

DAC 6 – Mandatory Disclosure Regime (« MDR »)

A New European Tax Transparency Regime

GGI ITPG Global Tax Summit – Frankfurt – February 2020

Confidential

Some definitions for a better understanding

- **ATAD** : Anti Tax Avoidance Directive
- **BEPS** : Base Erosion and Profits Shifting
- **CRS** : Common Reporting Standard
- **DAC** : Directive on Administrative Cooperation (purpose : exchange of information between Member States);
- **MBT** : Main Benefit Test
- **MDR** : Mandatory Disclosure Regime
- **MLI**: Multilateral Instruments (implementing Tax Treaty Related Measures for avoiding BEPS actions
- **MS** : Member States in Europe



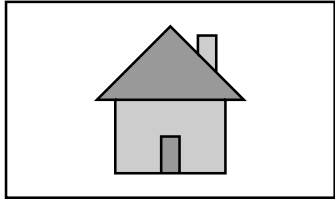
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Section 1

Background on MDR

DAC6 Framework

DAC	DAC1	DAC2	DAC3	DAC4	DAC5
Directive 2011/16	2011/16, Art.8	Directive 2014/107	Directive 2015/2376	Directive 2016/881	Directive 2016/2258
Framework for admin cooperation	Automatic exchange on information on : - Income front employment - Director's fees - Pensions	Common Reporting Standard ("CRS") Automatic exchange on financial account information	Automatic exchange of tax rulings - Advance cross-border rulings - Advance pricing arrangement	Country-by-exchange reporting	Exchange of AML Files Access by tax authorities to anti money laundering information
		CRS	BEPS, Action 5	BEPS, Action 13	Lux law 1 August 2018



OECD

BEPS Actions are implemented through different legal means (i.e., ATAD, MLI and DAC)

Coherence

Hybrid Mismatches (Action 2)

Interest limitation rules (4)

Controlled Foreign Companies (CFC) Rules (3)

Harmful Tax Practices (5)

Substance

Preventing Tax Treaty Abuse (6)

Avoidance of PE Status (7)

TP Aspects of Intangibles (8)

TP / Risk and Capital (9)

TP / High Risk Transactions (10)

Transparency

Methodologies and Data Analysis (11)

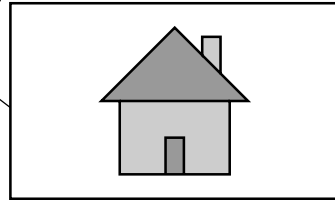
Disclosure Rules (12)

TP Documentation (13)

Dispute Resolution (14)

Digital Economy (1)

Multilateral Instrument (15)



