 3 of Part 28 TCA 1997 and section 87 of the Stamp Duty Consolidation Act 1999.

[24] The taxation of such transactions in Ireland is as set out in Chapter 3 of Part 28 TCA 1997 and section 87A of the Stamp Duty Consolidation Act 1999.

(treating the purchase price for the shares as a loan and the transferred shares as collateral for that loan) while the repo is taxed in the transferee's jurisdiction in accordance with its form (the sale and re-purchase of an asset). Where both counties allow for double tax relief for the same foreign tax, a mismatch arises.

Examples of cross-border arrangements that are unlikely to bear these hallmarks are set out below.

Example 1 - a worldwide system of taxation not bearing hallmark C.2

A company is tax resident in a country which has a worldwide system of taxation (such as found in section 26(1) TCA 1997) whereby the company claims a deduction for depreciation on assets used by its branch in another jurisdiction, and that branch also claims a deduction for depreciation on those assets. Where there is no conflict of ownership of the assets, where the income against which the depreciation is deducted is taxed in both the jurisdiction in which the branch is established and in the jurisdiction in which the company is tax resident, then the arrangement will not bear hallmark C.2.

Example 2 – claims for withholding tax not bearing hallmark C.3

A company that is tax resident in Ireland, which has a branch located in Italy, receives income from a third country in respect of which withholding tax has been deducted. Where there is no conflict in ownership of the assets, and the income is taxed in both Ireland and Italy, claims for double tax relief in relation to the withholding tax by the company in Ireland and by the branch in Italy would not trigger this hallmark.

Hallmark 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.

This hallmark will apply to arrangements involving a cross-border transfer of assets, where there is a material difference in the amount being treated as payable in consideration for those assets in the jurisdictions involved. A difference will be "material" where, taking into account all relevant facts and circumstances, it is reasonable to expect that the difference would affect decisions being made by the participants involved in it.

In applying this hallmark, "the amount being treated as payable in consideration for the assets" is the amount treated as payable for tax purposes. For example, in a cross-border merger involving a transfer of assets between two companies, one jurisdiction may regard the consideration payable for tax as the original cost of the assets, while the other may regard the consideration payable as the current market value of the assets.

A cross-border arrangement involving a share-for-share exchange will bear this hallmark where there is a material difference in the amount in the amount being treated as payable in consideration for the shares in the jurisdictions involved, notwithstanding that the exchange may be treated by section 584 TCA 1997 as not giving rise to a disposal for capital gains tax purposes.

Where the jurisdictions involved classify a particular payment in different ways or recognise an asset transfer at different points in time, this would not *per se* be considered as being a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved. For example, in a hire purchase arrangement, both jurisdictions may recognise the transaction as a sale, but one may treat it as sale when the transaction is entered into while the other may treat it as a sale when the final payment is made. As both jurisdictions treat a full and equal amount as payable or receivable for the purposes of tax, this would not be considered to bear hallmark C.4.

2.9 Hallmark category D: Specific hallmarks concerning automatic exchange of information and beneficial ownership

This category of hallmarks was introduced to address arrangements designed to circumvent reporting under the Common Reporting Standard (CRS) and arrangements aimed at providing beneficial owners with the shelter of non-transparent structures. It broadly reflects the types of arrangements and structures coming within the scope of the OECD **Model Mandatory Disclosure Rules for addressing CRS Avoidance Arrangements and Opaque Offshore Structures** ("OECD MMDR")[25]. As such, the OECD MMDR and related commentary may be used as an illustrative guide when applying this category of hallmarks, to the extent that those texts are aligned with EU law[26].

Hallmark D.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

[25] OECD (2018), Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, OECD, Paris.

[26] Recital 13 of DAC6.

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.

An arrangement will bear hallmark D.1 where it is reasonable to conclude that it has, or is designed to have, the effect of undermining a reporting obligation under the national laws implementing Council Directive 2014/107/EU ("the DAC2") and the Common Reporting Standard ("CRS") or it takes advantage of the absence of such laws.

The legislation that implements the DAC2 in Ireland is contained in section 891G TCA 1997 and the Mandatory Automatic Exchange of Information in the Field of Taxation Regulations 2015 (S.I. No. 609/2015). The legislation that implements the CRS is contained in section 891F TCA 1997 and the Returns of Certain Information by Reporting Financial Institutions Regulations 2015 (S.I. No. 583 of 2015). Revenue guidance on Automatic Exchange of Information (AEOI) for Financial Account Holders is available in TDM Part 38-03-24.

Rule 1.1 of the OECD MMDR, which applies to CRS avoidance arrangements, and its related commentary, can be used as a guide to interpreting Hallmark D.1, to the extent that those texts are aligned with EU law[27]. For instance, it is stated in paragraph 5 of the commentary:

> "The simple fact that an Arrangement has the effect of non-reporting is not sufficient for it to be considered to have the effect of circumventing CRS Legislation. This will only be the case where it is reasonable to conclude that the Arrangement undermines the intended policy of the CRS Legislation".

[27] Recital 13 of DAC6.

Broadly speaking, the same principle holds true when assessing whether an arrangement falls within Hallmark D.1, which means that routine financial transactions occurring in the normal course of business are unlikely to be reportable. However, as Hallmark D.1 deals with the DAC2 and the CRS, the references to “CRS legislation” in the OECD commentary should be read as the “DAC2 and/or CRS legislation”.

When assessing whether it is “reasonable to conclude” that an arrangement has, or is designed to have, the effect of circumventing DAC2 and/or CRS legislation, the test set out in paragraph 6 of the OECD commentary can be followed:

> “The test of “reasonable to conclude” is to be determined from an objective standpoint by reference to all the facts and circumstances and without reference to the subjective intention of the persons involved. Thus the test will be satisfied where a reasonable person in the position of a professional adviser with a full understanding of the terms and consequences of the Arrangement and the circumstances in which it is designed, marketed and used, would come to this conclusion.”

The types of arrangements that will bear this hallmark include those described in points (a) to (f) of the hallmark description (see preceding page). However, while these are indicative of the types of arrangements that will bear hallmark D.1, it is important to note that the list is not exhaustive. Further examples are set out in paragraphs 9 to 21 of the OECD commentary.

The fact that an arrangement involves the use of a financial account, but information in relation to that account is not reportable under DAC2/CRS, will not automatically trigger reporting under this hallmark. For instance, certain types of pension accounts and life insurance contracts are specifically excluded from the scope of reporting under DAC2/CRS. Therefore, information in relation to arrangements involving the use of such types of accounts will not be disclosable under this hallmark, unless a reportable account has been wrapped in, or converted into, a non-reportable account. Similarly, an arrangement involving the use of a jurisdiction that has not adopted national laws implementing the CRS will not automatically trigger reporting unless it is reasonable to consider, from an objective viewpoint, that at least one of the reasons the jurisdiction was used was to take advantage of the absence of such laws.

An arrangement will not have the effect of circumventing CRS Legislation if the Financial Account(s) information is exchanged under a FATCA Reciprocal Model 1A Intergovernmental Agreement with the jurisdiction(s) of tax residence of the relevant taxpayer. For example, if a relevant taxpayer that is tax resident in Ireland transfers a Financial Account to the USA, that transfer would not have the effect of circumventing CRS Legislation if the account information is exchanged by the Competent Authority of the USA with Ireland.

For the purpose of assessing whether an arrangement involves the use of a jurisdiction with an inadequate or weak regime of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements **(Hallmark D.1(f))**, the EU list of high-risk third countries referred to in Commission Delegated Regulation (EU) 2016/1675 (as amended)[28] may serve as a useful guide. However, other jurisdictions, which are not included in that list, may also meet this description.

Hallmark D.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,[29] are made unidentifiable.

Hallmark D.2 was introduced to address arrangements aimed at providing beneficial owners with the shelter of non-transparent structures. An arrangement involving a non-transparent legal or beneficial ownership chain will bear this hallmark only if all of the conditions specified in points (a), (b) and (c) above are satisfied.

Hallmark D.2 is similar to Rule 1.2 of the OECD MMDR, which applies to opaque offshore structures. As such, Rule 1.2, and its related commentary, can be used as a guide to interpreting Hallmark D.2 to the extent that those texts are aligned with EU law[30]. For instance, Rule 1.2 refers to the term “beneficial owner”, which, under Rule 1.4, is to be interpreted in a manner consistent with the latest Financial Action Task Force Recommendations. However, for the purpose of Hallmark D.2, the term “beneficial owner” is to be interpreted in accordance with Directive (EU) 2015/849[31] (as updated by Directive (EU) 2018/843[32]). Therefore, when following the OECD

[28] Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies.

