



# EU Mandatory Disclosure Regime — an update on the state of play for financial services companies

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# ... with you today



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# Administration

## Polling questions

- Polling questions will appear as we proceed through the presentation.
- As mentioned, in order to receive the certificate of attendance, we require participants to take part in at least five of the six polling questions.
- If you qualify for the certificate of attendance, it will be sent to you following the webcast.

## Attendee questions

- You may submit questions in the *Ask a question* button on the left. We will answer as many questions as we can during Q&A. If we are unable to answer your question during the webcast, someone from KPMG may reply via phone or email following the webcast.
- For technical issues, please use the *Question Mark* button in the upper-right hand corner of the media player.

## Your feedback

- When the webcast is over, the webcast player will automatically refresh to display an exit survey. Feel free to complete the survey, as your comments are very valuable to us.

# Topics for discussion

## Agenda



- 1 Introduction
- 2 Practical lessons learnt so far — a focus on Austria, Finland & Germany
- 3 State of play across the EU
- 4 Hallmarks
- 5 Q&A



# Practical lessons learnt so far



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# Practical lessons learnt so far ...

	Austria	Finland	Germany
Number of reports filed	<ul style="list-style-type: none"> <li>– Approx. 100 by tax advisory</li> <li>– Number of reports by taxpayers unknown, probably low</li> </ul>	<ul style="list-style-type: none"> <li>– 200</li> </ul>	<ul style="list-style-type: none"> <li>– Official statistics not available</li> <li>– Approx. 4,000 arrangements reported retrospectively according to informal sources</li> </ul>
Filing patterns?	<ul style="list-style-type: none"> <li>– Tax advisors and taxpayers</li> </ul>	<ul style="list-style-type: none"> <li>– Tax payers</li> </ul>	<ul style="list-style-type: none"> <li>– Tax advisors and other intermediaries</li> <li>– Tax payers predominantly for transfer pricing related hallmarks (E.2; E.3)</li> </ul>
Common hallmarks	<ul style="list-style-type: none"> <li>– transfer of functions (E.3) and hard-to-value intangibles (E.2)</li> <li>– transformation of income (B.2)</li> <li>– transfer of assets with deviating valuation in two jurisdictions (C.4)</li> </ul>	<ul style="list-style-type: none"> <li>– Payments to blacklisted countries</li> </ul>	<ul style="list-style-type: none"> <li>– Arrangements that have substantially standardized documentation or structure (A.3)</li> </ul>
Penalties	<ul style="list-style-type: none"> <li>– Possible but unlikely in the near future</li> </ul>	<ul style="list-style-type: none"> <li>– Possible but not very likely during the first year</li> </ul>	<ul style="list-style-type: none"> <li>– Possible for ongoing reporting</li> <li>– Implementing law does not stipulate penalties relating to retrospective reporting obligation</li> </ul>
Specific transactions	<ul style="list-style-type: none"> <li>– Cross-border transfer of functions/assets/business units</li> <li>– Debt/equity swaps</li> <li>– Shift of residency</li> </ul>	<ul style="list-style-type: none"> <li>– Tax Administration wants to really understand the transaction and the relevant tax rules</li> </ul>	<ul style="list-style-type: none"> <li>– Multi-intermediary reporting obligations particular in the Asset Management sector discussed</li> <li>– Stock Lending still under discussion</li> </ul>

# Practical lessons learnt so far — Austria

**Austria did slightly defer the reporting obligations under DAC6 because the technical functionality was not ready on time**

**The retroactive reporting was made until 31 October, now reporting within 30 days**

## Experiences and feed back from the Austrian Tax Administration:

- Approx. 100 reports were filed by tax advisors so far
- Number of reports by taxpayers unknown; conservative approach → few filings expected
- Narrow interpretation of when a potential risk of tax avoidance is given (independent from MBT) by the MoF
- Liberal position of Austrian tax authorities regarding supporting intermediaries and what they “know or could be reasonably expected to know” about a reportable cross-border arrangement
- Reports primarily concern transfer of functions (E.3) and hard-to-value intangibles (E.2), transformation of income (e.g. debt/equity swaps, B.2), transfer of assets with deviating valuation in two jurisdictions (C.4)
- Electronic reporting limited to what is required by Directive; no lengthy description of fact pattern expected
- Guidelines published on October 21, 2020 by the Tax Administration
- Penalties are not expected in the near future

