

EU Mandatory Disclosure Regime for M&A transactions



Acquiring new targets? Refinancing your portfolio? Reorganising your portfolios? Since 25 June 2018 you may have additional reporting requirements under the new EU mandatory disclosure rules.

Summary

- The mandatory disclosure rules require disclosure of **cross-border arrangements** to tax authorities entered into by taxpayers which fall within certain **hallmarks**.
- These **hallmarks are very broadly-defined** and many commercial transactions might be within the scope of the rules.
- **Relevant reportable cross-border arrangements** involving an EU territory will need to be disclosed to the relevant national tax authority within a short timeframe. The obligation falls to the taxpayer where there is no EU based intermediary or where legal and professional privilege applies.
- The **disclosures are shared between the tax authorities** of all Member States quarterly.
- **Transitional rules apply from 25 June 2018. Reportable cross-border arrangements implemented between that date and 30 June 2020 will need to be disclosed**, either by an intermediary or by the relevant taxpayer.

June 2018 - June 2020

The Directive comes into force on 25 June 2018. **Transitional rules** will apply, and reportable cross-border arrangements implemented between then and 30 June 2020 will be discloseable. These transactions need to be disclosed in 2020.

2018/2019

Member States will be required to transpose the rules into domestic law. We are expecting detailed German regulations in 2019. So the final requirements will not be known until that time.

July 2020 onwards

On 1 July 2020 the full regime must be in place. Disclosures will then need to be made within 30 days of advice being given, or the arrangement is ready for implementation.

31 August 2020

Reportable cross-border arrangements implemented during the transitional period (between 25 June 2018 and 30 June 2020) must be disclosed by 31 August 2020.

Why are these rules important?

- Information about the transaction, the taxpayer, the values and associated parties will need to be disclosed to tax authorities. (See box opposite.)
- The transitional rules will apply to transactions where a first step was taken after 25 June 2018, so taxpayers and advisers will need to keep records from that date to support disclosures.
- The hallmarks are very broad, and many commercial transactions could fall within them. Taxpayers and their advisers will need to decide whether the hallmarks apply whenever they are involved with a cross-border transaction. (See overleaf for more detail on the hallmarks.)
- In many cases the obligation to disclose will fall directly on the taxpayer.
- There is the risk of penalties for non-compliance with the rules; as yet the level of penalties has not been confirmed.

What Information needs to be disclosed?

The disclosable information required by the Directive includes:

- Taxpayer names, place and date of birth (for individuals), residence
- Taxpayer identification numbers
- Details of relevant associated persons
- A description of the arrangements
- The date on which the first step was or will be made
- The value of the transaction

Key facts

1. What is the scope of the rules?

The EU mandatory disclosure rules will apply to cross-border arrangements, either involving more than one Member State, or concerning a Member State and a third country.

2. What arrangements are reportable?

A hallmark has to be met for the cross-border arrangement to be reportable. There are five broad categories of hallmarks covering different types of arrangements.

3. What are the hallmarks?

The hallmarks are set out in the box opposite. Some only apply where the “main benefit test” is met - this means, if the main benefit or one of the main benefits for the arrangement was obtaining a tax benefit. However some have no such requirement and so are potentially much broader in application.

4. Who needs to make the disclosure?

- i) When there is an intermediary (such as an adviser or service provider) based in an EU Member State, that intermediary will basically be required to make the disclosure.
- ii) Where there is more than one intermediary involved in the arrangement, all intermediaries are required to report the arrangement - unless they have proof that the required information has already been filed.
- iii) Where an intermediary is subject to legal professional privilege under the law of their Member State, the reporting obligation passes to other intermediaries, or to the relevant taxpayer.
- iv) If no intermediary is required to report the transaction, the obligation passes to the taxpayer. This is likely to apply if arrangements are implemented without taking external advice, where advice is taken outside the EU, or when advisors are subject to legal professional privilege.

The hallmarks

Hallmarks which are subject to the tax main benefit test

- **Generic hallmarks** - These are certain confidentiality and premium fee agreements with advisors and standardised documentation and/or structure.
- **Specific hallmarks with a tax main benefit** - This includes acquiring a loss making company, converting income into capital which is taxed at a lower level or exempt from tax, and circular or offsetting transactions.
- **Specific hallmarks related to cross border transactions** - Deductible cross-border payments between two or more associated enterprises, where the recipient is resident in a state whose corporate tax rate is zero or "almost zero" (not defined), or the receipt is exempt from tax or the payment benefits from a preferential tax regime.

Hallmarks not subject to the tax main benefit test

- **Specific hallmarks related to cross border transactions** - Deductible cross-border payments between two or more associated enterprises, where the recipient is resident nowhere, or is resident in a State which is included in an EU or OECD list of uncooperative tax jurisdictions; deductions for depreciation on the same asset are claimed in more than one jurisdiction; double tax relief is claimed in more than one jurisdiction; or there is a transfer of assets and there is a material difference between the consideration in the two jurisdictions.
- **Specific hallmarks concerning automatic exchange of information and beneficial ownership** - These apply even if a tax advantage is not the main benefit, and include structures involving holding companies and trusts, whereby the identity of the beneficial owners are made “unidentifiable”.
- **Specific hallmarks concerning transfer pricing** - There are three hallmarks: a. Arrangements involving unilateral safe harbour rules; b. Arrangements involving the transfer of hard-to-value intangibles; and c. Cross-border transfer of functions / risks / assets which result in the EBIT of the transferor to fall to less than 50% of what it would have been if the transfer had not been made.

How can PwC help?

- We can screen your activities so that you understand your reporting obligations.
- We can assist you in meeting your reporting obligations by preparing the necessary paper work.
- For further information, please speak to your normal PwC contact (please see next page).

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Contact

Dr. Ralf U. Braunagel
Frankfurt / Stuttgart
Tel.: +49 69 9585-6376
ralf.ulrich.braunagel@de.pwc.com

Alke Fiebig
Hamburg
Tel.: +49 40 6378-1318
alke.fiebig@de.pwc.com

Dr. Lars Lawall
Frankfurt
Tel.: +49 69 9585-6622
lars.lawall@de.pwc.com

Jürgen Scheidsteger
Frankfurt
Tel.: +49 69 9585-5150
juergen.scheidsteger@de.pwc.com

Nicole Dehnhard
Frankfurt
Tel.: +49 69 9585-2513
nicole.dehnhard@de.pwc.com

Hansjoachim Köhler
Frankfurt
Tel.: +49 69 9585-5039
hansjoachim.koehler@de.pwc.com

Dr. Axel P. Mielke
Frankfurt
Tel.: +49 69 9585-6926
axel.mielke@de.pwc.com

Christian Tempich
München
Tel.: +49 89 5790-6321
christian.tempich@de.pwc.com