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11 March 2019

Mr Valère MOUTARLIER
Director
Direct taxation, Tax coordination,
Economic analysis and Evaluation
EUROPEAN COMMISSION
DG Taxation and Customs Union

SUBJECT: Position paper on DAC6

Dear Mr Moutarlier,

The European Banking Federation (EBF) and the Association for Financial Markets in Europe (AFME) support the efforts of the European Commission and the EU Member States to address international tax avoidance, and are committed to fostering a consistent and workable implementation of international standards.

We would like to share with you our comments on Council Directive 2018/822 of 25 May 2018 on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6), which is in the process of being transposed into national legislation. As the DAC6 introduces additional reporting requirements for companies including financial institutions, it is crucial that these are adequately targeted in order to generate useful and effective information for tax authorities trying to counter aggressive tax planning.

We believe that sufficient guidance is needed in order to clarify how the rules should be applied in practice, as we are concerned that the prescribed reporting regime once implemented would capture a significant amount of ordinary course of business activity, which would risk shadowing any relevant information. We further elaborate on this in the attached paper that notably includes a set of examples of such ordinary course of business transactions which we consider likely to unduly trigger reporting requirements unless otherwise clarified in domestic legislation.

We would like to refer specifically to the fact that the Commission's Working Party IV met on 24 September already to discuss the DAC6. In this respect, we encourage the Commission to convene this working party again so that there is a harmonised implementation. We also note the important contribution that the financial services industry can play in helping Member States in their implementation of the DAC6 and therefore suggest that the working party consider input from business.

We have shared the attached paper and examples with Member State tax authorities directly and with the OECD and hope to follow up with them but we feel that the Commission can play an important role in encouraging a consistent and harmonised approach to implementation.

We look forward to your feedback, and stand at your disposal for any comment or question you might have.

Best regards,
Roger Kaiser

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Finance for Europe

Comments for EU tax authorities on the implementation of the DAC6

March 2019

Introduction

AFME[1] and EBF[2] acknowledge the efforts by the EU and individual Member States to address international tax avoidance. We note that there are regulatory and reporting requirements[3] to which financial institutions are subject across all Member States which are specifically designed to identify and bring abusive arrangements to the attention of regulatory authorities in Member States. Our respective organisations and our members have a long-standing commitment to fostering a sound and consistent implementation of international standards. Financial institutions across Europe have made a significant investment in implementing such standards, sometimes within a very short timeframe. We believe that this investment has been instrumental in ensuring a high quality of reporting to competent authorities. The DAC6[4] adds another reporting requirement for companies including financial institutions. It is important that the measures introduced by the DAC6 are workable and effective and are sufficiently targeted and interpreted in such a way that they generate information which allows well informed and timely decisions by policymakers to counter aggressive tax planning. This is to the benefit of both taxpayers and Member State tax authorities.

We encourage all Member States to produce guidance alongside their domestic legislation detailing how the rules should be applied in practice. We are concerned that without appropriate guidance, the reporting regime will capture a significant amount of ordinary course of business activity, the volume of which may well obscure reporting on transactions which Member States would be concerned about. This risks tax authorities not being able to respond to any helpful information but nonetheless placing a significant burden on taxpayers, tax authorities and other stakeholders (e.g. associated financial institutions). The disclosure requirements should be proportionate, clear and achievable. It is important that Member States work together to ensure that the rules are applied *consistently* across the EU and to ensure that ordinary course of business activity carried out on standard terms by businesses is not unduly captured by the rules.

Below, we set out some specific comments on aspects of the DAC6 which we hope Member State tax authorities will bear in mind when producing domestic rules and guidance. The comments are not in the main targeted at situations in which the financial institution has itself designed a reportable arrangement, in which case the financial institution is likely to be an intermediary as it would fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement. Instead, our comments are primarily focused on situations in which a financial institution has provided a service or

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1 AFME is the voice of the European wholesale capital markets. Our members are European investment banks, broker/dealers and other sell-side wholesale capital markets firms. We are also the European member of the Global Financial Markets Association (GFMA), a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

2 EBF is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 3,500 banks – large and small, wholesale and retail, local and international – employing about two million people.EBF is registered on the EU Transparency Register, registration number 4722660838-23.

3 Such as the CRS and FATCA and the filing of Suspicious Activity Reports (SARs) across all Member States as a result of the 4AMLD.

4 Directive 2018/822 published on 25 May 2018 (available here).

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product which may have been used by a relevant taxpayer as part of an arrangement which the financial institution has not been involved in and of which the financial institution may have limited or no knowledge.

1. *Definition of intermediary*

Further clarity is required on what is meant by the term "intermediary", in particular, what it means to have "undertaken to provide…aid, assistance or advice…with regards to making the arrangement available for implementation". We believe that on a literal reading, this definition requires *active facilitation* of the arrangement and that, consequently, it should be restricted to circumstances of *active facilitation* of arrangements by intermediaries.

Adopting a wider definition of intermediary poses specific challenges for banks given their role in the wider economy. In any transaction which involves the movement of money, it is generally the case that a bank will have provided an ancillary service such as a bank account, transfer of funds, custodian services or a loan on normal commercial terms (these examples should not be viewed as exhaustive, in practice a wide range of banking services or products may be accessed in an entirely ancillary capacity). That service may be said to be a part of an arrangement, insofar as the arrangement would not have taken place without that ancillary service. However, the provision of such services should not be viewed as undertakings "to provide aid, assistance or advice…with regards to making the arrangement available for facilitation". Neither would the bank necessarily be aware that there is any tax purpose to the transaction at all, nor that it intends to facilitate or benefit from any tax avoidance by a client.

As an overarching point, we believe that services which are genuinely ancillary, where the bank has no role in the tax aspects of an arrangement should not be reportable from the perspective of the bank. It is important to note that were there to be such an arrangement, in which the bank was only involved in a passive role, it would remain a reportable arrangement for either the taxpayer or any other intermediaries who had designed, marketed or organised the arrangement or had provided active assistance or advice with respect to the same. It would just be the case that an intermediary who was only involved in an ancillary capacity would not be viewed as an intermediary for these purposes.

We believe that a targeted approach towards those who pose the highest risk and who are genuinely involved in intentionally enabling another party's aggressive tax planning would be preferable for national tax administrations, and easier to implement, oversee and enforce.

Accordingly, we believe that the definition of "intermediary" should exclude the provision of basic and routine banking services, financial advisory services or activities carried out in the normal course of securities dealing (whether as agent or principal), which are provided to clients and where the bank has no active role in the tax aspects of an arrangement. We have provided examples of common banking products in the Appendix to assist with this discussion.

2. *The 'main benefit' test*

We note from Part 1 of the Annex that the hallmarks in categories A, B and points (b)(i), (c) and (d) of paragraph 1 of category C may only come within scope where they fulfil the "main benefit test[5]".

[5] That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

We believe that further guidance on the meaning of the term "main benefit" is necessary. It is not always straightforward for a company, particularly a service provider which may be only involved in part of a transaction, to determine the tax advantage and how much this contributes to the decision to undertake a transaction by a client which is likely to have received its own advice[6]. We note, for example, that a tax benefit might arise as one of several outcomes from a transaction, but the main benefit of that transaction might be to achieve a separate commercial objective. We assume that this situation would not fall within scope of the reporting requirements. In cases where an intermediary is only acting as a service provider, this test is likely to be highly subjective, and difficult to apply in practice. Further clarity, including objective criteria, would be helpful here and it is important that a consistent approach to the meaning of the term "main benefit" is adopted by all Member States. Otherwise, it is possible that a transaction may be reportable in *some* but not *all* jurisdictions, an outcome which will not facilitate helpful and efficient information sharing between different Member States as mandated by the DAC6.

The main benefit test is based on the concept of a "tax advantage". The scope of the meaning of "tax advantage" needs to be clarified, and should include consideration of the following points:

- that a tax advantage should not automatically arise where a commonly used structure uses an entity in a low tax or tax free jurisdiction, or a transaction benefits from a domestic exemption[7] to ensure tax neutrality, in for example a debt repackaging or securitisation.
- that it should be made clear in guidance that where a tax benefit is expected or contemplated by existing law or guidance in a jurisdiction, it should be out of scope of the reporting requirement.
- that the main benefit test should be interpreted in a manner consistent with the original DAC[8] and should be limited to arrangements involving only "taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities."

3. Reasonably be expected to know

An intermediary is a party who "knows or could be reasonably expected to know" that they have taken part in a reportable cross-border arrangement. It is crucial that this test is clearly defined in Member State guidance and is applied consistently across Member States.