[29] The meaning given to “beneficial owner” in Directive (EU) 2015/849 is reproduced in Appendix I.

[30] Recital 13 of DAC6.

[31] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

[32] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of

guidance for the purpose of this hallmark, any references to the terms "beneficial owner" or "beneficial ownership" should be interpreted in accordance with Directive (EU) 2015/849. Guidance on the meaning of the term "beneficial owner" in Directive (EU) 2015/849 is available at https://rbo.gov.ie/faqs.html. Reflecting the OECD commentary on Rule 1.2, shareholders of widely held vehicles will typically not be captured by this hallmark, since it is unlikely that they would come within the definition of beneficial owner in Directive (EU) 2015/849.

2.10 Hallmark category E: Specific hallmarks concerning transfer pricing

This category of hallmarks applies to arrangements concerning transfer pricing. The hallmarks are to be interpreted in accordance with the **OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 ("OECD Transfer Pricing Guidelines")**[33].

Hallmark E.1

An arrangement which involves the use of unilateral safe harbour rules.

This hallmark applies to arrangements that involve the use of unilateral safe harbour rules.

In order to determine whether an arrangement bears this hallmark, the **OECD Transfer Pricing Guidelines**, specifically Section E on safe harbours in Chapter IV, are to be followed.

A "safe harbour" is described in the **OECD Transfer Pricing Guidelines** as follows:

> "A safe harbour in a transfer pricing regime is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules. A safe harbour substitutes simpler obligations for those under the general transfer pricing regime. Such a provision could, for example, allow taxpayers to establish transfer prices in a specific way, e.g. by applying a simplified transfer pricing approach provided by the tax administration[34]."

Only arrangements involving the use of unilateral safe harbours come within the scope of this hallmark. Therefore, bilateral or multilateral Advance Pricing Agreements concluded between tax authorities are not unilateral safe harbours and do not fall within the scope of this hallmark.

money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/E.

[33] **OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations** (July 2017), OECD Publishing, Paris. http://dx.doi.org/10.1787/tpg-2017-en.

[34] Paragraph 4.102 of the **OECD Transfer Pricing Guidelines.**

For the purpose of applying this hallmark, the following types of arrangements will not be considered to involve the use of unilateral safe harbour rules:

- Arrangements involving the use of administrative simplification measures that do not directly involve the determination of arm's length prices, for example, simplified documentation requirements in the absence of a pricing determination[35].

- Arrangements that adopt the simplified approach to low value intra-group services. Revenue has issued guidance regarding its simplified approach to low value intra-group services[36]. Revenue's practice of accepting a mark-up of 5% of the cost-base without requiring a taxpayer to provide a benchmarking analysis is consistent with international guidance in this area[37].

- Arrangements involving the use of provisions that exclude certain categories of taxpayers or transactions from the scope of transfer pricing rules. For instance, Small and Medium Enterprises are currently outside the scope of Ireland's transfer pricing rules[38].

- Where a particular category of taxpayer or transaction falls within the scope of a unilateral safe harbour rule, but the arrangement does not rely on or involve the use of that rule.

Hallmark E.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[39]:

(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.

[35] Paragraph 4.103 of the **OECD Transfer Pricing Guidelines.**

[36] TDM Part 35A-01-03, Guidelines on Low Value Intra-Group Services.

[37] **OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2017),** Ch. VII, Section D and EU Joint Transfer Pricing Forum, JTPF Report: Guidelines on Low Value Adding Intra-Group Services, DOC: JTPF/020/REV3/2009EN, Brussels, February 2010.

[38] The application to small and medium enterprises of the transfer pricing rules contained in Section 27 of Finance Act 2019 is subject to Ministerial Order.

[39] For the meaning of "associated enterprises", please refer to Chapter 7.

This hallmark applies to arrangements that involve the transfer of hard-to-value intangibles and/or hard-to-value rights in intangibles between associated enterprises.

The **OECD Transfer Pricing Guidelines***,* in particular Section D.4 of Chapter VI on Intangibles*,* and the **OECD Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles** published in June 2018, should be used as a guide to interpret this hallmark[40].

An arrangement will bear this hallmark where it is reasonable to conclude, based on all relevant facts and circumstances, that at the time of the transfer of intangibles between associated enterprises there are no reliable comparables for the transactions and the projections of future cash flows or income or the assumptions used in valuing the intangibles are highly uncertain.

Hallmark E.3

An arrangement involving an intragroup[41] 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.

This hallmark applies to 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) of the transferor(s) for the three-year period after the transfer are less than 50% of the projected annual EBIT of the transferor(s) if the transfer had not been made.

For the purpose of calculating the projected annual EBIT of the transferor(s), the terms “earnings”, “interest” and “taxes” are to be interpreted by reference to the accounting principles used by the transferor(s).

[40] **OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2017)**, Ch. VI; Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles - BEPS Actions 8-10, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris (June 2018).

[41] It was explained at a meeting of Working Party IV – Direct Taxation held on 24 September 2018 that “the term "intragroup" refers to the concept of "associated enterprise" and the definition provided in Article 3 point 24 of DAC6”. See Chapter 7 for the meaning given to “associated enterprise” in Article 3(24).

To establish whether this hallmark is met, it will be necessary to produce two sets of projections for the three-year period following the transfer – one based on what the position of the transferor(s) would be without the transfer taking place and one based on the position of transferor(s) with the transfer taking place. This testing should be carried out having regard to all relevant facts and circumstances at the time the reporting obligation arises under the disclosure regime.

If the transferor(s) would be projected to make a loss were the transfer not to go ahead and if the projected position of the transferor(s) post transfer is still loss-making but with reduced losses, nil earnings or a positive EBIT, this hallmark should not apply as these outcomes cannot be said to represent a 50% reduction in EBIT.

3 Filing a return

Once it has been established that an arrangement comes within the definition of a reportable cross-border arrangement, intermediaries and, in certain circumstances, relevant taxpayers, will be required to file a return of information with Revenue in relation to that arrangement. This chapter provides an overview of the information that is to be included in such a return and how a return can be filed.

3.1 Specified information (section 817RA(3))

The information that is to be returned to Revenue in respect of each reportable cross-border arrangement is referred to as the "specified information"[42] and is as follows:

(a) information in relation to the identity of each person coming within the definition of intermediary and relevant taxpayer involved in the arrangement, including:

- name,
- whether the person is an "individual" (i.e. a natural person) or an "entity",[43]
- if the person is an individual, date and place of birth,
- country of residence for tax purposes,
- taxpayer identification number, [44]
- country of issuance of taxpayer identification number,
- the person's address, where the taxpayer identification number **and/or** country of issuance of the taxpayer identification number of a person is not known, and
- where appropriate to each hallmark that makes the arrangement reportable, the persons that are associated enterprises[45] to each relevant taxpayer,

[42] The "specified information" is referred to as the "disclosure information" in the return.

[43] An "entity" is any person coming within the definition of person other than a natural person. The definition of "person" is set out in Appendix I.

[44] For the meaning of "taxpayer identification number", refer to Appendix I.

(b) details of each hallmark that makes the arrangement reportable,[46]

(c) an outline of the content of the cross-border arrangement.

This field will allow for a maximum of 4,000 characters to be entered. Filers are expected to use this limit as a guide to the level of detail required.

The content of the cross-border arrangement, in the context of DAC6, is the tax content of the arrangement. Sufficient information should be provided so as to allow an officer in a competent authority to understand how the complete arrangement operates, (or is intended to operate). The outline should set out how the hallmark is triggered and the various tax implications of the arrangement (including how any expected tax advantage arises) in straightforward terms. Each of the steps involved should be explained and should set out how any statutory provisions apply (or do not apply) in the context of the transaction. The nature[47] of the relationship between the parties to the arrangement should be disclosed where relevant.

For context purposes, the summary should also include an abstract summary of the business environment, setting out any relevant business activities and/or arrangements[48] without leading to the disclosure of:

- a commercial, industrial or professional secret,
- a commercial process, or
- information the disclosure of which would be contrary to public policy.

The summary should be accompanied by any name by which the arrangement is known.