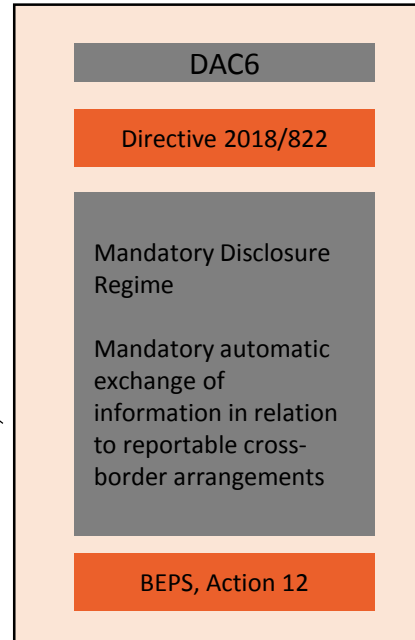
European Union



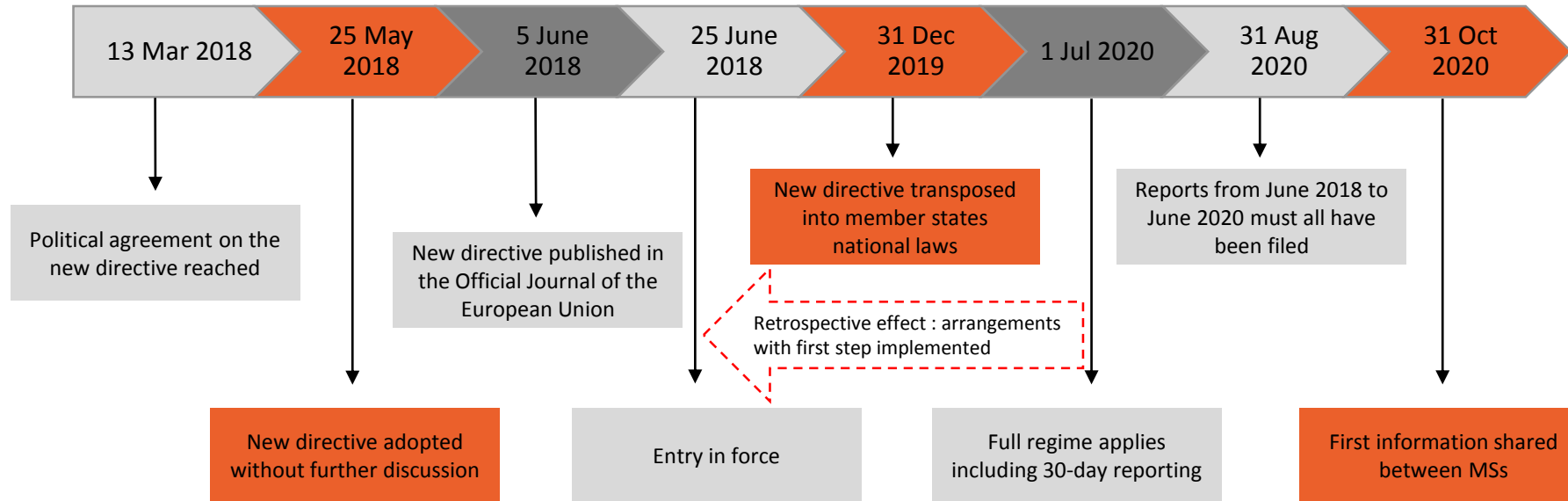
Anti-Money Laundering ("AML")



360° tax integrity methodology



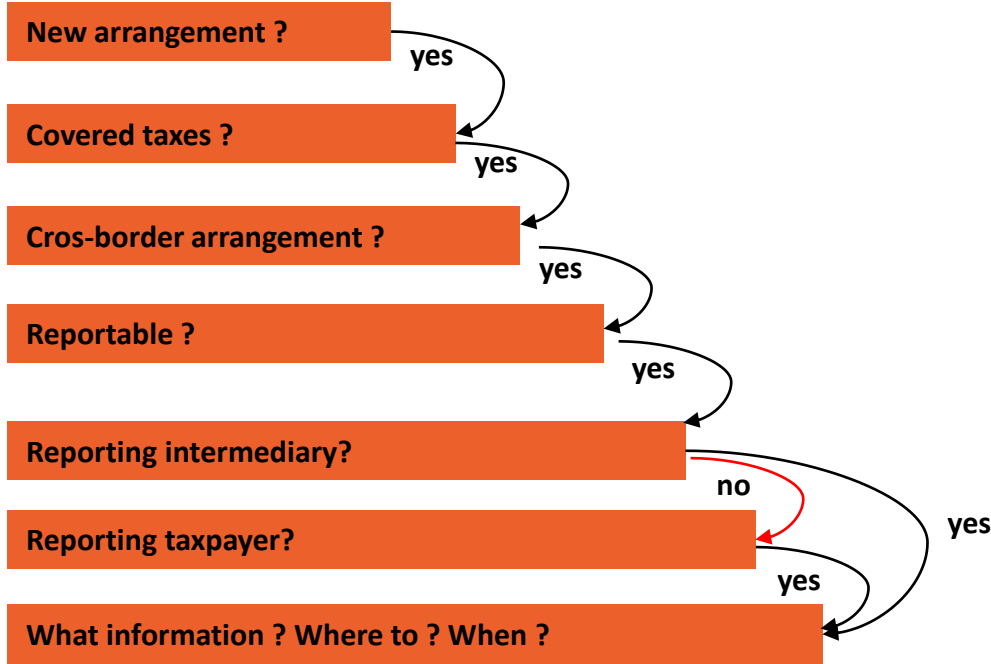
Implementation timeline for DAC6/MDR regime



Remember...