Unless an individual acting on behalf of a financial institution has specific knowledge of a tax position with respect to a client, we would not under normal circumstances expect that individual to enquire into the affairs of a client where this is not part of the service offered and we believe that the individual should not be put in a position where it is required to do so. In our view, financial institutions should not routinely be required to undertake specific due diligence on their clients to establish whether they have tax as a main benefit or are seeking a tax advantage. Accordingly, financial institutions will act on the knowledge they have for other

[6] It was suggested by the Council WP IV on Direct Taxation in its September 2018 meeting to consult the Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/77/EU) for the definition of such activities. "Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the State of source and residence) and double non-taxation (e.g. income which is not taxed in the source State is exempt in the State of residence)."

[7] Such as the UK securitisation company regime for example.

[8] Article 2 of Directive 2011/16/EU (available here).

regulatory and professional purposes, but the DAC6 will not require any other additional due diligence for these purposes.

In this context, it is important to note that individuals within financial institutions who routinely deal with clients and review client structures may not be tax professionals, and therefore may not know if a transaction on which they are advising relies on a transfer pricing safe harbour rule (relevant to hallmark E1), how the losses of a company will be used (relevant to hallmark B1), or, whether income is being converted into capital (relevant to hallmark B2).

We note that the definition of 'reasonably be expected to know' for the purposes of the OECD's mandatory disclosure rules (MDR)[9] does not capture routine banking transactions (e.g. money transfer, custody etc.). We believe that Member State tax authorities should adopt a similar approach for the DAC6.

4. Reporting arrangements

General comments

The DAC6 does not state the information that a reporting party must report to a relevant Member State tax authority (rather it states what information competent authorities are expected to exchange). The information that must be reported needs to be clear in domestic legislation and should be consistent across all Member States.

We strongly encourage Member States to cooperate and develop a single template for reporting purposes and a single reference number system recognisable across the EU. We would encourage Member State tax authorities to work closely together to enable this. Where a reference number is allocated to a reportable arrangement, this can then be shared with other parties involved in the arrangement and other Member State tax authorities where necessary. Allocating reference numbers in this way could also help to prevent duplicative reporting.

Certain hallmarks may result in the reporting of a large volume of transactions which we believe may not be helpful to Member State tax authorities (e.g. the reporting of depreciation in more than one jurisdiction as required by hallmark C2 which is discussed later in this paper). For these hallmarks, we suggest that an intermediary should be able to submit a single certificate notifying a Member State tax authority that they are involved in transactions which fall under a certain hallmark, rather than having to file a separate report for each transaction. We believe that this would be a more efficient approach for both taxpayers and Member States tax authorities and would encourage all Member States to incorporate this into their domestic rules where applicable.

We believe that intermediaries should not have to report a transaction under the DAC6 (or there is a simplified reporting requirement) in circumstances where they have already made the relevant Member State aware of a transaction (e.g. via a ruling request or via another tax or regulatory reporting regime). This is important in order to avoid duplicative reporting and we believe that this would facilitate the implementation of the DAC6 for intermediaries.

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9 See the OECD's model mandatory disclosure rules for CRS avoidance arrangements and opaque offshore structures published in March 2018 (available here).

Specific comments

Paragraph 9 of new Article 8ab in Directive 2011/16/EU states that "an intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information has already been filed by another intermediary." Member State tax authorities should make clear which intermediary is responsible for reporting in a chain of intermediaries and that an intermediary may rely on written representations from another intermediary to discharge them of the obligation to report. This will help to avoid duplicative reporting of transactions. It may be helpful if Member States created a single form with a standardised format for these purposes.

Paragraph 14(g) of new Article 8ab in Directive 2011/16/EU, requires a reporting party to inform a competent authority about "any other Member States which are likely to be concerned by the reportable cross-border arrangement" and Paragraph 14(h) of new Article 8ab in Directive 2011/16/EU requires "the identification of any other person likely to be affected by the reportable cross-border arrangement". We note that these requirements may entail a subjective judgment to be made by a party. Neither intermediaries nor taxpayers are likely to be best placed to make that judgment and therefore Member States should allow parties to take a reasonable approach here. We would encourage Member States to make this clear in their guidance to help taxpayers such that they comply with the provision.

We believe that Member State tax authorities should make clear that where an intermediary does not have all the information which it is required to report at the time when reporting is required (e.g., it does not have a relevant TIN or the value of an arrangement), and it is important to note that a service provider may never reach a position where it has all the necessary information, an intermediary should only have to report the information that it does have before the reporting deadline. It is important that guidance makes clear that reporting should be made on a 'best efforts' basis only in order to be valid and to avoid penalties. As noted above in Paragraph 3, we do not believe that intermediaries should be required to seek out information they do not already have in order to report. We believe that this approach reflects the comments[10] set out in the summary record[11] of the meeting of the Commission's Working Party IV held on 24 September 2018.

5. Deadline for reporting of transactions

We believe that in many cases a 30-day deadline for reporting would be very challenging to comply with, given that an intermediary may need to undertake an internal review of a transaction involving several departments before determining that a reporting obligation applies. We note that unlike other reporting regimes, some details that are required to be reported under the DAC6 will not be automatically populated from a system (compared to some of the information reportable under other regimes such as FATCA/CRS/BBSI etc.) and will therefore need to be completed and reviewed by someone with an understanding of the relevant tax law. Given the fact that sensitive information needs to be reported about other parties, and that parties require a reasonable opportunity to compile the necessary information, we believe that the 30-day time period should ideally begin only once an intermediary is certain that a reporting obligation applies. Furthermore, we note that the term "made available for implementation" is vague. It would be helpful if there is clear guidance on when an arrangement is deemed to be "made available".

[10] The minutes state that "there is no specific obligation for an intermediary or relevant taxpayer to actively investigate in quest for reportable information that the intermediary/ relevant taxpayer does not hold at the first place.

[11] Available here.

6. *Legal professional privilege*

We note that certain intermediaries and/or their clients may be able to rely on legal professional privilege to avoid reporting under the DAC6 and this could result in the reporting obligation falling to another intermediary including financial institutions. We believe that where an adviser invokes professional privilege, and therefore where the principal obligation to report the transaction or scheme should fall to an intermediary or relevant taxpayer, the adviser needs to inform the intermediary or taxpayer so that it is clear that the responsibility has passed to them and they shall thus be able to assess whether they must report based on the knowledge they possess. We believe that this needs to be applied consistently across all Member States.

Furthermore, we believe that there needs to be more clarity on the role that an intermediary is expected to play where an adviser notifies an intermediary that it has invoked professional privilege with respect to a transaction and where the intermediary judges that it does not possess sufficient knowledge to report the transaction to a competent authority. In particular, it needs to be clear if the intermediary has any further obligations in these circumstances (e.g. whether it has to notify a competent authority or inform another party that a responsibility to report may apply).

7. *Soft landing approach*

New IT systems are likely to be required to accommodate the new reporting requirements and where this is not the case, companies are likely to have to undertake a significant upgrade to existing systems. Typically, it can take a minimum of 18 months to build and test a new system from the point at which the requirements for the confirmed schema template are known. Given this, and the wide range of circumstances when reporting will be required, we encourage Member States to consider a 'soft landing' approach where appropriate for the first reporting period, particularly with respect to the application of penalties. Furthermore, we believe that no penalties should be imposed where financial institutions have undertaken a reasonable approach to capturing relevant information. To that end, we urge Member States to engage with parties to agree that a company's approach to reporting is reasonable.

For the 'lookback period' (reporting applies to transactions where the first step in implementation takes place on or after 25 June 2018), we believe that it is reasonable that no penalties should be applicable *before* the date that domestic legislation is enacted. It is worth noting that for the 'lookback period', financial institutions must ensure that they act in accordance with Article 6 of the GDPR[12] concerning the lawfulness of processing information. Member States should bear this in mind where there is no framework for the reporting of information.

8. *Application of the hallmarks*

We believe that it is crucial that there is certainty in the guidance issued by Member State tax authorities on whether a reporting requirement is necessary for the following ordinary course of business products/transactions carried out on standard commercial terms:

- Lending in the ordinary course of business by banks/lending entities (including secured and unsecured funding and leases).
- Securitisation vehicles/collateralised loan obligations (CLOs) and similar structures.

[12] Regulation 2016/679 (available here).