(d) the unique reference number assigned to the arrangement (i.e. the "Arrangement ID"), if such a number has been provided to the intermediary or relevant taxpayer that is filing the return,

(e) details of the statutory provisions that form the basis of the arrangement,

These provisions are the key legislative provisions (whether tax or otherwise) which form the basis of the cross-border arrangement[49], and not just those

[45] For the meaning of "associated enterprises", refer to Chapter 7.

[46] A cross-border arrangement may bear more than one hallmark. When determining which Hallmarks apply, filers should ensure they consider whether national provisions outside the State trigger the hallmark in addition to local provisions.

[47] Including commercial relationships, group relationships (% shareholding) or trust agreement relationships where relevant.

[48] In addition to the relevant cross-border arrangement being reported on.

[49] Although these are generally expected to be statutory provisions in an EU Member State, where the statutory provisions in a 3rd country have a bearing on the tax treatment in a Member State (for

provisions that make the cross-border arrangement a reportable cross-border arrangement. As such, the listed provisions should include both those that are relevant to the conclusion that the arrangement meets one or more of the hallmarks and also those which are relevant to the tax treatment of the arrangement.

A section is relevant to an arrangement both where:

- it directly applies to the arrangement, or
- it would typically be expected to apply to such an arrangement but for certain steps executed as part of the arrangement to prevent its application[50].

Irish statutory provisions should be quoted by listing the relevant sections, and should include subsection, paragraph etc. references were appropriate. Provisions of other relevant legislation should be quoted in a similar level of detail.

(f) the value of the arrangement,

The value of the arrangement to be entered in the return will be determined by the type of arrangement that it is. For instance, it could be the amount of the consideration in a contract or the balance on a Financial Account. Where the precise value of the arrangement is not known at the time a return is filed, a reasonable estimate of the value should be entered instead.

(g) the date on which the first step was taken or will be taken in implementing the arrangement,

In the return, the date to be entered in this field is the date on which the reporting obligation is triggered. For example, if an arrangement is made available for implementation on 1 August 2020, "1 August 2020" should be entered. Guidance on when a reporting obligation is triggered is provided in Chapter 4 (Intermediaries) and Chapter 5 (Relevant taxpayers).

(h) the Member State of each relevant taxpayer and any other Member State(s) likely to be concerned by the arrangement.

It is important to note that this is not the same thing as the Member State(s) in which participants to the arrangement are resident.

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example 3rd country entity classification rules or 3rd country transfer pricing safe harbour provisions), these provisions may also be relevant.

[50] For example, where a dividend is re-characterised to prevent certain DWT provisions set out in Chapter 8A from applying, the relevant sections of Chapter 8A should be disclosed (in addition to any other relevant sections) even though DWT does not apply.

(i) the identification of any other person in a Member State likely to be affected by the arrangement, indicating to which Member States such person is linked.

This is intended to capture information in relation to any participant[51] in a reportable cross-border arrangement that does not come within the definition of relevant taxpayer and has a nexus to an EU Member State.

3.2 Scope of reporting obligation (sections 817RC(9) and 817RD(10))

A person that returns information to Revenue in respect of a reportable cross-border arrangement is not required to include in the return information that is not within their knowledge, possession or control. Notwithstanding this point, all reasonable steps to obtain the return information should be taken. Reasonable steps are the steps a person in this situation would ordinarily be expected to take in the course of ordinary commercial due diligence on a transaction of that nature. However, there is no specific obligation to actively seek out information that the intermediary and/or the relevant taxpayer does not hold in the first place.

Information that is within a person's knowledge or possession will include any information that the person actually has and any information that is readily available to that person, including information held by agents. For example, information that is readily available to financial institutions will include information on the customer file or collected in connection with their Anti-Money Laundering, Know Your Customer and financial reporting obligations, where permitted by data protection rules.

Information that is within a person's control may include information held by associated entities and a relevant taxpayer will be expected to request information on the operation and effect of an intra-group scheme from other group members.

3.3 Online returns

Returns are to be filed electronically via Revenue's Online-Service ("ROS") **(sections 817RC(4) and 817RD(2))**. Two filing options will be available to users: completion of an online form or uploading an XML file completed offline.

After a return has been filed, Revenue will send a message to the ROS inbox of the person who filed it, containing the following information:

1. Confirmation that the return has been received (a temporary acknowledgement page will also be displayed immediately after the return has been received);

2. The unique reference number that has been assigned to the arrangement **(section 817RE(1))** (unless an existing Arrangement ID was included in the return). This is referred to as the "Arrangement ID"; and

[51] See Chapter 2 for guidance on the meaning of "participant".

3. A unique reference number linking the person who has filed the return to the arrangement. This is referred to as the "Disclosure ID".

Where a person who has filed a return in respect of an arrangement needs to subsequently correct or amend it, the person will be required to enter the Disclosure ID when making the correction or amendment. When correcting or amending a return, the same filing option should be used, i.e. the online form or XML upload.

Other obligations apply in respect of the Arrangement ID, which are set out in Chapters 4.7, 5.4 and 5.6.

Once a return has been filed and an acknowledgement has been issued by Revenue, the fact that Revenue does not make any further contact or take any action should not be taken to mean that Revenue has taken a view that the tax treatment of the arrangement is correct **(section 817RE(2))**.

3.4 Data protection

To ensure that data protection rules are complied with, intermediaries who are required to disclose client-specific information to Revenue may wish to consider whether their clients should be notified of this fact.

3.5 Time limits for filing a return (section 817RF)

Returns in relation to arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020 (the "lookback" period) are to be filed by **28 February 2021.** Where the first step of an arrangement was implemented during the lookback period, but, prior to 28 February 2021, the arrangement was abandoned without having been fully implemented, then a return in relation to that arrangement will not be required by Revenue.

For arrangements the first step of which was taken on or after 1 July 2020, returns will be required 30 days after the reporting obligation is triggered. These triggering events are described in Chapter 4 (Intermediaries) and Chapter 5 (Relevant taxpayers).

There is no obligation to disclose information in relation to arrangements the first step of which was implemented prior to 25 June 2018, even if such arrangements remain in place on or after 25 June 2018.

3.6 Multiple reporting

To keep duplicate reporting at a minimum, a number of exemptions from reporting are available, subject to certain conditions being satisfied. These exemptions are covered in Chapters 4 and 5.

Notwithstanding the availability of such exemptions, it is anticipated that, in a limited number of cases, more than one return of information will be filed in relation to the same arrangement. This may be because no single person holds all of the specified information and, therefore, it may be necessary for multiple returns in relation to the same arrangement to be filed. In such cases, and only insofar as it is feasible to do so, the same Arrangement ID should be used for each return that is made in relation to the same arrangement.

3.7 Marketable arrangements

Additional reporting requirements apply in respect of reportable cross-border arrangements that also come within the definition of marketable arrangement. These are covered in Chapter 4.8.

4 Intermediaries

Any person coming within the definition of intermediary in relation to a reportable cross-border arrangement is obliged to file a return with Revenue of all of the specified information in relation to that arrangement that is within their knowledge, possession or control.

Two distinct categories of intermediary are provided for in the legislation, and these are described in 4.2 and 4.3. However, a person will not fall within either category of intermediary unless at least one of the following conditions is also met:

- the person is resident for tax purposes[52] in a Member State;
- the person has a PE in a Member State through which the services with respect to the arrangement are provided;
- the person is incorporated in, or governed by the laws of, a Member State;
- the person is registered with a professional association related to legal, taxation or consultancy services in a Member State.

4.1 Meaning of "person"

When assessing whether a person falls within the definition of intermediary, it should be noted that the term "person" is given a broad meaning in the EU mandatory disclosure regime[53]. As such, an intermediary may be an individual (i.e. a natural person), a legal entity such as a company or a non-legal entity such as a partnership.

Whether a reporting obligation falls at individual or entity level will depend on whether a service in relation to a reportable cross-border arrangement is provided on an individual's own behalf or on behalf of an entity:

- Where an employee of an employer, working under a contract of service to the employer, carries out in accordance with the terms of that contract one of the activities described in this chapter, it is that employer that will come within the definition of intermediary.

[52] The meaning of "residence for tax purposes" is covered in Chapter 2.

[53] The definition of "person" is provided in Appendix I.

- Where a partner carries out in accordance with the terms of their partnership agreement one of the activities described in this chapter on behalf of that partnership, the partnership will come within the definition of intermediary.

- Where an individual is seconded by his/her employer to work for another person and carries out one of the activities described below in accordance with the terms of the secondment agreement, the person who is hosting the secondee will come within the definition of intermediary.