# Practical lessons learnt so far — Finland

## Finland did not defer the reporting obligations under DAC6

- The retroactive reporting was made by the 31 August
- Now the reporting within 30 days

### Experiences and feed back from the Finnish Tax Administration:

- 200 reports have been made so far
- Significant part of the reports have been made by the tax payer
- Major part of the reports concern payments to blacklisted countries
- Quality of the reports varies: the quality of the reports made by tax advisors good
- New guidelines will be given by the Tax Administration
- There were some technical problems which have been resolved. Also, XML schema can probably be used later.
- Tax Administration expects that the description is good so that it can be read why a relevant hallmark and MBT (if applicable) is met. It is not necessary to give the relevant tax law provisions but these need to be described
  - The Tax Administration has sent queries to some tax payers if the description was unclear
  - Tax Administration emphasized that the filer's contact details need to be mentioned
- The Tax Administration is not very willing to impose penalties during the first year



# Practical lessons learnt so far — Germany

**Germany decided to not defer the reporting obligations under DAC6 on very short notice, so that**

- **Retroactive reporting's for the period 25 June 2018 to 30 June 2020 were due by end of August 2020**
- **Regular reporting within 30 days due from 1 July 2020**

## **Tax authorities:**

- Technical infrastructure for reporting to the competent authority (Federal Tax Office) is available
- Interpreting administrative guidelines still in draft
- Ongoing discussion and alignment efforts with respect to standard transactions in the financial services sector (e.g. securities lending)

## **Intermediaries:**

- Most intermediaries in the FS Sector have undertaken impact assessments and implemented/amended policies/processes and trainings
- Retrospective reporting were rather made online rather than a technical reporting interface
- Current focus is to apply the principles to live products/transaction.
- There is a trend to outsource (escalated) transaction reviews



# EU update



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# Extended timeline — optional

## Optional deferral

Member States can choose to apply MDRs according to the initial timeline or defer the reporting deadlines for up to six months

**25 June 2018**

Effective date and start of retroactive period

**31 December 2019**

Transposition deadline

### Look-back period

Arrangements the first step of which was implemented between the effective date [June 25, 2018] and the date of application [July 1, 2020]

**1 July 2020**

MDRs become applicable — remains unchanged

**1 January 2021**

Latest start of reporting trigger (30-days)

**28 February 2021**

Deadline for look-back period reporting

**30 April 2021**

First periodic reporting of marketable arrangements

# Local implementation – Guidance

1

## Final local guidance available

- Austria
- Belgium
- Croatia
- Denmark
- Finland
- France (may be amended)
- Ireland
- Latvia
- Netherlands
- Poland
- Romania
- Slovenia
- Sweden\*
- UK\*

\* Guidance still evolving.

2

## Draft local guidance available

- Estonia
- Germany (already applicable)
- Lithuania

3

## Local guidance not publicly available

- All other member states
- Draft guidance under discussion with stakeholder in a number of EU jurisdictions (e.g. Cyprus, Portugal).

# Reporting options



## Manual data entry

- Paper forms
- Manual data entry to tax authority online portal — e.g. Austria, Denmark



1



## File upload

- Manual file upload (e.g. XML) — e.g. Finland, France, Luxembourg



2



## End-to-end

- End-to-end interface — e.g. Germany, the UK



3

# Keep in mind

You may have to **register** on the reporting platform — might take a few weeks to obtain a registration number.

Manual filing: you will need to review **guidance** (if available) on how to file information manually. This might not become available until close to the reporting date.

Platforms don't always work as intended — **re-filing** might be needed.

Several Member States have not published **final reporting schemas**.

# Mandatory Disclosure Rules in Mexico



## Applies to

- **Cross-border arrangements:** list of specified features, no main benefit test.
- That generate, or have the potential to generate, a tax benefit (direct or indirect) in Mexico.