- Structured notes (e.g. under hallmark A3 or B2).
- Stock loans and repos, swaps, futures, options, hedging, loan sub-participations, primary and secondary offerings (e.g. under hallmarks A2, A3, B2, C1, D1, D2) and M&A advisory transactions (e.g. under hallmarks B1 and D2).
- Quoted Eurobonds and other instruments exempted from withholding under domestic legislation (e.g. under hallmark A3).

In the Appendix, we provide a series of examples of ordinary course of business activity which may be carried out by financial institutions and we set out why we believe that they should not generally be caught by the reporting requirements under the DAC6. We believe that it would be helpful for Member States to have these examples in mind as they prepare their own domestic legislation and accompanying guidance, and, where possible, confirm that our interpretations are correct.

In addition, we set out below some specific comments on the hallmarks:

- **Hallmark A**
  - Hallmark A1 requires the reporting of 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". We believe that the arrangement should not be included in the reporting requirements where a tax benefit is permitted by legislation and is standard and established market practice. We set out below some examples where these circumstances may apply:
    - A transaction which takes advantage of a generally available relief (e.g. merger or rollover relief, or the maintaining of control so the conditions of the Parent Subsidiary Directive may be met).
    - Advising on transactions where a holding company is established in a jurisdiction with a participation exemption.
    - Advising clients who are issuing tax deductible Tier 1 capital or other forms of tax-efficient debt.
  - Hallmark A3 includes an arrangement that involves substantially standardised documentation, that does not require substantial customisation for implementation. Standardised documentation is used in many ordinary course of business situations (e.g., the widely used templates used across global financial markets such as Loan Market Association (LMA)[13] loan agreements, the International Swaps and Derivatives Association (ISDA)[14] Master Agreement, Global Master Securities Lending Agreement (GMSLA) and Global Master Repurchase Agreement (GMRA)). Rather, standardised documentation can reduce costs for suppliers and customers, facilitate contractual enforcement, and, in the context of regulated financial services, improve market operation and robustness. We believe that the standardised element in the document should relate directly to the intended tax advantage. This is consistent with the OECD BEPS 12 report which indicates that this hallmark is intended to capture what are often referred to as 'mass-marketed schemes', arrangements that are made available to more than one person and that use standardised documentation that is not tailored to

[13] The LMA website is available here.
[14] The ISDA website is available here.

any material extent to the client's circumstances. Therefore, we would suggest 'standardised documentation' to be interpreted in this context, rather than applying to commercially standardised documentation such as LMA and ISDA standards.

- **Hallmark B**
  - Hallmark B2 applies to arrangements that have the effect of converting income into capital. We note that this could potentially include for instance the issuance of excluded indexed security notes, which provide a capital return for a UK investor. Banks will earn derivative income which is taxable as income when hedging the notes. However, investors to whom notes are issued, will be subject to capital gains tax since the value of the note will be linked to a capital asset (such as shares). We believe that an excluded indexed security note is an example of a standard banking product which should not automatically be included in the reporting requirements and Member State tax authorities should make this clear in guidance.

- **Hallmark C**
  - Hallmark C1(a) applies to cross-border payments where a recipient is not resident for tax purposes in any tax jurisdiction. Furthermore, hallmarks C1(b)(i), C1(b)(ii), C1(c) and C1(d) require knowledge of tax residency of a recipient in a transaction. Where the recipient does not hold an account with the financial institution, the financial institution would not be in a position to know the tax residency of the recipient. We believe that the financial institution should not be required to undertake due diligence on the counterparties of their account holders in these circumstances. It would be helpful if this point is confirmed in domestic legislation and/or guidance.
  - Hallmark C2 includes circumstances where "deductions for the same depreciation on the asset are claimed in more than one jurisdiction" and hallmark C3 where "relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction". Financial institutions often operate through overseas branches. Where a group's head office jurisdiction taxes overseas branches, the group may claim depreciation or double tax relief in more than one jurisdiction. Since there is no main benefit test for these hallmarks, this would result in the reporting of a large volume of transactions in non-abusive circumstances. We understand that it was clarified[15] at the meeting of the Commission's Working Group IV on 24 September 2018 that this hallmark will not apply if the income is subject to tax in both jurisdictions. It would be helpful if this position is confirmed in domestic legislation and/or guidance.
  - Hallmark C4 includes a transfer of assets where there is a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved. Situations where an arm's length price is used, but tax law mandates a different price, should be excluded from the reporting requirements.

- **Hallmark D**

[15] The summary record states that "hallmark C2 does not apply where "deduction for the same depreciation on an asset" is claimed both in the State of the PE and the Head Office which taxes the PE profits and gives relief for double taxation by credit".

- Hallmark D(1)(f) includes arrangements that involve the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation. As presently drafted, an intermediary or taxpayer may be required to appraise the strength of the anti-money laundering rules in other jurisdictions. This may be a difficult analysis to undertake and risks incurring a penalty if a party decides that no reporting is required where it ought to have done. A list of jurisdictions considered by the EU to have inadequate or weak AML legislation should be made available, or alternatively, clarification that this is intended to be the same as either the lists produced by FATF, or the EU under Delegated Regulation (EU) 1675/2016[16].
- With respect to hallmark D2, financial institutions which are established in jurisdictions that implement AML regulations that meet appropriate global standards (such as the Financial Action Task Force 2012 recommendations) and apply those standards to their due diligence procedures for identifying or validating the controlling persons of relevant entities for automatic exchange of information purposes, should not be required to report to Member State tax authorities under this hallmark. We will provide further detail in a written example for this point.

- **Hallmark E**
    - We note that hallmark E2 covers "an arrangement involving the transfer of hard-to-value intangibles." It would be helpful to have more guidance (particularly some examples) of the circumstances which are included in this hallmark. In particular, it would be helpful to have more guidance on what it means that "no reliable comparables exist" or "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".
    - Hallmark E3 includes an intra-group cross-border transfer of assets where the projected annual earnings before EBIT of the transferor for 3 years after the transfer are less than 50% of the projected annual EBIT if the transfer had not been made. We note that assets may be transferred between jurisdictions where assets are subject to different valuation rules (e.g. one jurisdiction values assets at historic base cost). Without a 'main benefit' test, we suggest that it would be sensible that a blanket notification should apply.

9. Relevant contacts

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[16] Available here.

Appendix

The examples provided below are intended to be of assistance to EU tax authorities and Ministries of Finance as they prepare their domestic legislation and guidance implementing the DAC6.

These examples detail products and services provided by financial institutions in the ordinary course of their business activities and assess whether the provision of these products and services in normal circumstances is likely to trigger a reporting requirement under the DAC6. Our comments are focused on the DAC6 specifically and we do not consider whether financial institutions may have obligations arising from other domestic legislation.

The comments below are not in the main targeted at situations in which the financial institution has itself designed a reportable arrangement, in which case the financial institution is likely to be an intermediary as it would fall within the definition of a person who "designs, markets, organises or makes available for implementation" a reportable arrangement. Instead, our comments are primarily focused on situations in which a financial institution has provided a service or product which may have been used by a relevant taxpayer as part of an arrangement which the financial institution has not been involved in and of which the financial institution may have limited or no knowledge.

The examples below are provided for general guidance only and it is understood that each arrangement must be considered on its own merits and the individual circumstances need to be considered.

1. Provision of bank accounts and banking services

Overview

In any transaction which involves the movement of money, it is necessarily the case that a financial institution will have provided some service to the client which may include:

1. Provision of a bank account.
2. Executing payment instructions or the transfer of funds.
3. Correspondent banking - providing services to other banks in order that the international transfer of funds can reach their end destination.
4. Foreign exchange spot transactions.

It is therefore likely that for the majority of reportable transactions, a financial institution will have been involved at some point. However, most of these transactions will be implemented automatically, with a small percentage performed manually. Where necessary, transactions will be subject to regulatory checks for the purposes of sanctions legislation, anti-money-laundering etc.

Is the FI an intermediary?

A financial institution providing normal banking services on commercial terms should not be viewed as being a person that *"has* undertaken to provide…*assistance* with regards to *…making the arrangement available for implementation or manages the implementation of a reportable cross-border arrangement"* in these circumstances.

Even with knowledge of the arrangement, such a financial institution will not be providing any undertaking or commitment to assist the client with its tax planning, it is merely offering standard services which the client is using itself to assist with its arrangement. This is particularly relevant where the bank account or service facility was offered before the bank came into knowledge of the arrangement.

The financial institution is only involved in any reportable arrangement in a passive role not an active one, in responding to the legitimate requests of its clients and customers to move money or engage in transactions. The financial institution may not be able to decline to carry out the transaction on behalf of its customer unless there is a specific legal reason for doing so.