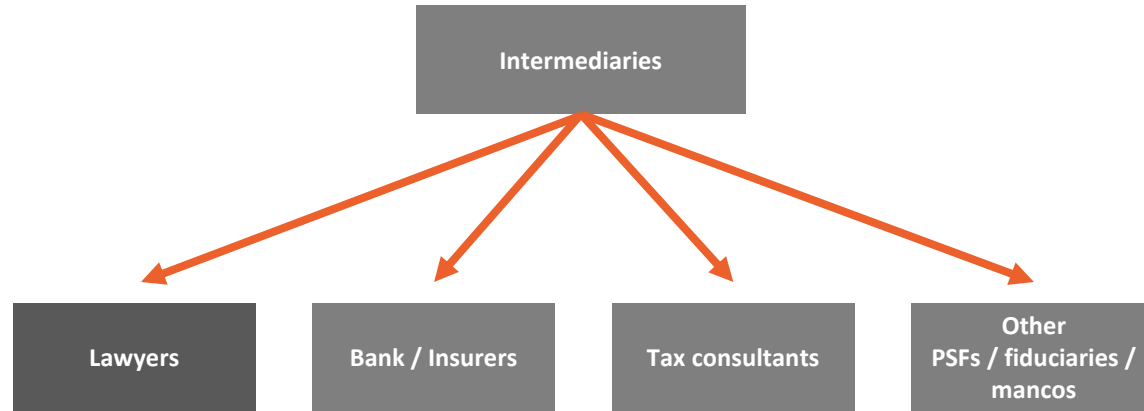
- Although the MDR exists in the form of DAC6, EU Member States had until 31 December 2019 to transpose the Directive into Domestic law where necessary.
- However, the MDR has a retrospective effect and will apply to arrangements from 25 June 2018, meaning that institutions need to consider the application of the MDR, despite there being no domestic legislation or guidance yet.
- We strongly discourage to wait until domestic legislation and guidance is published and that they must begin identifying potentially reportable cross-border arrangements now, such that they can revisit once final legislation and guidance has been issued.

An overview of the new regime

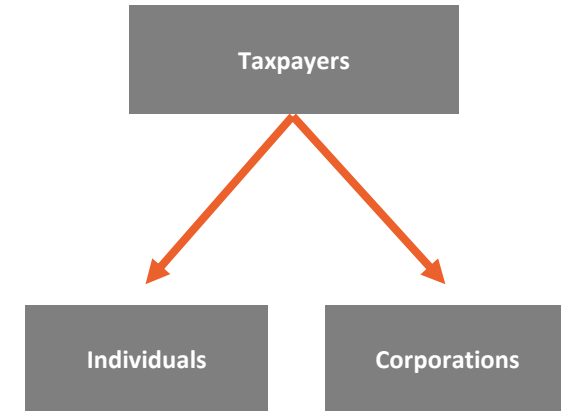


- Any transaction, series of transactions, structure or schem
- All taxes except VAT, customs and duties, and compulsory social security contributions
- More than one MS or an MS and a third country
- More than one MS or an MS and a third country

Who is concerned by the European Directive ?