## Reporting requirement for

- **Taxpayers** (tax residence or PE in Mexico) that realize a Mexican tax benefit.
- Mexican **Tax Advisors**. Note that advice provided by non-Mexican tax advisors that share a trademark or trade name with a Mexican resident advisor is presumed to be provided in Mexico.



## Applies from

- **January 1, 2021**, for regular reporting.
- **Look-back period** — 2020 transactions and pre-2020 transactions if a tax benefit from the transaction is sustained in 2020 or thereafter.



## Reporting deadlines

- **February 15, 2021**, for “look-back period”.
- **30 business days** after a triggering event.
- **20 business days** for subsequent modifications to a reportable transaction.



## Consequences of failure to report

- **Taxpayers:** per missed report, from 2,100 USD + prohibition of applying the tax benefit provided for in the reportable transaction + economic penalty equivalent to an amount between 50 percent and 75 percent of the amount of the tax benefit of the reportable transaction.
- **Tax advisors:** from 4,100 to 830,000 USD per missed report.

# Mandatory Disclosure Rules in Argentina



## Applies to

- National arrangements (to be listed by the Federal Tax Administration).
- International arrangements: six hallmarks, incl. strategies for avoidance of PE status, double non-taxation, foreign individual holding double tax residence.



## Reporting requirement for

- Taxpayers that participate in covered arrangements.
- Tax Advisors, involved either directly or through third parties.



## Applies from

- **January 1, 2021**, for regular reporting.
- **Look-back period** — implemented between January 1, 2019 and October 20, 2020 or prior to January 1, 2019 and still in place on October 20, 2020.

## Ongoing reporting deadlines

- **January 29, 2021**, for “look-back period”.
- National: by the last day of the month following the end of the relevant fiscal year
- International: within **10 days** from the date on which the implementation is initiated.



## Consequences of failure to report

- Aggravating circumstance in determining fines for tax evasion. Fine of USD 120 or USD 240 for formal infraction.
- Inclusion of the taxpayer in higher tax-risk categories (higher audit risk) and impact on ability to obtain e.g. tax credit certificates.







# Hallmarks



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# Hallmark C.1(b)(ii)

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# Hallmark C.1(b)(ii)

Cross-border transactions between two or more associated persons with tax deductible payments made to a recipient resident in an EU blacklist or OECD non-cooperative jurisdiction.

- No main benefit test
- No current OECD list. EU blacklist changed at numerous times during the look-back period. Likely to be subject to bi-annual review by the EU in the future.
- Awaiting final guidance on Hallmark C in Ireland.
- Suggestions that a country must be on the EU list at “date of implementation” and the date of reporting (e.g. 28 February 2021 for look-back period) for reporting to arise.
- Can capture routine funding and capital markets transactions. Reputational considerations?
- Insurance: reinsurance to Bermuda. Currently off list, was present March–May 2019.
- Funds and asset management: Cayman feeder structures, asset ownership in Cayman (Cayman listed and removed from list in 2020).
- Some other common investor jurisdictions have been on list for a period (e.g. UAE).



# Hallmark D.1 & D.2


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# Hallmark D.1 and D2 : Automatic Exchange of Information

**Undermining OF the reporting obligation under the laws implementing AEOI legislation (not only the EU one!), an arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures**

- 
- **Hallmark D1: applicable to the account/investment etc.**
  - **Hallmark D1: looking at the situation of the account holder**
  - **How to coordinate DAC 2 and DAC 6 local anti-abuse measures?**
  - **Regulatory consequences, especially in France**
  - **How the financial Institution needs to document? Actual Knowledge?**
  - **Structured finance and Private Banking business impact**
  - **Subjective approach?**

# Hallmark E.3

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# Hallmark E.3

An intra-group cross-border transfer of functions and/or risks and/or assets, where the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 percent of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

- 
- What does “intra-group” mean?
  - What does “cross-border” mean?
  - Status of intra-entity transfers?
  - How narrowly should the test be focussed on EBIT — particularly in a financial services context? Treatment of intra-group dividends?
  - What is the comparator?
  - Recurring arrangements? (E.g. renewals of annual reinsurance)