4.2 First category of intermediary (section 817RA(1))

The first category of intermediary is any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement.

This category of intermediary will comprise those that actively design and advise on tax planning schemes for their clients, such as lawyers specialising in tax law and professional tax advisors. It will also include companies in corporate groups that design and advise on such schemes using in-house experts for implementation by other group members.

4.3 Second category of intermediary (section 817RA(1))

The second category of intermediary is 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 such person 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**.**

This category of intermediary is likely to encompass a much broader range of persons than the first category. It may include accountants, auditors, wealth managers, lawyers, insurance companies, asset managers of investment funds and bankers. As with the first category of intermediary, it will also include companies in corporate groups that design and advise on such schemes using in-house experts for implementation by other group members.

4.3.1 What a person "knows or could be reasonably expected to know"

The test of whether a person **"knows or could be reasonably expected to know"** that they have undertaken to provide reportable services in relation to a relevant cross-border arrangement is to be determined from an objective standpoint by reference to –

- the relevant facts and circumstances;
- the available information; and
- the relevant expertise and understanding required to provide such services.

The word "reasonably" is based on the common law "reasonable man test"[54]. The reasonable man test asks what a "reasonable person of ordinary prudence" would do in a given situation. It is an objective test. "Know" in this context means to be aware of.

Therefore, what is important, in the context of a relevant cross-border arrangement, is whether a hypothetical service provider, given:

- the relevant facts and circumstances,
- the available information, and
- the relevant expertise and understanding required to provide such services

would be expected to have knowledge that it provided reportable services.

As regards a person's actual knowledge, such person must consider anything that they actually know about the arrangement and any information that is readily available to them when delivering a particular service. Readily available information will include information that is acquired during the course of providing the service, such as that acquired when carrying out standard checks and due diligence procedures, subject to data protection rules. There is, however, no onus on service providers to seek out any additional information or to carry any additional checking or due diligence beyond that which would ordinarily be undertaken when providing a service of that nature.

As noted in Chapter 4.1, the term "person" has a broad meaning in the EU mandatory disclosure regime, which means that an intermediary may be an individual, a legal entity such as a company or a non-legal entity such as a partnership. As such, the knowledge and actions of an intermediary will include those of their employees and other individuals carrying out work on their behalf. Notwithstanding this point, it is acknowledged that, in large organisations, knowledge may be spread out and disjointed. Provided that it can be clearly established that there is no attempt to deliberately fragment such knowledge, Revenue will not necessarily expect that all knowledge held within the organisation would be treated as known to one person. What it is reasonable to expect an intermediary to know will depend on the circumstances, in particular their level of involvement with respect to a particular arrangement.

As regards the degree of expertise and understanding required to provide their services, the intermediary is required to have the level of expertise that would ordinarily be expected of a person providing that service.

4.3.2 Provision of service by means of other persons

The second category of intermediary extends to any person that provides the aid, assistance or advice in question "by means of other persons".

[54] Refer to TDM Part 33-01-01 for a discussion on the objective test.

Example 1

A company that is tax resident in Ireland engages a local law firm to provide legal advice in relation to a proposed transaction between its French subsidiary and an unrelated entity that is based outside of the EU. The proposed transaction falls within the definition of a reportable cross-border arrangement. The law firm provides the advice to the Irish company. On the basis of the advice received, the Irish company gives directions to the French subsidiary regarding the implementation of the proposed transaction. In this scenario, the Irish law firm will come within the definition of intermediary (second category) in relation to the reportable cross-border arrangement because the Irish law firm provided advice in relation to it. In addition, the parent company will itself come within the definition of intermediary (first category), because it has made the arrangement available for implementation by the French subsidiary.

Example 2

Firm A, which is tax resident in Ireland, is engaged by Parent Inc in the US to provide advice in relation to the implementation of a scheme by Sub Ltd in Ireland. The scheme, which has been designed by a US tax advisor with no nexus to the EU, comes within the definition of a reportable cross-border arrangement. It is implemented by Sub Ltd.

Firm A comes within the definition of “intermediary” because it provided advice with respect to the implementation of a reportable cross-border arrangement (second category). It is not relevant that the advice was not provided directly to Sub Ltd, only that the advice was provided in relation to a reportable cross-border arrangement.

4.4 Provision of routine services

For a person to fall within the definition of intermediary in relation to a reportable cross-border arrangement, some degree of involvement in the arrangement is necessary. It is unlikely, therefore, that a person providing only a routine service, such as an accountant processing an invoice for accounting purposes, a tax advisor filing a tax return on behalf of a client or a bank carrying out a routine transfer of money, would be classified as an intermediary. This is because it is unlikely that the routine service they provide would amount to:

- designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement, or

- aiding, assisting or advising in relation to the design, marketing, organisation, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Crucially, such a person may not have knowledge of the wider arrangement, in particular whether the arrangement triggered any hallmark. However, this may not always be the case.

4.5 Triggers and time limits for filing (section 817RC(1), (1A), (2) and (2A))

A person coming within the **first category of intermediary** is required to file a return of the specified information with Revenue within 30 days beginning:

(a) on the day after the arrangement is made available for implementation,
(b) on the day after the arrangement is ready for implementation, or
(c) when the first step in the implementation of the arrangement was taken,

whichever occurs first.

The exception to this is where an arrangement is made available for implementation, is ready for implementation, or where the first step in its implementation has been taken **between 1 July 2020 and 31 December 2020**, in which case this 30-day period will not begin to run until **1 January 2021**.

A person coming within the **second category of intermediary** is required to file a return of the specified information with Revenue within 30 days of providing, directly or indirectly, the aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement**.** For example, where an intermediary provides advice in relation to the design of a reportable cross-border arrangement on 1 March 2021, a return should be filed no later than 31 March2021.

The exception to this is where the aid, assistance or advice is provided, directly or by means of other persons, **between 1 July 2020 and 31 December 2020**, in which case this 30-day period will not begin to run until **1 January 2021.**

An arrangement will be “made available for implementation” if and when the arrangement is capable of implementation in practice and information regarding it is communicated to potential clients. An arrangement will be “ready for implementation” at the point in time when the relevant parties are ready to proceed with the transaction. It is anticipated that the application of these provisions will result in the disclosure of information in relation to certain arrangements that have not yet been implemented.

Where a person comes within either category of intermediary in relation to the same reportable cross-border arrangement, the time limit that will apply is whichever results in the earliest filing of a return.

An intermediary has no obligation to file more than one return in relation to the same arrangement, unless the arrangement comes within the definition of a “marketable arrangement” (see Chapter 4.7). However, an intermediary may wish to amend a return if it comes to light that it contains incorrect information.

4.6 Nexus to Ireland (section 817RC(7) & (8))

Any person coming within the definition of intermediary with respect to a reportable cross-border arrangement is required to file a return of information with Revenue in relation to that arrangement. In practice, this filing requirement will apply only if Ireland features before all other Member States in the following list applied in order of priority:

(a) it is the Member State where the intermediary is resident for tax purposes,
(b) it is the Member State where the intermediary has a PE through which the services with respect to the arrangement are provided,
(c) it is the Member State which the intermediary is incorporated in or governed by the laws of that state,
(d) it is the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

Where another Member State features before Ireland on the list, the intermediary will file a return to the tax authorities of that Member State and will be exempt from filing with Revenue where the information that they filed includes all of the specified information that they would be required to file in Ireland. For the exemption to apply, the intermediary should retain the following documentation:

- a copy of the information that was provided to the competent authority of the other Member State, and
- written confirmation of the Arrangement ID that was assigned to the arrangement by the other Member State.

4.7 Duty to share reference number (section 817RC(5))

After an intermediary files a return with Revenue, Revenue will assign an Arrangement ID to the arrangement, if no such number has already been assigned to it. The intermediary is required to provide written confirmation of the Arrangement ID to any other intermediary and each relevant taxpayer involved in the same arrangement, where the identity of such other persons is known. This written confirmation should be provided **within five working days** of the later of:

- the date on which the intermediary is notified by Revenue of the reference number, and
- the date on which another intermediary or a relevant taxpayer becomes involved in the same arrangement.

4.8 Marketable arrangements (section 817RC(3))

When an intermediary files a return of information with Revenue in respect of a marketable arrangement, it must be stated in the return that it is a marketable arrangement.