OR

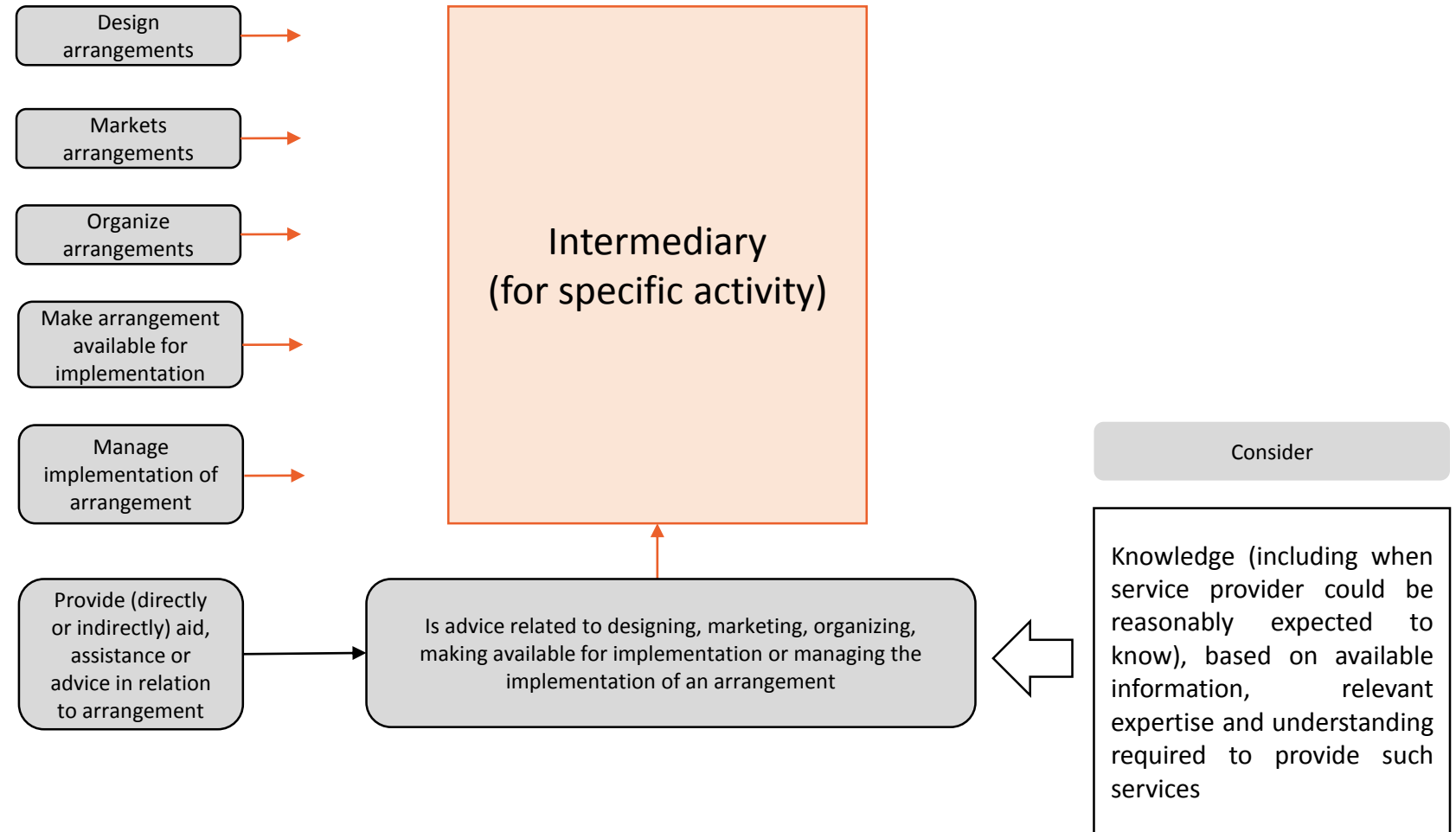


Intermediary means who:

Designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement, including person that knows or **could be reasonably expected to know** that they provided aid, assistance or advice

MDR – When is a service provider an intermediary ?

- Service providers, banks, insurers, advisers, etc are not « intermediaries » for all their activities.
- It is important to analyse in detail whether the activity falls within the scope of activities that make the company an intermediary.
- Some business lines will be more likely to render services of an intermediary. These could be determined in a first stage, with a more detailed review of actual transactions undertaken after.



Hallmarks

Overview of reportable cross-border arrangements

Cross-border arrangements

HALLMARKS – Are any of the below hallmarks satisfied ?

A

- Confidentiality clause
- Success fee
- Substantially standardized documentation /structure, available to more than taxpayer without the need for customization

B

- Acquisition of a loss-making company
- Conversion of income into capital or low-taxed revenue
- Circular transaction

C

- Deductible cross-border payments to associated enterprises subject (when received) to a zero or almost zero tax rate, a full tax exemption, or preferential tax regime

D

- Payments to an associated stateless enterprise or associated enterprise in a blacklisted jurisdiction
- Same asset subject to depreciation in more than one jurisdiction
- Transfer of assets with a material difference in the price used for tax purposes

E

- EU legislation or any equivalent agreements on the automatic exchange of financial account information circumvented
- Non-transparent legal or beneficial ownership chains used

F

- Unilateral safe harbor rules
- The transfer of hard-to-value intangibles
- The transfer of hard-to-value intangibles
- Restructuring resulting in significant profit shifts (50%) following the transfer of functions and/or risks and/or assets between associated enterprises

MAIN BENEFIT TEST (« MBT »)

Having regard to all relevant facts and circumstances is the main benefit or one of the main benefits that a person may reasonably expect to derive from the arrangement, the obtaining of a tax advantage ?