Where the use of the financial institution's services by a party to further a potentially reportable arrangement is entirely ancillary to the arrangement itself, the financial institution should not be viewed as 'making available or managing the implementation'.

Does the FI have reason to know that a transaction meets the hallmarks?

For most ordinary transactions (such as transfers of money), there is no requirement for the financial institution to ask for the purpose of the specific transaction, and therefore there would be no knowledge that the transaction formed part of a tax avoidance scheme. In most cases, the financial institution would not have any reason to know why the payment is being made.

Does the 'main benefit' test apply?

As above, even if the financial institution knows a transaction involves seeking a tax advantage, it is unlikely that the financial institution acting in the normal course of its business would be in a position to assess whether the main benefit test is met. Such an assessment in practice can only be performed by active participants or promoters of the arrangement and the financial institution would not be under any obligation to investigate or confirm the position.

2. Provision of financing, loans and mortgages

Overview

Financial institutions will provide financing to a wide range of taxpayers on a bilateral basis, ranging from SMEs through mid-sized corporates through to large multinational clients. Such services may include:

1. Provision of loans.
2. Provision of mortgages (both commercial and individual).
3. Provision of credit including overdrafts and credit cards.
4. Trade finance – a range of products to support clients in global trade, including letters of credit, guarantees, invoice factoring.

Is the FI an intermediary?

The financial institution should not be viewed as being a person that *"has* undertaken to provide…assistance. with regards to *…making the arrangement available for implementation or …manages the implementation of a reportable cross-border arrangement"* in these circumstances.

Even where a loan is an integral part of a reportable arrangement designed by another party, a financial institution should not be viewed as 'making available' or 'managing the implementation' simply because it provides services on normal commercial terms.

However, where the financial institution provides finance as part of a transaction which confers a tax benefit that the financial institution has itself designed, the financial institution is likely to be an intermediary as it would fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement.

Does the FI have reason to know that a transaction meets the hallmarks?

Financial institutions will normally have a wide range of documentation in relation to financing transactions to satisfy both regulatory considerations and commercial due diligence.

For many routine transactions, such as personal and business lending, mortgages or credit, individuals without specific tax knowledge will commonly be part of the approval process and they may not identify a tax avoidance purpose contrary to the intentions of these rules. Where an individual with relevant tax knowledge reviews the documentation, they may not be in a position to assess whether all the relevant conditions for reporting have been met unless they were actively involved with or promoting the arrangement.

Does the 'main benefit' test apply?

We note the summary record of the Commission Working Group IV meeting on 24 September 2018 which confirmed that "under Hallmark A3, standard banking contracts, such as mortgages, would not need to be reported, because the tax advantage represents an insignificant benefit as compared to other main benefits, e.g. satisfaction of housing needs."

3. Provision of structured finance and related services

Overview

Financial institutions will also provide financing for more complex scenarios involving multiple counterparties. These will typically be provided to large multinational organisations as well as to governments and supra-national bodies such as the EU or UN. Such services may include:

1. Infrastructure and project finance – providing finance to support large projects, which may involve greater complexity in terms of the loan, repayments, interest calculations and may involve multiple lenders, borrowers and guarantors.
2. Syndicated lending – the provision of finance to a company or group of companies by multiple lenders, typically managed by a single financial institution who provides administration of the loan, calculation of payments and onboarding of counterparties. Payments may be made directly to the lenders by the borrowers or may be paid to the lead bank for distribution. This may also include secondary trading of loan interests between lenders.

Financial institutions may provide solely financing in these areas or may provide both financing and administrative services on an ongoing basis.

Is the FI an intermediary?

If the financial institution provided finance as part of a tax motivated structured transaction that it had designed, the financial institution would likely be an intermediary as it would fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement.

Where that is not the case, the financial institution should not generally be viewed as being a person that has "undertaken to provide…assistance. with regards to *…making the arrangement available for implementation or …manages the implementation of a reportable cross-border arrangement"* particularly where it solely provides finance and is not engaged in the ongoing administration of the structured transaction.

Even where a is an integral part of a reportable arrangement designed by another party, the financial institution should not be viewed as 'making available' or managing the implementation' simply because it provides financing services on normal or standard commercial terms.

Where the financial institution provides ongoing administrative services, for example as the lead bank in a syndicated loan, it should not be viewed as managing the implementation of a cross-border arrangement solely because it provides ongoing services unrelated to any specific tax aspects of the lending structure.

Does the FI have reason to know that a transaction meets the hallmarks?

Financial institutions will normally have a wide range of documentation in relation to financing transactions to satisfy both regulatory considerations and commercial due diligence. That documentation may indicate that hallmarks are met, however, it is unlikely that a financial institution will be in a position to assess whether all the relevant conditions for reporting have been met unless it was actively involved with or promoting the arrangement.

Does the 'main benefit' test apply?

Where the financial institution provides services on normal commercial terms, it is unlikely that it would be in a position to assess whether the main benefit test is met. Such an assessment in practice can only be performed by active participants or promoters of the arrangement and the financial institution would not be under any obligation to investigate or confirm the position.

4. Securitisation and similar vehicles

Overview

Financial institutions will provide services which allow organisations to sell interests in future receivables to the market to generate liquidity. This may include mortgage and other credit receivables, invoice payments, and royalties or other intellectual property payments. This includes collateralised loan obligations (CLOs) which are securities, typically loan notes, which are backed by a pool of loans.

Typically, a special purpose vehicle (SPV) will be created for the purposes of the securitisation, with interests in the form of loan notes in that vehicle held by investors who receive future payments in return for an upfront investment.

SPVs created for these purposes are normally created in locations where any receivables are not taxed in the hands of the SPV itself and are passed on to the investor[17].

Financial institutions may provide a range of services to the SPV including advice on its creation and sale to investors, ongoing administration and a range of banking services including ordinary bank accounts, management of underlying receivables and the provision of various derivative contracts to assist with the management of the assets by hedging fx, interest or other risks (for example, an fx swap where the assets are held in a range of currencies but the loan notes are issued in a single currency).

Is the FI an intermediary?

Where a financial institution provides services as part of the establishment of an SPV or provides ongoing administrative services as the service provider for a securitisation vehicle, it might be viewed as an intermediary as it may be a person that has *"undertaken to provide…assistance.. with regards to …making the arrangement available for implementation or manages the implementation of a reportable cross-border arrangement".*

[17] This includes, for example, the UK's securitisation regime, which only taxes any residual income retained by the SPV.

Other services to the SPV should be viewed on their own terms, so that ordinary banking services, including derivatives used to hedge financial risks of the underlying portfolio, do not make the financial institution an intermediary in respect of those services or the arrangement as a whole.

Does the FI have reason to know that a transaction meets the hallmarks?

Financial institutions may well be in a position where they have enough information to conclude that certain hallmarks may apply.

Does the 'main benefit' test apply?

Although the structure for the SPV is likely to be chosen in part for tax reasons, the overall purpose for securitisation is more likely to be liquidity and the changing of financing maturity profiles by converting assets with ongoing revenue streams into immediate investment.

We believe that the main benefit test would not be satisfied where a market-standard structure uses an entity in a tax-free jurisdiction, or a transaction benefits from a domestic exemption[18]. The purpose of any tax planning in respect of securitisation is to ensure that any tax consequences are based on the status of the investor, and not the fact that a legal entity has been interposed in the structure for other purposes.

5. Provision of M&A and transaction advisory services

Overview

Financial institutions provide a range of services to clients in respect of corporate activity which may include mergers and acquisitions, the sale of part of a business and the securing of funding from new investors, including initial public offerings.

Those services are typically advisory in nature although they may also include other ordinary banking services provided by the financial institution.

Is the FI an intermediary?

If the financial institution provided advice as part of a tax motivated structured transaction that it had designed, the financial institution would be an intermediary as it may fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement.

Where that is not the case, the financial institution should not be viewed as a party that *"…manages the implementation of a reportable cross-border arrangement"* where it provides transactional advice or M&A support which is unrelated to the tax purposes of the transaction.

Does the FI have reason to know that a transaction meets the hallmarks?

Financial institutions will normally have a wide range of documentation in relation to the transactions to support the provision of their advice. That documentation may indicate that certain hallmarks are met, however, it is unlikely that a financial institution will be in a position to assess whether all the relevant conditions for reporting have been met unless it was actively involved in or promoting the arrangement.

[18] Such as the UK's securitisation company regime, to ensure tax neutrality in for example a debt repackaging or securitisation.

Does the 'main benefit' test apply?