The return should be amended every quarter where new information has become available in respect of any of the following:

- the identity of each intermediary and relevant taxpayer involved in the arrangement,
- the date on which the first step was taken or will be taken in implementing the arrangement,
- the identification of the Member State of each relevant taxpayer involved in the arrangement and any other Member State(s) likely to be concerned by the arrangement,
- the identification of any other person in a Member State likely to be affected by the arrangement, indicating to which Member State(s) such person is linked.

Example

On 31 December 2020, Tom O'Connor Consulting Limited makes available for implementation a scheme that comes within the definition of a reportable cross-border arrangement and a marketable arrangement. The company files a return of information with Revenue in relation to the scheme on 31 January 2021. At that point in time, there is no other intermediary and no relevant taxpayer involved in the arrangement.

On 1 March 2021, the company manages the implementation of the scheme for a client who falls within the definition of a relevant taxpayer.

Because the scheme is a reportable cross-border arrangement, the company gives written notification of the reference number to the new client by 8 March 2021, i.e. within five working days of the date on which the new client became involved in the arrangement.

Because the scheme is a marketable arrangement, the company, on 30 April 2021, amends the return that was made on 31 January 2021, i.e. three months after the date on which the initial return was filed, with new information that is available in relation to:

- the identity of the relevant taxpayer,
- the date on which the arrangement was implemented,
- the identification of the Member State of the relevant taxpayer involved in the arrangement and any other Member State(s) likely to be concerned by the arrangement, and
- the identification of any other person in a Member State likely to be affected by the arrangement, indicating to which Member State(s) such person is linked.

4.9 Multiple reporting (section 817RC(6), (6A), (7) & (8))

An intermediary may be exempt from the obligation to file a return with Revenue where another intermediary files a return of **all of** the specified information (as set out in section 817RA(3)) with Revenue or with the tax authorities of another Member State.

A. Where the other intermediary files such a return with Revenue, an exemption will apply only if the intermediary receives, in writing:

- confirmation that the other intermediary has returned the specified information to Revenue; and
- the reference number assigned to the arrangement by Revenue (the Arrangement ID).

B. Where the other intermediary files such a return with the competent authorities of another Member State, the intermediary who is relying on the exemption should retain the following documentation:

- confirmation that the other intermediary has returned the specified information to the competent authority of another Member State,
- a copy of the specified information that was provided to the competent authority of another Member State, and
- written confirmation of the unique reference number (the Arrangement ID) that was assigned to the arrangement by the competent authority of the other Member State.

An intermediary should provide written confirmation that they have provided the specified information to Revenue (or to the competent authority of another Member State) only if the intermediary has provided **all of the specified information** relating to the reportable cross-border arrangement to Revenue (or to the competent authority of another Member State). The specified information that is to be returned to Revenue in respect of each reportable cross-border arrangement is set out in Chapter 3.1. The onus is on the intermediary availing of the exemption to ensure that all of the specified information has been provided to either Revenue or the tax authority in another Member State.

Example

A tax advisor based in Limerick and an advisor based in France design a reportable cross-border arrangement. The intermediary located in France files the specified information known to that intermediary with the French authorities. The French intermediary provides the Limerick based advisor with an arrangement ID and details of the specified information which was filed. As the specified information filed in France does not include details of the Irish tax provisions that form the basis of the arrangement (as they were not known to the French advisor), the Limerick based advisor must make a return to Revenue of all of the specified information known to it, quoting the French Arrangement ID.

Example

A tax advisor based in Cork City designs a loss-buying scheme that comes within the definition of a reportable cross-border arrangement. Therefore, the tax advisor comes within the definition of the first category of intermediary in relation to the arrangement. The scheme is made available for implementation to a potential client on 1 January 2021. In accordance with his disclosure obligations, the tax advisor files a return of information in relation to the arrangement with Revenue on 1 February 2021.

Before proceeding to implement the arrangement, the taxpayer seeks advice in relation to it from his regular accountant, who is also based in Cork City, on 15 February 2021. It is reasonable to expect that the accountant should know that it is a reportable cross-border arrangement. Therefore, the accountant comes within the definition of the second category of intermediary. She provides the advice to her client on 1 March 2021 and, therefore, has an obligation to file a return with Revenue by 31 March 2021. However, if she receives and retains written confirmation that the tax advisor has already returned all of the specified information to Revenue and the Arrangement ID, she can avail of an exemption from filing.

Example

A company seeks advice from an Irish tax advisor regarding the transfer of half its operations to Portugal. In advance of the arrangement being made available to the company, specialist advice is sought in Portugal with regard to the transfer of employment operations as part of the wider arrangement. The transfer of employment operations is significant and it is reasonable to expect that the Portuguese advisor would know that it is a reportable cross-border arrangement. Therefore, the Portuguese advisor comes within the definition of the second category of intermediary.

The Portuguese advisor provides advice to the Irish advisor on 1 April and files the return on 22 April as the arrangement has not yet been made available to the relevant company.

The filing made by the Portuguese advisor is limited to aspects relating to Portuguese tax law and does not contain all the specified information that the Irish advisor is reasonably expected to know and declare.

The Irish advisor must make a return to Revenue of all of the specified information known to it, quoting the Portuguese Arrangement ID.

4.10 Legal professional privilege (section 817RC(9)(b) & (10))

An intermediary will be exempt from the obligation to file a return of the specified information with Revenue if a claim to legal professional privilege in respect of that information could be maintained in legal proceedings. Where part of the specified information is so privileged, the exemption will apply only in respect of that information.

For the purpose of this exemption, the term "legal professional privilege" will be interpreted in accordance with Irish law. Therefore, except for those cases where litigation is in actual contemplation, legal privilege will generally apply only to confidential legal advice given to a client by a lawyer and will not extend to documentation prepared in the ordinary course of a transaction or to the identity of the parties involved.[55] Furthermore, as the privilege is that of the client, not the legal professional, the client may elect to waive[56] their right to legal privilege to the extent necessary to allow the legal professional to disclose the information to Revenue.

Intermediaries should analyse whether their interactions with their clients in respect of arrangements (within the meaning of section 817RA) are privileged or not and discuss with such clients whether or not they wish to waive such privilege in advance of determining whether or not an exemption or a partial exemption applies.

Where an exemption from disclosure applies due to legal professional privilege, an intermediary is required to notify, without delay, the relevant taxpayer of their obligation to file a return of information with Revenue. For the purpose of this obligation, "without delay" should be taken to mean as being as soon in time as the intermediary becomes aware that an exemption applies due to legal professional privilege.

Where an exemption from disclosure applies in relation to only part of the specified information, an intermediary should:

- file a return of that part of the specified information that is not legally privileged with Revenue[57] [58], and
- within the time limits referred to in Chapter 4.7, share the Arrangement ID that is assigned to the arrangement with the relevant taxpayer[59] and notify the relevant taxpayer of their obligation to file a return of information with Revenue.

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[55] *Silver Hill Duckling v Minister for Agriculture Attorney General* [1987] ILRM 516; *Gallagher v Stanley* [1998 SC] 2 IR 267.

[56] Revenue accepts that, in these circumstances, privilege is waived only for the purpose of making the appropriate return to Revenue under Chapter 3A of Part 33.

[57] Fields referring to specified information that is exempt from disclosure on the basis of legal professional privilege may be marked 'information legally privileged'.

[58] For disclosures due for filing on or before 28 February 2021, it is not possible to file a return on ROS where certain information is identified as subject to LPP. In those specific circumstances, where an intermediary cannot use ROS to make a return because certain specified information is subject to LPP, MyEnquiries is the electronic means made available by the Revenue Commissioners as required by section 817RC(4). Form DAC 6 (LPP) should be filed using MyEnquiries, setting out the identity of the relevant taxpayer and other intermediaries involved in the reportable cross-border arrangement.

[59] As set out in section 4.7, this number should also be provided to other intermediaries.

The relevant taxpayer must, within 14 days of receiving the Arrangement ID, file all of the specified information with Revenue through ROS.

4.11 Penalties for non-compliance

Where a decision is taken that an arrangement is not disclosable but it subsequently transpires that the decision was incorrect, there will not be a failure to comply with a disclosure obligation if it can be established to the satisfaction of Revenue that the decision was arrived at in an objective way, taking into account all relevant facts and circumstances and based on available information. Where, on the other hand, Revenue forms the view that there is a failure to comply with a disclosure obligation, a penalty or penalties for non-compliance may apply. The legislation sets out the maximum penalties that may be imposed in such situations. See Chapter 6.