« Reportable cross-border arrangement »

Hallmarks subject to Main Benefit Test

The Main Benefit Test will be satisfied if it can be established that **the main benefit or one of the main benefits** that, 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**.

- Comparison of tax effects of transaction with those of “plain vanilla” comparable
- Which tax ? Including taxes not covered by DAC 6 ?
- Including foreign taxes
- **Main Benefit Test being met does not necessarily imply structure is abusive**

What information must be reported on cross-border arrangements ?

 Information that is within the intermediary's **knowledge, possession or control**:

The Intermediaries and relevant taxpayers, including their name and place of birth (for individuals), tax resident jurisdiction and Tax Identification Number (TIN), associated enterprises (where appropriate)

Details of the hallmarks that are met

A summary of the content of the arrangement including commonly know name (if any), description of business activities or arrangements

The date on which the first step in implementing has been made or will be made

National Provisions That form the arrangement;

The **value of the cross-border arrangement**

MS of the taxpayer and other MS which are likely to be concerned by the arrangement

Persons that are likely to be affected by the arrangement and the MS to which they are linked

Failure to comply



Penalties are **determined by national laws**. In Luxembourg, it will be in Luxembourg maximum Eur 250.000 in the case of :

- Non compliance
- Non reporting in time
- Incomplete reporting
- Inexact reporting
- Absence of or late notification by the intermediary exempt from reporting to notify the relevant intermediary or the relevant taxpayer (e.g., lawyers)

Impact on reputation



Directives requires them to be “**effective, proportionate and dissuasive**”

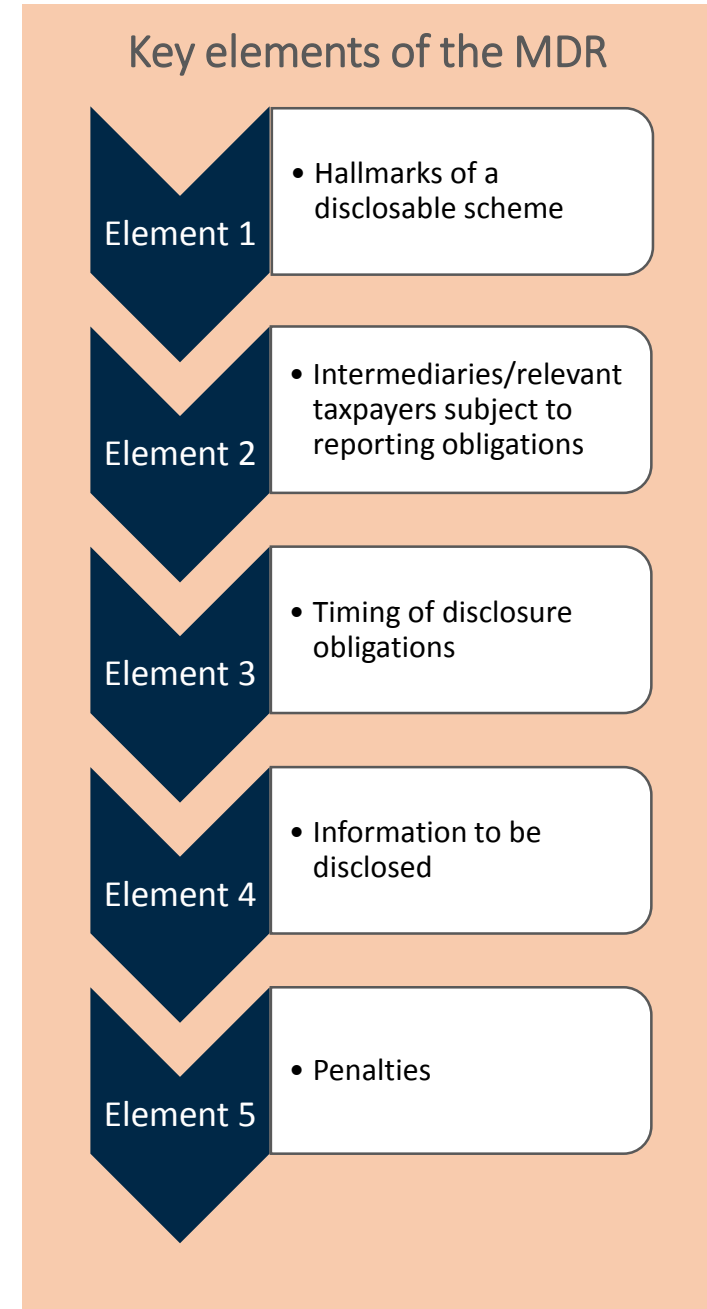
What about other European countries (contemplated) ?