Where the financial institution provides services on normal commercial terms, and the advice or service is unrelated to the tax purposes of the transaction, it is unlikely that it would be in a position to assess whether the main benefit test is met.

6. Prime Brokerage and equity derivatives business

Overview

Financial institutions (e.g. banks, brokers and custodians) provide a range of services to clients who wish to trade in equities. Such services may include:

- Entering into or arranging stock lending transactions: the lending and borrowing of stocks as part of a client's investment strategy. The financial institution may facilitate the lending between two unrelated counterparties as agent or may act as a borrower or lender of equities in a proprietary capacity.
- Writing equity derivatives such as forwards and options which provide a client with the ability to trade a stock in the future at a pre-agreed price.
- Writing equity derivatives such as swaps and contracts for difference which will typically include synthetic payments which mirror the performance of an underlying stock or basket of stocks and a financing element.
- Clearing listed or OTC derivatives.

As an additional part of the transactions noted above, a financial institution may also require collateral from a client to secure a position and may provide collateral management services to clients with large portfolios. Where equities are transferred as collateral on a full title transfer basis, that may result in manufactured payments in respect of any equities which pay a dividend whilst they are being held as collateral.

The financial institution may also provide custody and back office services to their derivative counterparties as part of their prime brokerage business.

Stock lending

Is the FI an intermediary?

In cases where the financial institution enters into a contract or provides services as part of a transaction which the financial institution has designed or organised specifically to secure a tax benefit for itself or another counterparty , the financial institution is most likely to be an intermediary as it would fall within the definition of a person who "*designs, markets, organises or makes available for implementation*" a reportable arrangement, and would likely meet the reason to know and main benefit tests. In those cases, the financial institution would need to assess the hallmarks and determine whether the transaction was reportable.

However, where a financial institution solely acts as a counterparty to a stock loan or as an agent arranging a stock loan, there is a need to clarify whether the financial institution is acting as an intermediary. Unless a financial institution is actively involved in discussions with the client to structure a transaction with regard to the client's specific tax position, it is not clear that the financial institution should be viewed as being a person that *"…manages the implementation of a reportable cross-border arrangement*" solely because it enters into a financial transaction with a counterparty.

Does the FI have reason to know that a transaction meets the hallmarks?

Whilst financial institutions will often understand the broad commercial rationale behind a client's transactions, it is generally unlikely that they will know why a client is specifically entering into that stock lending transaction and whether that transaction is tax motivated, unless the tax motivation is specifically discussed with the client and taken into account in determining the specific terms of the contract. In the absence of such circumstances, a financial institution should not be viewed as an intermediary, as it is not "designing, marketing organising or making available for implementation" a tax motivated transaction.

Clients holding stock may enter into stock lending arrangements i.e. lend stock out in return for fees arising from the demand from a borrower, and where a stock loan crosses a dividend date, they may receive compensating payments equal to the amount that they would have received had they held the underlying equity. A borrower may want to borrow stock in order to sell the stock short if it believes that it can generate profit from downward price movements, it may on lend to a third party or sit long the position. Financial institutions play an important intermediary function in this respect but may have little or no insight into the tax motivation of the client.

Dividends paid in relation to equities are often more likely to be subject to withholding tax than other income flows on stock loans such as manufactured dividends or interest. Accordingly, there could be different tax consequences for a lender and borrower of stock depending on whether it holds the underlying equity or whether it pays or receives a manufactured dividend. The tax consequences are not necessarily in the client or intermediary's favour and may include the loss of foreign tax credits or the inability to exclude dividend payments under participation or exemption regimes.

Does the 'main benefit' test apply?

As noted above, there are a broad range of commercial reasons for entering into such transactions which can include earning fee income or obtaining funding (e.g. where cash may be provided as collateral) and stock lending is an important tool to bring liquidity to the market.

We do not believe that it would be appropriate to infer a main tax benefit solely because a transaction involves a payment without withholding tax in comparison to another 'theoretical' transaction (e.g. because a manufactured dividend is not subject to withholding when a dividend payment would have been). The financial institution is unlikely to be aware of all the facts in such a case, or the specific motivation of the client.

The prime brokerage service provided by the financial institution will typically be the same irrespective of the client's rationale for entering into the transaction.

Even where a contract does confer a tax advantage, it is unlikely that a financial institution would be in the position to determine that the main benefit of such a transaction is tax unless the financial institution was party to contrived or circular transactions, such as crossing in and crossing out of stock either side of a dividend payment date (which requires a much higher level of knowledge of the client's tax motivation).

The role of the SFTR and EMIR

We note that information gathered as a result of reporting under the Securities Financing Transactions Regulation[19] (SFTR) may include data that a tax authority would find helpful to assess whether particular counterparties may be entering into tax motivated transactions.

SFTR reporting is required by financial institutions in all Member States and covers stock lending transactions and repos as well as other transactions. For example, reports submitted to regulators include, on a transaction-by-transaction basis:

- The issuing country of the underlying stock.
- Some identifying information of a counterparty.
- The value of the transaction.
- The relevant dates for the transaction.

Given that a financial institution may be unaware of any specific tax motivation for a transaction, the use of data provided for the purposes of the SFTR may be an alternative and more effective means to identify transactions about which a tax authority may wish to investigate a tax motivation. As reporting is submitted by all financial institutions in a jurisdiction to a single regulator, tax authorities may be able to obtain a more complete view of the activities of a party than the information provided by a single financial institution based on its dealings with that same party by accessing that information through the regulator.

For derivative transactions, reporting under the European Market Infrastructure Regulation (EMIR)[20] on derivatives, central counterparties and trade repositories may provide similar information to allow tax authorities to assess derivative trades by accessing information through the regulator.

We would be happy to discuss the requirements under these Regulations in more detail if that would be helpful.

Equity derivatives

Is the FI an intermediary?

In cases where the financial institution enters into a contract or provides services as part of a transaction which the financial institution has designed or organised specifically to secure a tax benefit for itself or another counterparty, the financial institution is most likely to be an intermediary since it would fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement, and would likely meet the reason to know and main benefit tests. In those cases, the financial institution would need to assess the hallmarks and determine whether the transaction was reportable.

However, where a financial institution solely acts as a counterparty to an equity derivative, there is a need to clarify whether the financial institution is acting as an intermediary. Unless a financial institution is actively involved in discussions with the client to structure a transaction with regard to the client's specific tax position, it is not clear that the financial institution should be viewed as being a person that *"...manages*

19 Regulation 2015/2365

20 Regulation 2012/648.

the implementation of a reportable cross-border arrangement" solely because it enters into a financial transaction with or provides services to a counterparty.

Does the FI have reason to know that a transaction meets the hallmarks?

Whilst a financial institution will often understand the broad commercial rationale behind a client's transactions, it is generally unlikely that it will know why a client is specifically entering into a derivative transaction and whether that transaction is tax motivated, unless the tax motivation is specifically discussed by the client and taken into account in determining the terms of the contract. In the absence of such circumstances a financial institution should not be viewed as an intermediary as it is not "designing, marketing organising or making available for implementation" a tax motivated transaction.

A counterparty may write an equity derivative with a financial institution as opposed to purchasing an equity. There are important commercial drivers which will influence the client's choice. For example, the client may take synthetic exposure to an equity under a derivative rather than holding the equity because it does not want the associated funding cost which it incurs when funding the acquisition of the equity. It may be that the client is "shorting" its exposure to the equity or obtaining optionality or stop loss features in a non-delta 1 arrangement. Tax may also be a factor in the client's decision-making e.g. dividends paid in relation to equities may be more likely to be subject to withholding tax than other income flows under a derivative or there may be reduced transaction tax costs. We note though that the tax consequences may not be necessarily in the client's favour and may include for example the loss of foreign tax credits or the inability to exclude dividend payments under participation or exemption regimes.

Does the 'main benefit' test apply?

As noted above, there may be a broad range of commercial reasons why a client may wish to write an equity derivative transaction as opposed to holding the underlying equity e.g. transactions costs, liquidity concerns, ability to leverage, access to more remote markets and other regulatory reasons.

We do not believe that it would be appropriate to 'infer' a main benefit tax advantage solely because a transaction involves a payment which does not attract a withholding tax in comparison to another 'hypothetical' transaction (e.g. because a derivative payment is not subject to withholding when a dividend payment would have been). The financial institution is unlikely to be aware of all the facts in such a case, or the specific motivation of the client.