5 Relevant taxpayers

A relevant taxpayer is any person to whom a reportable cross-border arrangement is made available for implementation, who is ready to implement a reportable cross-border arrangement or who has implemented the first step of such an arrangement **(section 817RA(1)).**

An arrangement will be "made available for implementation" to a person if and when the arrangement is capable of implementation in practice and information is communicated to the person suggesting that they consider entering into transactions forming part of the arrangement. An arrangement will be "ready for implementation" by a person at the point in time at which the person is ready to proceed with it.

5.1 Obligation to file (section 817RD(1), (6) & (7))

A person coming within the definition of relevant taxpayer in relation to a reportable cross-border arrangement with a nexus to an EU Member State is required to file a return with Revenue of all specified information that is within their knowledge, possession or control in relation to that arrangement where –

- there is an intermediary, but the relevant taxpayer has not waived their right to legal privilege to the extent necessary to allow the intermediary to disclose the information to Revenue (see Chapter 4.9), or
- there is no intermediary (within the meaning of the legislation).

There may be no intermediary, for example, where a taxpayer designs and implements a reportable cross-border arrangement through its in-house team of legal advisors, without the assistance of external legal advisors. There may also be no intermediary where, for example, a taxpayer seeks advice in relation to a reportable cross-border arrangement from an external tax advisor that is not established within the EU.

If it is not clear whether a relevant taxpayer has a nexus to an EU Member state, the list provided in the next section (see (a) to (d)) should be of assistance.

5.2 Nexus to Ireland (section 817RD(6) & (7))

In practice, relevant taxpayers will be required to file a return with Revenue only if Ireland features before all other Member States in the following list applied in order of priority:

(a) it is the Member State where the relevant taxpayer is resident for tax purposes;
(b) it is the Member State where the relevant taxpayer has a PE benefitting from the arrangement;

(c) it is the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no PE in any Member State;
(d) it is the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no PE in any Member State.

Where another Member State features before Ireland on the list, the relevant taxpayer will file a return with the tax authorities of that other Member State and will be exempt from filing with Revenue where the information that they filed includes all of the specified information that they would be required to file in Ireland. For the exemption to apply, the relevant taxpayer should retain the following documentation:

- a copy of the information that was provided to the competent authority of the other Member State, and
- written confirmation of the Arrangement ID that was assigned to the arrangement by the other Member State.

5.3 Triggers and time limits for filing (section 817RD(1) & (1A))

Where a relevant taxpayer is obliged to file a return of information with Revenue, the return is to be filed within 30 days of:

(a) the day after the arrangement is made available for implementation to the relevant taxpayer,
(b) the day after the arrangement is made ready for implementation by the relevant taxpayer, or
(c) when the first step in its implementation was taken in relation to the relevant taxpayer,

whichever occurs first.

The exception to this is where an arrangement is made available for implementation, is ready for implementation, or where the first step in its implementation has been taken **between 1 July 2020 and 31 December 2020**, in which case this 30-day period will not begin to run until **1 January 2021**.

It is anticipated that the application of these provisions may result in the disclosure of information in relation to arrangements that have not yet been implemented.

5.4 Duty to share reference number (section 817RD(4))

After a relevant taxpayer files a return of information with Revenue, Revenue will assign a unique reference number to the arrangement, if no such number has already been assigned to it (the Arrangement ID). The relevant taxpayer is required to provide written confirmation of the Arrangement ID to any other relevant taxpayer involved in the same arrangement, where the identity of such other person is known. This written confirmation should be provided within five working days of the later of:

- the date on which the relevant taxpayer is notified by Revenue of the reference number, and
- the date on which another relevant taxpayer becomes involved in the same arrangement.

5.5 Multiple reporting (section 817RD(3) & (5))

Where more than one relevant taxpayer is required to file a return of **all of** the specified information (as set out in Section 817RA(3)) with Revenue, or with the competent authority of another Member State, in relation to the same reportable cross-border arrangement, the return is to be filed only by the relevant taxpayer referred to in whichever of the following paragraphs first applies:

(a) the relevant taxpayer that agreed the arrangement with the intermediary;
(b) the relevant taxpayer that manages the implementation of the arrangement.

A. Where the other relevant taxpayer files such a return with Revenue, an exemption will apply only if the relevant taxpayer receives, in writing:

   - confirmation that the other relevant taxpayer has returned all of the specified information to Revenue; and
   - the reference number assigned to the arrangement by Revenue (the Arrangement ID).

B. Where the other relevant taxpayer files such a return with the competent authorities of another Member State, the relevant taxpayer who is relying on the exemption should retain the following documentation:

   - confirmation that the other intermediary has returned the specified information to the competent authority of another Member State
   - a copy of the specified information that was provided to the competent authority of another Member State, and
   - written confirmation of the unique reference number (the Arrangement ID) that was assigned to the arrangement by the competent authority of the other Member State.

A relevant taxpayer should provide written confirmation that they have provided the specified information to Revenue, or to the competent authority of another Member State, only if the relevant taxpayer has provided **all of the specified information** relating to the reportable cross-border arrangement to Revenue. The specified information that is to be returned in respect of each reportable cross-border arrangement is set out in Chapter 3.1.

5.6 Duty to include Arrangement ID in tax return (section 817RD(8) & (9))

Any person who obtains or seeks to obtain a tax advantage from a reportable cross-border arrangement with respect to a tax, duty, levy or charge which is under the care and management of Revenue will be a chargeable person for the purposes of Part 41A TCA 1997. Chargeable persons are required to comply with the full self-assessment regime provided for in Part 41A.

A person coming within the definition of relevant taxpayer in relation to a reportable cross-border arrangement is required to include the Arrangement ID assigned to the arrangement in their return of income[60] for any chargeable period in which the person:

- Entered into any transaction which is or forms part of the reportable cross-border arrangement, or
- Obtains, or seeks to obtain, a tax advantage from the reportable cross-border arrangement. The person must include the Arrangement ID in their tax return for every year or period until the advantage ceases to apply.[61]

In practice, relevant taxpayers will not be expected to comply with this requirement for returns that are made in respect of accounting periods ended prior to 1 January 2020 or tax years prior to 2020.

In joint assessment cases, Revenue will consider the obligation of a non-assessable spouse or civil partner to include the Arrangement ID(s) in his/her Form 11 as being satisfied if that individual's spouse or civil partner includes the Arrangement ID(s) in his/her Form 11 for the relevant chargeable period(s). For information regarding joint assessment, please refer to TDM Part 44-01-01 and TDM Part 44-02-01.

5.7 Penalties for non-compliance

Where a decision is taken that an arrangement is not disclosable but it subsequently transpires that the decision was incorrect, there will not be a failure to comply with a disclosure obligation if it can be established to the satisfaction of Revenue that the decision was arrived at in an objective way, taking into account all relevant facts and circumstances and based on available information. Where, on the other hand, Revenue forms the view that there is a failure to comply with a disclosure obligation, a penalty or penalties for non-compliance may apply. The legislation sets out the maximum penalties that may be imposed in such situations. See Chapter 6.

[60] In circumstances where an intermediary was responsible for reporting, but neither filed a return nor provided the taxpayer with an Arrangement ID, the relevant taxpayer should make a return to Revenue to obtain an Arrangement ID to include in their return of income.

[61] Fields for entering the Arrangement ID are included in the Form 11, Form CT1 and Form 1 tax returns.

6 Penalties for non-compliance

The legislation sets out the maximum penalties that may be imposed for a failure to comply with an obligation under the disclosure regime **(section 817RH)**.

6.1 Level of penalties

Different levels of penalties are provided for, depending on the nature of the infringement, as follows:

Where the failure to comply relates to:

- the obligations of an intermediary in relation to marketable arrangements,
- the obligation of an intermediary to inform another intermediary or the relevant taxpayer of their disclosure obligations where a reporting exemption applies due to legal professional privilege,
- the obligation of a relevant taxpayer to provide the Arrangement ID to any other relevant taxpayer, or
- the reporting obligations that apply in relation to the "lookback" period,

a **maximum** penalty of €4,000 may be imposed. If the failure to comply continues after a such penalty is imposed, a further penalty of €100 may be imposed for each day on which the failure continues **(section 817RH(1)(a))**.