- Poland : Up to Plm 10 Mios (ie approx. EUR 2.3 Mios)
- The Netherlands : Up to EUR 830.000 per reporting.
- Germany : EUR 25.000 per reporting.
- Belgium : First infringement not fined but as from second infringement from 250 to 1.250 EUR / day.

Purpose of the MDR

- Provide tax administrations with comprehensive and relevant information about potentially aggressive arrangements to enable authorities to react promptly against harmful tax practices, i.e., closing loopholes with new legislation or undertaking tax audits.
- Place an obligation on those who are involved in designing, marketing, organizing or managing the implementation of reportable cross-border transactions or a series of such transactions, as well as those who provide assistance or advice.
- Act as a deterrent against marketing and implementation of these types arrangements.

The MDR requires an intermediary (or relevant taxpayer) to disclose certain information to its Tax Administration.





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Section 2

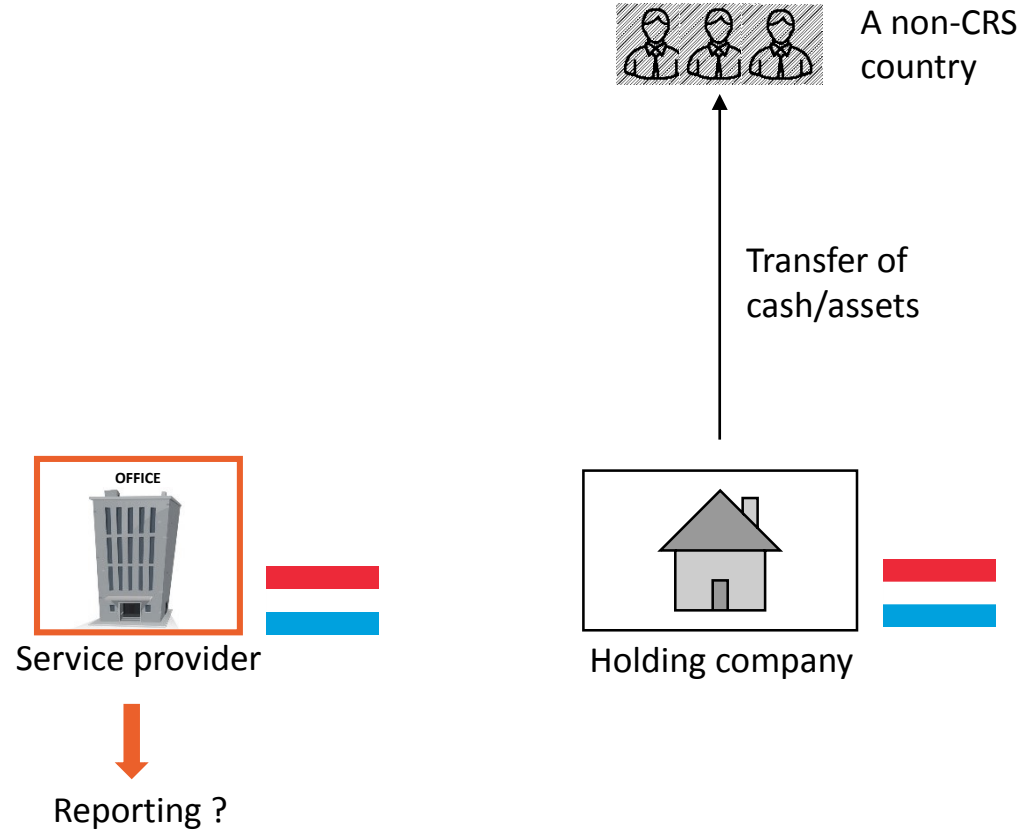
MDR – Case Studies

CASE STUDY 1

Hallmarks not subject to main benefit test

Hallmarks D – Anti avoidance of CRS / « offshore structures »

D
D1 : Anti avoidance of CRS reporting
D2 : “Offshore structures” Unidentifiable Beneficial Owner



Questions: Reportable ? By the Service provider ? By the taxpayers ?