Even where a contract could confer a tax advantage, it is unlikely that a financial institution would be in a position to determine that the main benefit of such a transaction is tax. Clients may also use multiple intermediaries so no one financial institution may have visibility on its client's overall position or on the position of both sides of any transaction. In such cases, the financial institution or other intermediary will not have reason to know what tax benefit is being obtained or by whom.

Discussion of specific hallmarks

Hallmark A2 – The fee income on most stock lending transactions is driven primarily by commercial considerations which include the price that a borrower is willing to pay for the temporary use of the security, the borrower's or lender's other positions which it may need to hedge or reduce exposure to, and the price set by others offering the same service in the market.

The fee is rarely dependent on tax benefits being achieved by one of the parties to the stock lending transaction. However, in circumstances where this is the case, we would expect the transaction to meet this hallmark.

Payments in respect of equity derivatives are also not dependent on tax benefits, payments under swaps are based on market rates and will fluctuate with supply and demand and are bilateral payments which are not dependent on any other amount being received or paid on any hedge.

Hallmark A3 – Although template documentation is published by various bodies, it is subject to bilateral negotiation between parties before it is agreed. Such contracts include, for example, Global Master Stock Lending Agreements issued by the International Securities Lending Association (ISLA) and Master Agreements issued by the International Swaps and Derivatives Association (ISDA) and have been developed over time for commercial reasons and not to secure any tax advantage or benefit. In practice, negotiations are conducted as part of onboarding processes and can be lengthy discussions and will involve reviews undertaken by specialist individuals from a variety of business areas including tax and legal.

The OECD BEPS 12 final recommendations[21] state that this hallmark is intended to capture what are often referred to as 'mass-marketed schemes' where the standardised terms relate specifically to the tax benefit and can deliver this tax benefit without being tailored to any material extent to the client's circumstances. We believe that neither derivatives nor stock loans in normal circumstances could legitimately be described as "mass-marketed schemes". We suggest that 'standardised documentation' is interpreted in this context, rather than applying to commercially standardised documentation that is subject to negotiation and designed to facilitate the smooth functioning of the market such as ISLA and ISDA standards.

Hallmark B2 – As noted above, in certain cases, the client will receive a different type of income than if it had not entered into the transaction. In the case of stock lending, the lender would otherwise have received a dividend and instead receives a manufactured payment representing the dividend.

Unless designed as part of a structured transaction to improve the client's position, the financial institution will not have knowledge of the specific tax treatment of each income type in the client's hands and will not therefore know whether it is either exempt or taxed at a lower rate.

In any event, hallmark B2 of the DAC6 discusses the "conversion" of income and provides an example of the conversion of income into capital, as well as the conversion of income taxed at a lower rate or income that is exempt. Under a stock lending arrangement, there is no conversion of income from one category into another, such that the original income no longer exists. Rather, there is an additional income stream i.e. the manufactured dividend that may be treated as interest rather than a dividend. However, the dividend payment, the original income, has not been converted and still exists, albeit received by a different party. This is also the position with an equity derivative.

[21] Available here.

7. Products subject to reporting under CRS (DAC 2)

Overview

Financial institutions have been at the forefront of commitments to tax transparency, with unprecedented programmes running in the past few years to implement the US Foreign Account Tax Compliance Act (FATCA) programme and the OECD's Common Reporting Standard (CRS). Both regimes impose new standards on financial institutions in the identification of customers and reporting to tax authorities.

The CRS requirements would apply to financial institutions providing a wide range of services, including for example:

- Provision of bank accounts and banking services (see example 1).
- Certain investment banking transactions (see example 6).
- Custody services (see example 9).
- Wealth management services, which may include investment advice, execution-only transactions in debt and equity and active portfolio management.
- Trust and trustee services, where the financial institution acts as trustee/administrator, or assumes some of the responsibilities, for a trust or personal investment company. This should be distinguished from cases where the financial institution provides other services to a trust or personal investment company.

In these cases, further guidance is needed on the application of the hallmarks in section D to the responsibilities of the financial institution.

Is the FI an intermediary?

This will be determined for each service which a financial institution provides. As noted in example 1, a financial institution should not be viewed as an intermediary solely because it provides services to a client at the client's request.

In cases where a financial institution is acting in an ongoing capacity, such as providing trustee or administrative services, it is more likely that it would be viewed as *"managing the implementation of an arrangement".*

A financial institution which offers a specific product to remove the reporting obligation under hallmarks D1 or D2 is most likely to be an intermediary as it would fall within the definition of a person who "designs, markets, organises or makes available for implementation" a reportable arrangement.

Discussion of specific hallmarks

Hallmark D1 – the DAC6 refers to *"an arrangement which may have the effect of undermining the reporting obligation"*. A wide range of banking services may result in an account or balance which was previously reportable no longer being reportable. These could include for example the movement of money from a CRS reportable jurisdiction to a non-reportable jurisdiction (including the US), a client investing in assets which are not reportable under the regime (such as commodities or cryptocurrency) or simply a client withdrawing income to buy a property.

Although such transactions result in assets of a client no longer being reported for CRS purposes, they cannot be said to undermine the policy intent of the CRS; the change in account balance is merely a result of the scope of the definition of financial asset and financial account.

The OECD states that *"For the purposes of this Rule 1.1, an Arrangement is not considered to have the effect of circumventing CRS Legislation solely because it results in non-reporting under the relevant CRS Legislation, provided that it is reasonable to conclude that such non-reporting does not undermine the policy intent of such CRS Legislation."*

A similar approach should be adopted in respect of the DAC6, with guidance to support the view that a specific intention is required by the client to escape reporting under the DAC6. In practical terms, that would mean that such an arrangement would be reportable where:

- A client has a specific intention to escape CRS reporting.
- That intention is communicated to the financial institution.
- The financial institution is acting as an intermediary in respect of the transaction.

Hallmark D2 – the DAC6 refers to circumstances in which the controlling persons for the purposes of CRS are 'made unidentifiable'. Financial institutions will deal with entities with controlling persons in many circumstances, and in most cases will rely on customer due diligence procedures as per AML requirements to determine the controlling persons and the self-certifications collected in line with the CRS rules to determine tax residence. It would be impracticable in most cases to determine whether a controlling person had been made unidentifiable without actual knowledge.

As above, in practical terms, that would mean that such an arrangement would be reportable where:

- A client has a specific intention that one or more controlling persons should not be identified under normal CRS procedures.
- That intention is communicated to the financial institution.
- The financial institution is acting as an intermediary in respect of the transaction.

Where a financial institution operates in a jurisdiction that applies an AML standard comparable to the FATF's Recommendations of 2012[22], or a higher standard, and that financial institution identifies all relevant controlling persons as required by the CRS rules in its jurisdiction in line with AML standards, we suggest that hallmark D2 should not apply to validly documented clients using either self-certifications or due diligence procedures unless a financial institution has specific knowledge that an arrangement to circumvent CRS has been implemented.

8. Tax incentivised transactions

Overview

Some services which are provided by financial institutions will be designed to access a specific tax benefit within domestic legislation. That may include tax-incentivised savings or investments, pensions and

[22] See here.

retirement savings, specifically structured investments or transactions, or services which help clients to manage their tax affairs.

Such services would include products established under legislation or those agreed with the tax authority.

Financial institutions would need to assess in these circumstances whether they meet the test for being an intermediary and whether any hallmarks are present. However, it is expected that there will be cases where common products would meet these requirements. In such cases, it seems impractical for the domestic tax authority to require reporting of the transaction which are agreeable to all parties.

Recital 10 of the DAC6 states that "…the primary objective of this Directive concerning the reporting of potentially aggressive cross-border tax-planning arrangements…". There are numerous other mentions of aggressive tax planning throughout the recitals.

Transactions which are within domestic legislation or are agreed with the tax authority cannot be said to be aggressive tax planning and should be excluded from reporting.

In terms of giving this effect, we understand that the DAC6 does not allow for the provision of a 'white list' of transactions which do not need to be reported. We would propose that such transactions are addressed through two routes:

- Confirmation that a tax treatment which is established in legislation or by agreement with tax authorities does not constitute a 'tax advantage' for the purposes of the main benefit test.
- For those hallmarks without a main benefit test, clear guidance on the application of the hallmarks to exclude agreed transactions.

9. Custodian services

Overview

Financial institutions provide a wide range of support services to clients to help them invest in a wide range of assets including equities, bonds, commodities, currency and other investment vehicles. The customer base typically includes large investors, including pension funds, investment entities, governments, sovereign wealth funds and other financial institutions.