Where the failure to comply relates to:

- the obligation of an intermediary to file a return of information with Revenue (with the exception of the reporting obligations that apply in relation to the "lookback" period),
- the obligation of an intermediary to provide any other intermediary and each relevant taxpayer with the Arrangement ID, or
- the obligation of a relevant taxpayer to file a return with Revenue,

a **maximum** penalty of €500 may be imposed for each day on which the obligation is not complied with. If the failure continues after such a penalty is imposed, a further penalty of €500 may be imposed for each additional day on which the failure continues. **(section 817RH(1)(b))**.

Where the failure to comply relates to the obligation of a relevant taxpayer to include the Arrangement ID in their annual return of income, a **maximum** penalty of €5,000 may apply **(section 817RH(1)(c))**.

6.2 Application to court

While the legislation prescribes the maximum penalties that may be imposed, it will ultimately be for the courts to decide whether a person is liable to a penalty (or penalties) and, if the person is so liable, the amount of that penalty (or penalties). Therefore, where a Revenue officer forms the view that a person has failed to comply with an obligation (or obligations) in relation to a reportable cross-border arrangement, an application will be made to the relevant court for a determination on the matter.

When determining the amount of a penalty that is to apply, the Court is to have regard for the following:

- if the person is an intermediary, the amount of any fees received or likely to have been received by the person in relation to the reportable cross-border arrangement;
- if the person is a relevant taxpayer, the amount of any tax advantage gained or sought to be gained by the person from the reportable cross-border arrangement.

Where the court determines that a person is liable to a penalty (or penalties), an order will be made for recovery of those penalties, and the penalties shall be subject to the same collection mechanism as a tax.

7 Associated Enterprises

The term **"associated enterprise"** is defined in Article 3(23) of the DAC **(section 817RA(1))** and 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[62] over the other person;
(b) a person participates in the control of another person through a holding that exceeds 25% 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% of the capital;
(d) a person is entitled to 25% or more of the profits of another person.

If more than one person, as described in points (a) to (d), participates in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

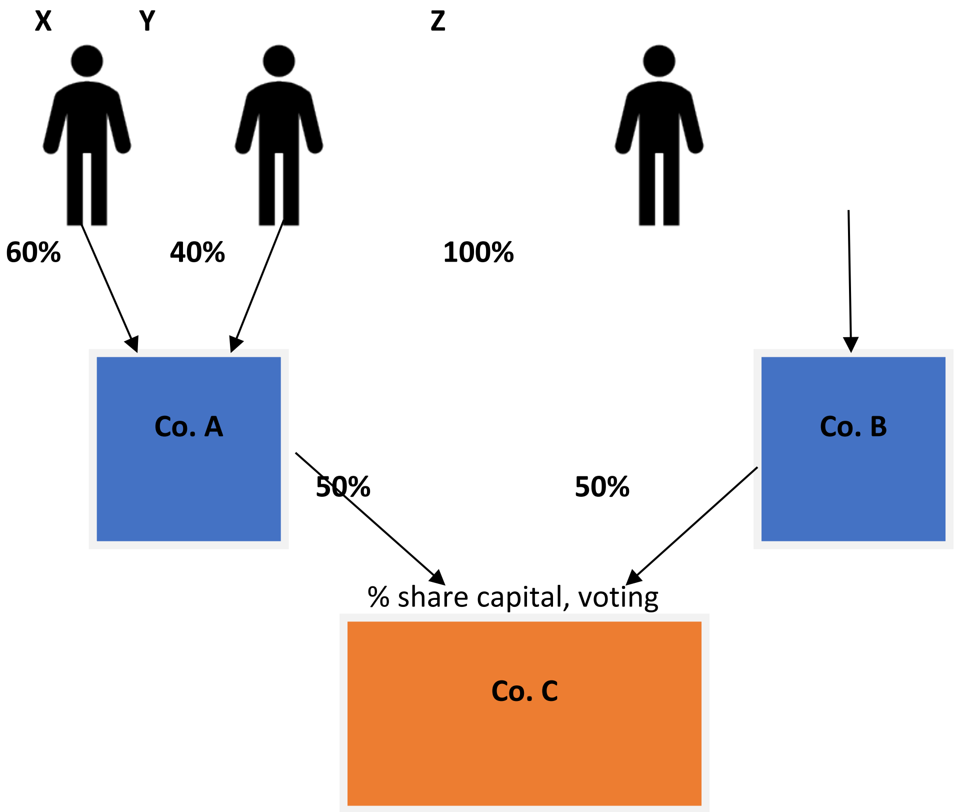
For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%.

For the purpose of this definition, an individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

[62] The term "significant influence" is to be interpreted in accordance the meaning given to the same term under the anti-hybrid rules in Part 35C TCA 1997.

Example of associated enterprises



Two companies, Co. A and Co. B, each own 50% of the share capital, voting rights and right to profits in Co. C. Co. A is owned by two individuals, X and Y, who own 60% and 40% respectively of the share capital, related voting rights and the right to profit in the company. Z is the sole owner of Co. B. Co. A and Co. B are not acting together to exercise their voting rights or share capital rights in Co. C.

Who are associated enterprises taking into account directly held participations?

- **X and Co. A; Y and Co. A.** X and Y are associated enterprises of Co. A as they each hold a participation in Co. A of greater than 25% of the share capital, voting rights and rights to profits in the company.
- **X and Y.** As X and Y hold a greater than 25% participation interest in the same company, X and Y are also regarded as associated enterprises of each other.
- **Z and Co. B.** Z is an associated enterprise of Co. B as Z holds a participation in Co. B of greater than 25% of the share capital, voting rights and rights to profits in the company.
- **Co. A and Co. C; Co. B and Co. C.** Co. A and Co. B are associated enterprises of Co. C as they each hold a participation in Co. C of greater than 25% of the share capital, voting rights and rights to profits in the company.
- **Co. A and Co. B.** As Co. A and Co. B hold a greater than 25% participation interest in the same company, they are also regarded as associated enterprises of each other.

Who are associated enterprises taking into account indirect participations?

- **X and Co. C.** X, holding 60% of the voting rights in Co. A, is deemed to hold 100% of the voting rights in the company. Multiplying this rate of holding through to the next tier (i.e. through Co. A to Co. C), X is deemed to hold indirectly 50% (i.e. 100% x 50%) of the voting rights in Co. C and is, therefore, an associated enterprise of Co. C.
- Y, holding 40% of the shares, voting rights and right to profits in Co. A, is considered to hold 20% (i.e. 40% x 50%) of the shares, voting rights and right to profits in Co. C and is not, therefore, an associated enterprise of Co. C.
- **Z and Co. C.** Z, holding 100% of the shares, voting rights and right to profits in Co. B, is considered to hold 50% (i.e. 100% x 50%) of the shares, voting rights and right to profits in Co. C and is, therefore, an associated enterprise of Co. C.
- **X and Z.** As X and Z hold a greater than 25% indirect participation interest in the same company (Co. C), X and Z are also regarded as associated enterprises of each other.

8 European Commission access to information

The information received from intermediaries and relevant taxpayers will be shared with all other Member States via a shared central directory that is maintained by the European Commission. In order to monitor the proper functioning of the DAC, the European Commission will have access to this information, with the exception of the following:

- information in relation to the identity of intermediaries and relevant taxpayers in relation to an arrangement;
- summary of the content of an arrangement; and
- the identification of any other person in a Member State likely to be affected by an arrangement.[63]

[63] Art. 8ab(17) of the DAC, as transposed into Irish law by the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012 (as amended).

9 Contact details

General queries regarding the operation of the disclosure regime may be submitted to Revenue via MyEnquiries (Category: 'AEOI', Subcategory: 'DAC6').

Complex queries regarding the interpretation of the legislation providing for the disclosure regime which are not addressed by the contents of this Tax and Duty Manual should be raised via the Revenue Technical Service (RTS), guidance on which is available here.

Technical support is available by email at AEOI_technicalsupport@revenue.ie and telephone at +353 42 9353337.

Links to useful sources of information are provided in Appendix III.

Appendix I: Key definitions

For the purpose of hallmark D.2, **"beneficial owner"** has the same meaning as it has in the DAC (in accordance with **section 817RA(4)**), and means: [64]

any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:

(a) in the case of corporate entities:

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council;

(ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;

(b) in the case of trusts:

(i) the settlor(s);
(ii) the trustee(s);
(iii) the protector(s), if any;

[64] In the DAC, the term is to have the meaning given to it in Directive (EU) 2015/849, which was transposed into Irish law by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018.

(iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;
(v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

(c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b).

"competent authority" (section 817RA(1)) means the authority designated as such by a Member State for the purposes of Council Directive 2011/16/EU on administrative cooperation in the field of taxation. In relation to the State, it means the Revenue Commissioners.

