

New Directive significantly broadens range of reportable cross border transactions

The EU Tax Intermediaries Directive is designed to strengthen the hands of tax authorities in identifying and responding to 'potentially aggressive tax arrangements' across the union. Deloitte Tax Director Niamh Gaffney outlines what it means for tax, accountancy and law firms with clients that engage in cross-border transactions. She points out that although details of relevant transactions do not need to be reported to the Irish Revenue before 2020, the details of transactions which fall within the scope of the Directive from 25 June 2018 onwards must be recorded and stored, ready for reporting.

The EU Tax Intermediaries Directive became effective in 25 June 2018. It requires EU Member States to enact domestic legislation requiring taxpayers or their advisors (intermediaries) to disclose details of certain cross-border arrangements to their local tax authority. The Directive also provides that these details can then be shared by the local tax authority with their European counterparts.

The purpose of the Directive (which is a response to OECD BEPS Action 12) is to allow Member States' tax authorities to obtain comprehensive and relevant information about 'potentially aggressive tax arrangements,' with a view to allowing the authorities to close loopholes, undertake risk assessments and/or carry out tax audits.

Although the Directive is similar in some respects to Ireland's existing domestic mandatory disclosure regime, there are some significant differences. The categories of reportable transactions covered by the EU Directive are very broad, covering diverse arrangements, some of which do not have any tax motivation. It is widely envisaged that a very significant number of transactions may become reportable annually to the Irish Revenue Commissioners once these provisions take effect. Reporting will be a likely occurrence for many organisations and taxpayers.

The Directive must be enacted into Irish domestic law by 31 December 2019, with first reports due on or before 31 July 2020. However, due to its retroactivity, the Directive is relevant immediately. With only the Directive itself to guide us until the Irish



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legislation is enacted, Irish taxpayers and their advisors alike must now actively consider the application or otherwise of this Directive to all cross-border transactions and arrangements and take action accordingly.

In scope

The Directive applies to 'reportable cross border arrangements'. But it does not define what an 'arrangement' is, and thus the Irish legislation in this regard will be key in scoping what is within and what is outside the remit of the regime.

A cross-border arrangement is defined as 'an arrangement concerning either more than one Member State or a Member State and a third country'. Therefore, broadly speaking, where any arrangement is put in place involving more than one jurisdiction the provisions of the Directive should be considered.

Hallmarks

A cross-border arrangement becomes reportable where the arrangement satisfies at least one of the 'hallmarks' set out in Annex IV of the Directive. A 'hallmark' is a characteristic or feature of a cross-border arrangement which, according to the Directive, presents an indication of a potential risk of tax avoidance.

The 'hallmarks' are divided into five categories. Some categories of 'hallmark' will only give rise to a reporting requirement where the 'main benefit test' is satisfied - which is similar to the existing domestic reporting regime in Ireland. The main benefit test in this case will be satisfied where 'it can be established that 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 derive from an arrangement is the obtaining of a tax advantage'.

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However, in a key departure from the existing Irish regime, for other 'hallmarks' the main benefit test is not applicable. These 'hallmarks' are mechanical in nature and, once they are present in a particular

arrangement a reporting obligation will arise, regardless of whether or not a tax advantage or avoidance motive is present. One such 'hallmark' includes the taking of a deduction for tax depreciation on the same asset in more than one jurisdiction - a common feature of many foreign branch structures and certain lease arrangements.

'Intermediary' definition

The reporting obligations are placed on 'intermediaries' or taxpayers, depending on the circumstances of the transaction.

The Directive defines an intermediary as being 'any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement,' where that intermediary is resident, operating, incorporated or registered with a professional association in an EU Member State. As such, in Ireland, an intermediary is likely to be a tax/accounting firm, a law firm or other advisor working in Ireland with clients on cross-border transactions.

Where there is no intermediary (i.e. where the taxpayer seeks no external

advice) or the intermediary has legal professional privilege (which is not waived) or if the intermediary is not resident in an EU Member State, the onus is on the taxpayer to report to Irish Revenue.

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Reporting requirements

The Directive requires reportable cross-border arrangements to be reported within 30 days beginning after such arrangement is made available for implementation/ready for implementation, or the first step in the implementation has been made.

The 30 day time limit commences from 1 July 2020, however, reportable arrangements, the first step of which was concluded on or after 25 June 2018 are to be reported by 31 August 2020. This means that details of cross-border arrangements that meet a 'hallmark' must be recorded and

stored from 25 June 2018 onwards and then provided to Irish Revenue in 2020.

The Directive requires a significant amount of information to be reported in relation to each reportable arrangement, including an identification of the taxpayers and intermediaries and a summary of the arrangement, including the date of the first step, an indication of the 'hallmarks' which apply, the national legislative provisions which are relevant and the value of the arrangement.

The Directive outlines that the penalties for non-compliance 'shall be effective, proportionate and dissuasive'.

From 25 June 2018 onwards all cross-border arrangements should be considered in light of the 'hallmarks' and a decision taken as to whether or not a particular arrangement is likely to be reportable or otherwise under the Directive.

For reportable transactions, relevant details must be recorded and stored, ready for reporting to Irish Revenue, in whatever format they prescribe, in August 2020.

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