Services may include:

- Execution and clearing services to buy and sell investments.
- Safekeeping and other custodial services to hold the assets.
- Processing corporate events which includes receiving income (dividends, interest etc) into accounts on behalf of the client.
- Provision of information to investors in relation to income received, corporate events, annual general meetings and other voting requirements.
- Provision of investor reporting services, including tax information.
- Processing of withholding tax reclaims on behalf of the underlying investor – this will typically include the collection of tax residency documentation from investors, along with other documentation which

may be required by the local tax authority, and the submission of that documentation to make a reclaim of withholding tax based on entitlements under local law or double tax treaties. Withholding tax reclaim procedures vary greatly between countries (and are subject to EU initiatives to align and streamline processes) and financial institutions will provide support in respect of the administrative requirements in each jurisdiction where the service is offered. However, financial institutions will not normally provide tax advice – for example, whether an investor meets the criteria for making a reclaim; it is the responsibility of the investor to make that determination, taking independent advice as needed.

Is the FI an intermediary?

It is likely that the financial institution would be viewed as being a person that *"…manages the implementation of a reportable cross-border arrangement"* and would therefore be a potential intermediary.

Does the FI have reason to know that a transaction meets the hallmarks?

Financial institutions may hold a wide range of documentation in relation to the investor's tax residency position. However, for the majority of hallmarks, the relationship between the custodian and the investor will mean that the custodian would not know why the investor was choosing a specific investment and would not know that the investor was engaging in a tax motivated transaction.

As with other services, if the financial institution provided advice or support as part of a tax motivated transaction that it had designed, the financial institution would be an intermediary as it would fall within the definition of a person who *"designs, markets, organises or makes available for implementation"* a reportable arrangement.

Does the 'main benefit' test apply?

A custodian providing services on normal commercial terms is unlikely to be able to assess that a main benefit test has been met. The administrative and support services in relation to withholding tax reclaims are not likely to be viewed as a tax benefit under the terms of the DAC6. In this case, the role of a custodian is limited to assisting an investor to access the correct rates of withholding tax.

Discussion of specific hallmarks

It seems likely that the only hallmark which would apply to custodian services is A3 – the use of standardised documentation.

Investors who engage a custodian for tax reclaim services will sign a standard contract. However, that relates only to the administrative assistance that the custodian will provide in relation to tax reclaims. We do not believe that these contracts match the OECD BEPS 12 description of 'shrink-wrapped' or 'plug and play' schemes which are easily replicable and confer a tax advantage. Accordingly, it would be appropriate to conclude that this hallmark is not met for 'normal' custodian services as the standardised documentation requirement is not met.

Sent by MOUTARLIER Valère (TAXUD) <valere.moutarlier@ec.europa.eu>. All responses have to be sent to this email address.

Dear Mr Kaiser,

Thank you for your message and comments of 11 March 2019 on the implementation of the new mandatory disclosure rules for intermediaries as laid down in Council Directive 2018/822/EU (the Directive). We are aware that stakeholders are very interested in the legislation, some suggesting the legislation goes too far, some suggesting it does not go far enough and we are always prepared to respond to submissions such as yours.

I would also like to thank the European Banking Federation (EBF) and the Association for Financial Markets in Europe (AFME) for the support of measures enhancing tax transparency, which is very high on the Commission's agenda, and your strong interest in achieving a consistent application of this Directive across the European Union. Recent scandals and revelations have provided evidence that expertise and advice by intermediaries can play an important role in taxpayers' strategies to set up schemes with the aim to avoid taxes or circumvent reporting obligations. I would like to emphasise that the Directive includes no element of pre-judgement, meaning that a reportable scheme is not presumed to be illegal or illegitimate. Therefore, we would not characterize a disclosure in accordance with the Directive as an 'unduly triggered reporting requirement', but rather as an instrument that provides useful and timely information for tax administrations to combat potentially aggressive tax planning schemes.

As the Directive has been adopted unanimously by the 28 Member States it is now for each of them to transpose it into domestic law by 31 December 2019. From our point of view, our first priority task for the time being is to ensure a consistent transposition into national law. It is for this purpose that in September 2018, we organised a full-day meeting with Member States to discuss questions regarding the transposition of the Directive. Our impression was that the meeting was perceived as being very useful. Until today we have not received requests for additional meetings from any Member State. Therefore, we have no plans to repeat the exercise.

I should emphasise that the text of the Directive has been adopted and cannot be unilaterally changed by the Commission or a Member State. Member States, however, are free to issue additional guidance based on their national law. The Commission does not intend to provide EU implementation guidelines and clarifications. The Directive is a minimum harmonisation instrument and it is thus not for the Commission to provide interpretation that goes further than the recitals, provisions or guidance provided by the Directive itself.

With respect to the reporting arrangements and the reference to a single template in your document, we would like to reassure you that the development of a standard form is a task of the European Commission. Currently, we are in the last stages of adopting an implementing regulation on standard forms. This includes a reference number and we will also be involved in the preparation of an XML schema. Based on this, the Member States will be in the position to finalise their transposition measures which will enable the reporting to the competent authorities and exchanges of information through the Central Directory in an efficient manner. Building on our experience in creating the Central Directory for exchanging information on cross-border tax rulings under DAC3, we can reassure you that the timing laid down in the Directive for creating the necessary IT environment is workable. It follows that the IT arrangements will be in place by 31 December 2019; that is well before the first reporting is due on 31 August 2020. If the reporting obligation is not complied with, the Member States shall apply effective, proportionate and dissuasive penalties. This obligation is applicable to both the current period (i.e. 25 June 2018 – 30 June 2020) and the period that starts with the application of the Directive (i.e. 1 July 2020).

In parallel, DG TAXUD colleagues are in contact with different groups of stakeholders who wish to be kept informed of developments and business input is taken into account, where the suggestions are within the scope of the Directive and not designed to weaken or circumvent it. The Commission will carefully monitor the functioning of the new reporting obligations under the Directive and comply with its legal obligation under the Treaty to carry out a conformity check of the transposition in each Member State.

As a last point, you refer to sharing examples with the OECD. I am slightly confused by this reference to a set of non-binding model rules (OECD) which only relate to one of the five hallmark categories of the Directive (i.e. Hallmark Category D). I hope that you share my support of the higher more comprehensive mandatory standard that Member States introduced with the Directive.

Yours sincerely,

Valère Moutarlier
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Mr Stephen QUEST
Director General
European Commission
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Email: Stephen.QUEST@ec.europa.eu

Subject: Implementation of DAC6

Dear Mr Quest,

The European Banking Federation (EBF) supports the efforts of the European Commission and the EU Member States to address international tax avoidance and is committed to fostering a consistent and workable implementation of international standards.

A few months ago, we shared with you a joint EBF-AFME comment letter on Council Directive 2018/822 of 25 May 2018 on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6).

As the DAC6 introduces additional reporting requirements for companies including financial institutions, it is crucial that these are adequately targeted in order to generate useful and effective information for tax authorities trying to counter aggressive tax planning.

Unfortunately, a significant level of legal uncertainty remains with regard to DAC 6 and its effects on Financial Institutions. There is a general consensus view amongst the industry that sufficient guidance is needed in order to clarify how the rules should be applied in practice. The absence of such guidance one year from the 1 July 2020 date of application of DAC6 puts Financial Institutions in a very difficult position. In this respect, a postponement of the date of application until 1 January 2021 should be considered.

There is also a very broad view which is shared by tax authorities in many Member States that the Commission can play an important role in encouraging a consistent and harmonised approach to implementation. To our knowledge, this will be on the agenda for a Council meeting to take place on Friday, 21 June.

Ahead of this meeting, we would like to remind you of our general and specific concerns that you will find below. We further elaborated on these in the attached EBF-AFME paper of March that notably includes a set of examples of such ordinary course of business transactions which we consider likely to unduly trigger reporting requirements unless otherwise clarified in domestic legislation.

General Comments:

1. **Scope creep/deviation from the Directive** – Some EU member jurisdictions appear to be expanding the scope of DAC6 to be wider than the Directive to include domestic transactions as well as cross border transactions. Additional taxes are also being included (e.g. VAT). The disconnect on DAC6 introduces significant complexity in designing and implementing an appropriate IT reporting system within an international organisation. This disconnect is likely to lead to greater misreporting. For instance, the definition of the "main benefit test" and "tax advantage" is being interpreted differently across EU member states. This is already leading to bulk reporting (of plain vanilla arrangements / products) in some jurisdictions whereas in other jurisdictions we understand these definitions are being interpreted such that only tax avoidance arrangements are being targeted. All member states should commit to a common approach to implementation including interpretation of hallmarks and reporting processes. All member states should respect the anticipated framework of DAC6 (i.e., reporting to home country tax authorities which then share with other tax authorities as appropriate).