"person" has the same meaning as it has in the DAC **(section 817RA(1))** and means[65]:

(a) a natural person;
(b) a legal person;
(c) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the status of a legal person; or
(d) any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by the Directive.

"taxpayer identification number" means the tax identification number (TIN) allocated to a person by the tax administration of the jurisdiction of residence of the person and, in relation to the State, means a tax reference number within the meaning of section 885.

A tax reference number within the meaning of section 885 is any of the following:

- the Personal Public Service Number (PPSN) stated on the certificate of tax credits and standard rate cut-off point issued to that person by an inspector,
- the reference number quoted on any return of income form or notice of assessment issued to a specified person by an inspector, and
- a specified person's VAT registration number.

For the purpose of section 885, a specified person, in relation to a business, means - where the business is carried on by an individual, that individual, and where the business is carried on by a partnership, the precedent partner.

[65] The term is defined in Article 3 of the DAC.

Appendix II: List applying in relation to Hallmark A.3

List of exemptions and reliefs excluded from the scope of hallmark A.3, as outlined in Chapter 2.6:

1. A salary sacrifice arrangement approved under section 118B.
2. The occupation of woodlands as provided for by section 232.
3. The disposal by an individual of woodland as provided for by section 564.
4. A retirement benefits scheme within the meaning of section 771, for the time being approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30.
5. An annuity contract or a trust scheme, or part of a Trust Scheme, for the time being approved by the Revenue Commissioners under section 784.
6. A PRSA contract (within the meaning of section 787A) in respect of a PRSA product (within the meaning of that section).
7. A qualifying overseas pension plan within the meaning of Chapter 2B of Part 30.
8. A profit sharing scheme approved by the Revenue Commissioners under Part 2 of Schedule 11.
9. An employee share ownership trust approved by the Revenue Commissioners under paragraph 2 of Schedule 12.
10. A savings-related share option scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12A.
11. A certified contractual savings scheme certified by the Revenue Commissioners under Schedule 12B.
12. A share option scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12C.

Appendix III: EU list of non-cooperative jurisdictions for tax purposes

As of 26 February 2021 (the date of its publication in the Official Journal of the European Union), the list is composed of American Samoa; Anguilla; Dominica; ; Fiji; Guam; Palau; Panama; Samoa; Seychelles; Trinidad and Tobago; US Virgin Islands; and Vanuatu. A table setting out the composition of the list for the period covering the lookback period is set out in the following table.

Applicable time period	**EU list of non-cooperative jurisdictions for tax purposes**
5 June 2018 – 4 October 2018	American Samoa, Guam, Namibia , Palau , Samoa, Trinidad and Tobago, and the US Virgin Islands.
5 October 2018 – 8 November 2018	American Samoa, Guam, Namibia , Samoa, Trinidad and Tobago, and the US Virgin Islands.
9 November 2018 – 25 March 2019	American Samoa, Guam, Samoa, Trinidad and Tobago, and the US Virgin Islands.
26 March 2019 – 21 May 2019	American Samoa, Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Guam, the Marshall Islands, Oman, Samoa, Trinidad and Tobago, the United Arab Emirates, US Virgin Islands and Vanuatu.
22 May 2019 – 20 June 2019	American Samoa, Belize, Dominica, Fiji, Guam, the Marshall Islands, Oman, Samoa, Trinidad and Tobago, the United Arab Emirates, US Virgin Islands and Vanuatu.
21 June 2019 – 16 October 2019	American Samoa, Belize, Fiji, Guam, the Marshall Islands, Oman, Samoa, Trinidad and Tobago, the United Arab Emirates, US Virgin Islands and Vanuatu.
17 October 2019 – 13 November 2019	American Samoa, Belize, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin

	Islands and Vanuatu.
14 November 2019 – 26 February 2020	American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.
27 February 2020 – 6 October 2020	American Samoa, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.
7 October 2020 to 25 February 2021	American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.
26 February 2021 to date	American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Appendix IV: Useful sources of information

Links to useful sources of information, including legislation and Tax & Duty Manuals referred to in this document, are provided below.

Legislation

- Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements;
- Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic;
- Commission Implementing Regulation (EU) 2019/532 of 28 March 2019 amending Implementing Regulation (EU) 2015/2378 as regards the standard forms, including linguistic arrangements, for the mandatory automatic exchange of information on reportable cross-border arrangements;
- Finance Act 2019;
- European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012;
- European Union (Administrative Cooperation in the Field of Taxation) (Amendment) Regulations 2019;
- European Union (Administrative Cooperation in the Field of Taxation) (Amendment) Regulations 2020.

Notes for Guidance

- Revenue Notes for Guidance - Taxes Consolidation Act 1997, Part 33, Anti-Avoidance.

Tax & Duty Manuals

- Revenue's TDM Part 33-01-01 Tax Avoidance: "Main purpose" tests;
- TDM Part 33-03-01: Mandatory disclosure guidance notes. This manual contains links to Revenue guidelines on the domestic mandatory disclosure regime, which is provided for by Chapter 3 of Part 33 of the Taxes Consolidation Act 1997;
- TDM Part 33-03-02: EU Mandatory Disclosure Rules (Entry into Force on 25 June 2018). This manual, which was issued in June 2018, provides an overview of the disclosure regime, as well as alerting taxpayers and

intermediaries that 25 June 2018 was the commencement date in relation to monitoring and recording information in relation to possible reportable arrangements;

- TDM Part 35-01-01a : Guide to Exchange of Information under Council Directive 2011/16/EU, Ireland's Double Taxation Agreements and Tax Information Exchange Agreements and the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters.

- TDM Part 38-03-24: Revenue Guide to Automatic Exchange of Information (AEOI) for Financial Account Holders.

Revenue webpages

- ROS Registration: https://www.ros.ie/ros-registration-web/ros-registration;rjsessionid=912CDD71210F0A974EECB1312629EF38?execution=e1s1.

Other

- Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU);

- Working Party IV – Direct Taxation, minutes of meeting held on 24 September 2018;

- OECD Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles - BEPS Actions 8-10;

- OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures;

- OECD (2015), Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project;

- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017.

Appendix V: Schedule of material amendments to this document

December 2020 update:

- Introduction: updated to refer to Council Directive (EU) 2020/876.
- 2.2: On page 6 of the previous version of this guidance, the final paragraph, which referred to point (d) in the definition of a cross-border arrangement, has been deleted.
- 2.2.1: The guidance on the meaning of tax residence has been amended.
- 2.6: The final paragraph of the guidance on hallmark A.2 has been deleted.
- 2.8: The guidance on the hallmarks in category C has been replaced.
- 4.9 In the guidance on multiple reporting, a new paragraph has been inserted before the example.
- 4.10: The guidance on legal professional privilege has been amended to provide additional guidance where the legal professional privilege exemption from disclosure applies in relation to only part of the specified information.
- 5.5 In the guidance on multiple reporting, a new paragraph has been inserted.
- 5.6: The guidance on the duty to include Arrangement IDs in tax returns has been updated.
- 9: Contact details have been updated.

January 2021 update:

- 4.10 updated to provide additional guidance in respect of filing obligations where legal professional privilege applies.

February 2021 update:

- 2.5.3: Guidance on the meaning of **"may reasonably expect"** in the application of the Main Benefit Test has been inserted.
- 2.6: Guidance on Hallmark A3 updated for introduction of section 817RI in Finance Act 2020.
- 3.1: The guidance on the specified information has been updated as follows:
    1. Removal of the practice in relation to the disclosure of persons where the person indicated that they would not be proceeding with the arrangement.
    2. Provision of further guidance on the required disclosure standard in respect of:

    - the summary of the content of the arrangement;
    - the national provisions forming the basis of the arrangement, and
    - Member State(s) likely to be concerned by an arrangement.

- 4.3.1: Linked to the update to 2.5.3, guidance on the meaning of **"knows or could be reasonably expected to know"** in the context of a secondary intermediary has been inserted.
- 4.6: Additional examples included to demonstrate the application of the exemption.
- 4.10: Clarifying footnote included to note that waivers of LPP are accepted as for the purpose of DAC6 filings only.
- 5.5: Additional guidance included to cover situations where the relevant taxpayers have reporting obligations in different Member States.
- 5.6: Additional guidance provided to deal with situations where an intermediary was responsible for reporting, but neither filed a return nor provided the taxpayer with an Arrangement ID.