# Intermediary



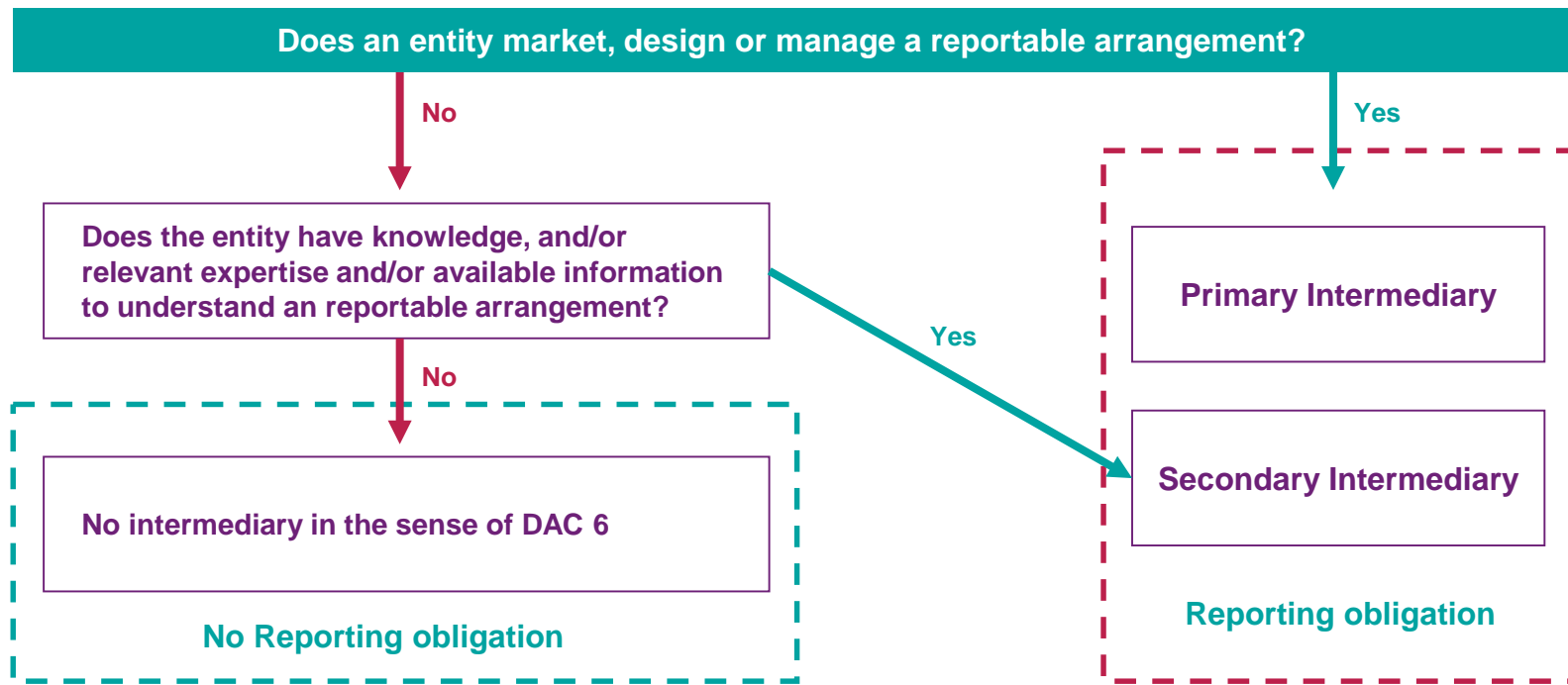
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# Intermediary – Relevant Role



Determining whether someone is a primary or a secondary intermediary — 2-Step-Approach



# Intermediary – Relevant Role



Distinction between a primary intermediary (“promoter”) and a secondary intermediary (“service provider”) have to be considered