   We are presently particularly concerned by the potential extra-territorial application of domestic hallmarks bolted on in the local implementation of DAC6 in Poland. For instance, it appears that Polish rules may require disclosure by an entity outside Poland of the receipt of Polish source income (interest, dividends, potentially gross sales proceeds from the sale of Polish securities, etc.) above a fairly low (PLN 25m) monetary threshold even in situations where there is no tax motive. If this is replicated across other EU member states, this will make compliance unduly burdensome, subject to legal and data privacy risks and could act as a significant barrier to the smooth operation of the capital markets.

2. **Guidance/legislation/Harmonized consultation on the reporting process** – Publication of official guidance and draft legislation by tax authorities has been slow with many jurisdictions still to publish this. In the absence of guidance, it is difficult to track what arrangements should and should not be reportable within the retrospective reporting period. The date of implementation of DAC6 has also differed across EU Member States. Reporting will be challenging regardless, but such inconsistency will multiply the complexity of the regime.

   Industry and government should cooperate in the design of the reporting process (e.g., determining a protocol to avoid multiple reporting of the same transactions), we should be able to develop a process that is more administrable for both tax authorities and reporting institutions.

3. **Provide adequate time**. Agree to a minimum implementation gap (e.g., 9 months) between enactment of final rules and effective date. Some countries have accelerated implementation and allowed almost no time for potentially impacted parties to evaluate their obligations and create processes to capture and report.

Specific comments/issues:

4. Banking products provided on commercial terms should not give rise to a financial institution meeting the requisite knowledge threshold required of an intermediary and it should further be recognised that ordinary due diligence activities for such products do not require an explanation of a client's underlying tax planning or rationale. Ordinary banking activities would not trigger scrutiny from a tax perspective and the individuals responsible for product delivery and client management are not tax experts – therefore, any reporting regime must be based on some sort of tax risk giving rise to escalation to in-house functions, who then determine whether a reporting obligation exists. Such escalation must be based on some type of atypical fact pattern, justifying further review from in-house tax advisors – otherwise we run the risk of having a regime that requires tax departments to review every transaction that occurs, which is physically impossible bearing in mind the volume of financial transactions per day.

5. DAC6 should be solely targeting tax avoidance and tax evasion, therefore any arrangements that confer a tax benefit or meet a hallmark but are clearly within the letter of the law and policy intentions of the relevant tax legislation should be excluded from reporting. For example, arrangements where the tax outcome is certain and there are no contrived or artificial features in the arrangements to produce this outcome or where the arrangements are subject to a tax ruling on a fully disclosed basis should not need to be reported.

   If bulk reporting of arrangements is envisaged, the industry would encourage Member States to consider allowing reporting institutions to register a transaction by providing a description, hallmarks and tax consequences. Instead of providing details of every single transaction, the entity that registers the transaction agrees to make details of specific transactions available on request. Registrations could also be made public. Any other entity engaging in transactions that have been publicly registered can satisfy their obligations by informing their tax authorities that they participate in those type of transactions and agreeing to make details available on request. This will allow tax authorities to understand potentially relevant activity (which we understand to be the objective) without being inundated with very high-volume reporting of essentially identical transactions.

6. The law should not impose onerous obligations retro-effective to 25 June 2018 as Intermediaries presently have no legal obligation in most EU member states to perform reporting and there is also no guidance on the scope of reportable arrangements. It would therefore be unfair to require Intermediaries to definitively catalogue all reportable transactions, when such a determination will turn on guidance to be published. Obligations on service provider intermediaries should be limited to actual knowledge in the case of such prior arrangements. There should be no obligation on service provider intermediaries to review arrangements where services were already being provided before 25th June 2018 notwithstanding the specific reporting obligation trigger for service providers in the last paragraph of Article 8ab1.

7. The timing of a reporting obligation is triggered under the directive in the following scenarios:
   a. on the day after the reportable cross-border arrangement is made available for implementation; or

b. on the day after the reportable cross-border arrangement is ready for implementation; or
c. when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first.

Rather than having all three as catch-all triggers, the exact circumstances of an arrangement should determine which trigger applies. For example, if an intermediary becomes aware of a mass marketed tax exploitation scheme, the first trigger – available for implementation – makes sense. However, in the context of a bespoke merger or acquisition, an advisory firm or other intermediary should not be obliged to report on a proposed arrangement merely because certain preliminary actions have been taken – in such cases, as a policy matter, it would be more sensible for reporting to be triggered once a transaction actually occurs. That is because the structuring of a transaction may not be agreed upon and any reporting during the planning stages would be premature. The reporting of a proposed arrangement could result in time lost for both tax authorities and taxpayers where the arrangement was never in fact implemented.

8. The 30-day reporting time limit should only run from the time when a Service Provider Intermediary, acting in good faith, has determined it has a reporting obligation – including seeking internal advice and clearances. As a matter of market practice, Financial Institutions and other service providers will need to seek advice and sign off from a variety of internal stakeholders (tax, legal, compliance, senior management) prior to concluding that a reporting obligation exists. It will also be necessary to contact the client for verification and further details. If the 30 days were to run simply from when a service is provided, it is possible that many large firms will not have been able to seek appropriate internal views before expiration of that time. We would suggest an extension from 30 days to 90 days, particularly for service providers.

9. It would be wise to limit the scope of tax advantage to direct taxation that an EU taxpayer benefits from the reportable cross-border arrangement anywhere in the world, rather than any kind worldwide tax benefit being sufficient to meet the main benefit test. For example, if an EU company participates in an arrangement where another member of its group obtains a deduction outside the EU and the arrangement otherwise meets a hallmark, that might be in scope. However, in scenarios where an EU intermediary simply has a non-EU client and that client might derive a local tax advantage – with no EU nexus – it is odd that would trigger a reporting obligation under DAC 6. Further, it would effectively require an EU intermediary to judge the concept of "tax advantage" in a third-party country applying EU standards to a taxpayer that is not resident in the EU. At any rate, clarity is needed as Financial institutions will be subject to significant GDPR penalties if client information is shared over and above what is required by law.

10. It is clear that the intention of the OECD regarding the adoption of the "standardised documentation" hallmark was to capture products that "are mainly tax driven" and are "highly unlikely ... to be sold without the tax benefit. (See OECD/G20 Mandatory Disclosure Rules, Action 12: 2015 Final Report, Paragraphs 103-105). In other words, the target is clearly to capture transactions involving standardized documentation designed to achieve a tax objective. We would propose confirmation on a harmonized basis that this is the agreed interpretation and that documentation that has been standardized to facilitate the creation of common market practices in respect of

ordinary course business transactions should not be considered within the scope of this hallmark.

11. Hallmark C1(b)(ii) – payments to countries on the EU blacklist – as this list can change without notice, guidance is needed on when this test should be applied (e.g. is the test at the point of payment or reporting?), in particular during the transaction period. In addition, if the test must be applied e.g. at the point of the payment and is made to a country that is off the list, has to be also specified that the arrangement should not be reported if the country gets on the list by the reporting date.

12. Additional guidance is needed for service providers on the meaning of providing "… aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement". The key question here is whether the services must be material to the design, marketing, organising, making available or managing of the implementation? Banks provide such a broad range of services – many of which are fundamental to the raising and movement of capital – that we could provide tangentially related services, but in fact play no material role in any part of the design, marketing, or management of the tax planning/structuring, of an arrangement. Service providers need this clarity in order to implement internal procedures and systems that are proportionate to the objective of the Directive which is to deter aggressive tax-planning practices and which is not a mechanism to report all transactions.

13. The Directive is unclear on how to handle branches in other countries, especially outside the EU for which clarification is required. We have noted a couple of approaches in the market.

- A first approach would be following the FACTA/CRS methodology: *"The term "Reporting Financial Institution" means any Member State Financial Institution that is not a Non-Reporting Financial Institution. The term "Member State Financial Institution" means:*
  (i) any Financial Institution that is resident in a Member State, but excludes any branch of that Financial Institution that is located outside that Member State; and
  (ii) any branch of a Financial Institution that is not resident in a Member State, if that branch is located in that Member State" (cf. Section VIII of Annex I of the DAC2)

- The other approach would be to report for every branch (worldwide) of a Financial Institution located in a jurisdiction based on the domestic law and according to the Guidance notes of this jurisdiction.

Yours sincerely,

Wim MIJS
Chief Executive Officer