Directive on the Mandatory Disclosure of Potentially Aggressive Tax Planning Arrangements

5th Amendment to the DAC
The New Initiative

- **Policy objective**
  - To increase the effectiveness of tax authorities in tackling cross-border tax avoidance and evasion in the internal market

- **How?**
  - By reporting potentially aggressive tax planning schemes to the tax authorities &
  - **Sharing** information with all Member States
  - Expected outcome: deterrent effect

- This proposal **amends the DAC**
International Context

• OECD
  ❖ BEPS Action 12 (2015)
    □ Compilation of features of national regimes worldwide
    □ No minimum standards
    □ No best practice recommendations
  ❖ Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures (2018)

• 3 national regimes: IE, PT, UK.
Main Concepts

• **Cross-border Arrangements** that include at least one indicator – 'Hallmark' – are **reportable**

  ❖ Only cross-border arrangements are reportable:
    - Two or more Member States; or
    - One Member State and a third country

  ❖ An arrangement includes a **series** of arrangements & comprises **steps or parts**.

  ❖ **Marketable & Bespoke** Arrangements
Main Concepts

- The **hallmarks** determine what arrangements are reportable
  - There is **no presumption of tax avoidance**
  - The **authorities may investigate** whether there is an illegitimate tax practice based on the information
- **No action** by the authorities does **not imply acceptance of validity or the tax treatment**
- Taxes covered coincide with the scope of the DAC
Personal Scope –
Who is liable to report?

- Primary reporting obligation lies with the **Intermediary**. **Who** is an Intermediary?

- Conditions for qualifying as an Intermediary

- The reporting obligation is shifted to the **Relevant Taxpayer** if:
  - **No intermediary** (in-house schemes)
  - **Waiver** (legal professional privilege)
  - **Outside the EU**
Personal Scope – Who is liable to report?

- What happens where there is more than one Intermediary?

- Joint and several liability – all intermediaries involved in the same reportable cross-border arrangement

- unless evidence that the same information has been filed by another intermediary
Personal Scope – Who is liable to report?

- **Waiver** due to Legal Professional Privilege

- **Obligation to notify** any other intermediary or, if there is no such intermediary, the Relevant taxpayer of their disclosure obligations

- Professional secrecy rules remain national
Personal Scope – Who is liable to report?

- What happens where there is more than one Relevant Taxpayer?

- Information to be filed by the Relevant Taxpayer that agreed the arrangement with the Intermediary;

- Or if there is no such Taxpayer, the Relevant Taxpayer that manages the implementation of the arrangement.

- Each Relevant Taxpayer shall report annually that it keeps using a certain arrangement.
Timing – When is the reporting due?

• **Intermediaries & Taxpayers:** within **30 days** beginning:
  - On the day after the reportable arrangement is made **available for implementation**; or
  - On the day after the reportable arrangement is **ready for implementation**; or
  - When the **first step in implementing** the arrangement has been made.

• For **marketable** arrangements, **periodic** reporting every 3 months – clients' list update
Where is the reporting due?

- **Intermediaries** shall file information with the **competent authorities of the Member State** that features first:
  - Their tax residence;
  - There is a PE linked to the arrangement;
  - Incorporated or governed by the laws of;
  - Registered with a professional association.
Where is the reporting due?

- **Relevant taxpayers** shall file information with the **competent authorities of the Member State** that features first:
  - Their tax residence;
  - There is a PE that benefits from the arrangement;
  - They receive income or generate profits in a Member State although they are not tax resident or have a PE in any Member State;
  - They carry on an activity in one or more Member State although they are not tax resident or have a PE in any Member State.
Exchange of Information

- The disclosed information is exchanged **automatically**
- Exchanges take place **within one month after each quarter** of the year in which information was filed
- It is made **available to all Member States** on a Central Directory set up by the Commission
- The **Commission** has **limited access** to this information in order to monitor the functioning of the Directive
Penalties

- Design is left to Member States – national law
- Penalties shall be effective, proportionate & dissuasive
Hallmarks (i)

- Generic hallmarks & some of the specific ones require an additional "main benefit" test;

- A tax advantage is the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement.
Hallmarks (ii)

- Generic hallmarks + "main benefit" test
  - **Premium or contingency fee** fixed by reference to the amount of the tax advantage (incl. refunds)
  - **Marketable** arrangements: substantially standardised documentation and/or structure which are available to more than one relevant taxpayer without a need to be customised.
Hallmarks (iii)

- Hallmarks B.1 – B.3 + "main benefit" test
  - Use of (cross-border) **losses** to obtain a tax advantage
  - **Round-tripping of funds**
  - **Converting** income into other categories of revenue taxed at lower level
Hallmarks (iv)

- **Hallmark C.1(b)(i)&(ii) + "main benefit" test**
  - Cross-border payments
  - between associated enterprises
  - Source: deductible
  - Recipient's tax residence:
    - (i) No corporate tax or corporate tax at zero rate or almost zero rate; or
    - (ii) On a list of non-cooperative jurisdictions
Hallmarks (v)

- Hallmarks C.1(c)&(d) + "main benefit" test
  - Cross-border payments
  - between associated enterprises
  - Source: deductible
  - Recipient's tax residence: **(c) full tax exemption & (d) preferential tax regime**
Hallmarks (vi)

- **Hallmarks C.2 – C.4**
  - *Same depreciation* claimed on a specific asset in more than one jurisdiction
  - Cross-border *transfers of assets* & there is a *material difference* in the amount treated as payable in consideration for the assets in the jurisdictions involved
Hallmarks (vii)

- Hallmark D.1 & D.2 – AEoI & Beneficial Ownership
  - Arrangements that **may have the effect of undermining** the reporting obligation
    - under DAC 2 or
    - any equivalent international agreements, incl. with 3rd countries or
    - By taking advantage of the absence of legislation or agreements
Hallmarks (viii)

- Hallmarks E.1 – E.3 – Transfer Pricing
  - Unilateral safe harbour rules
  - Hard-to-value-intangibles
  - Business re-organisations leading to BEPS (impact on the projected EBIT)
Information to the Commission

- Information for evaluating effectiveness in combating tax avoidance and evasion (Art. 23(2))
- Yearly assessment re AEOI (Art. 23(3)): effectiveness and results achieved
- **Statistical data** for evaluation of the Directive (Art. 23(4))
Retroactivity

- Unlike DAC 3, there is no retroactive effect

  However:

- The reporting obligation includes arrangements the first step of which was implemented after the Directive enters into force.

- Information to be reported by 31st August 2020.

- Existing arrangements become reportable if they are modified subsequently
Important Dates

- **By 31st December 2019**: national transposition measures
- **From 1st July 2020**: application
- **By 31st October 2020**: first (regular) AEoI
- **Every 5 years after 1st January 2013**: Commission report
- **Every 2 years after 1st July 2020**: evaluation of the relevance of the Hallmarks – Commission report – (possibly) legislative proposal.