## Primary Intermediary

Intermediary means any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

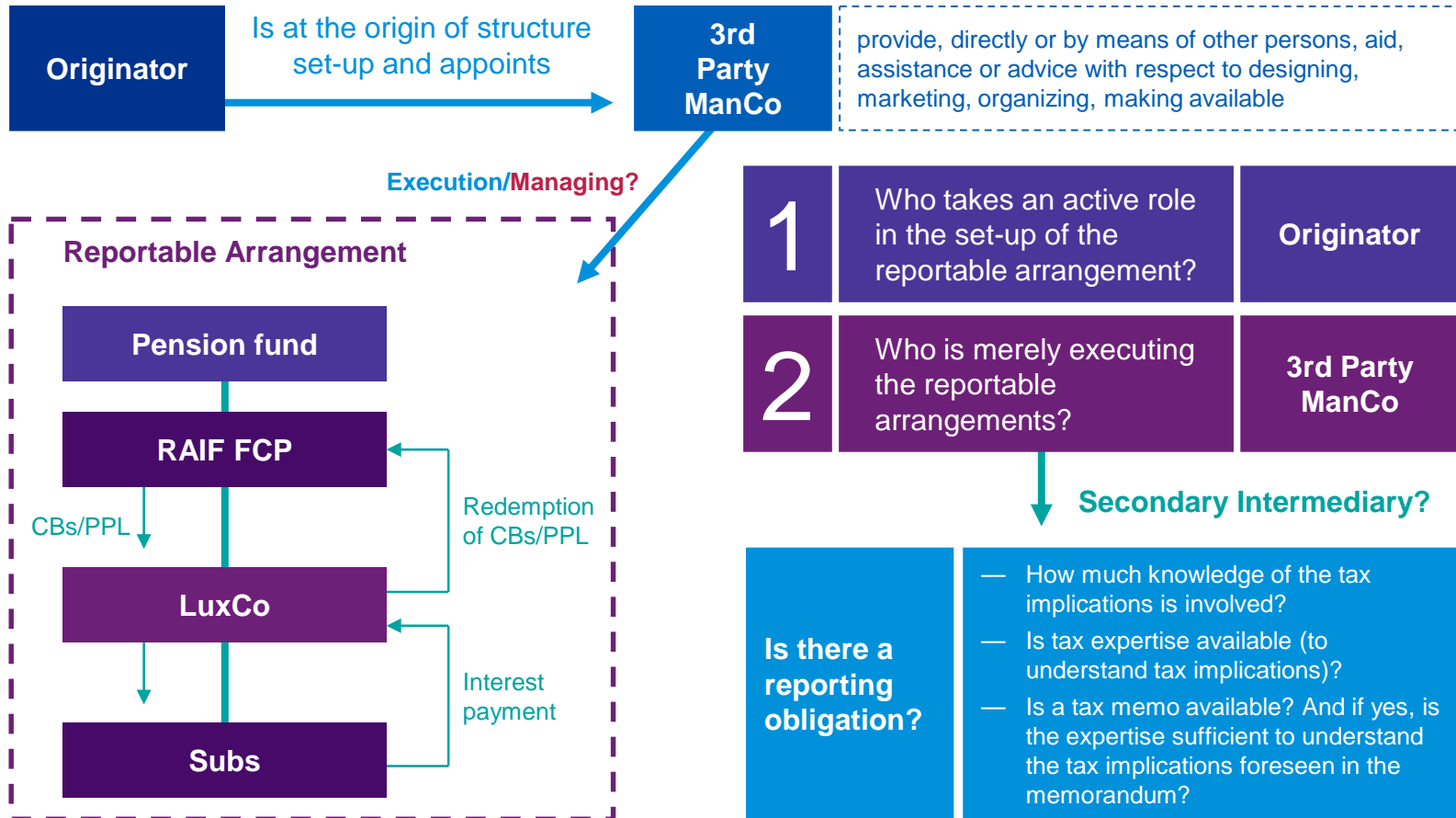
## Secondary Intermediary

It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise [...] *knows or could reasonably expected to know* that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

A secondary intermediary has no obligation to actively seek information which is not primarily in his possession and which goes beyond the existing professional obligation

**Level of Knowledge is crucial**

# Determination of Intermediary's role — Practical Example





# Q&A



# Thank you for joining us



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