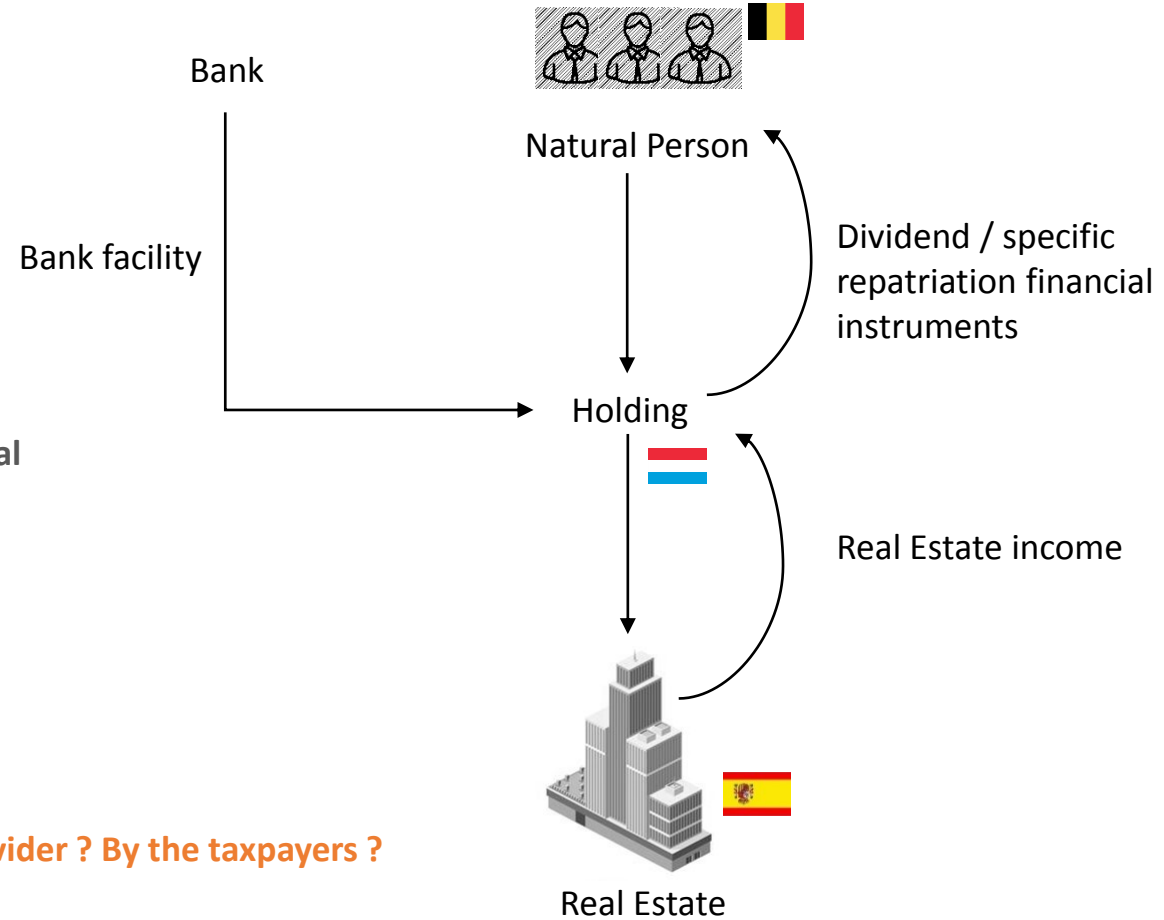
CASE STUDY 2

Hallmarks not subject to main benefit test

Hallmarks B – Specific hallmarks

B
B1 : Loss making company
B2 : Conversion of income into capital or low-taxed revenue

The main effect is to convert real estate income into capital
/ income taxed at a lower level.



Questions: Reportable ? By the Service provider ? By the taxpayers ?



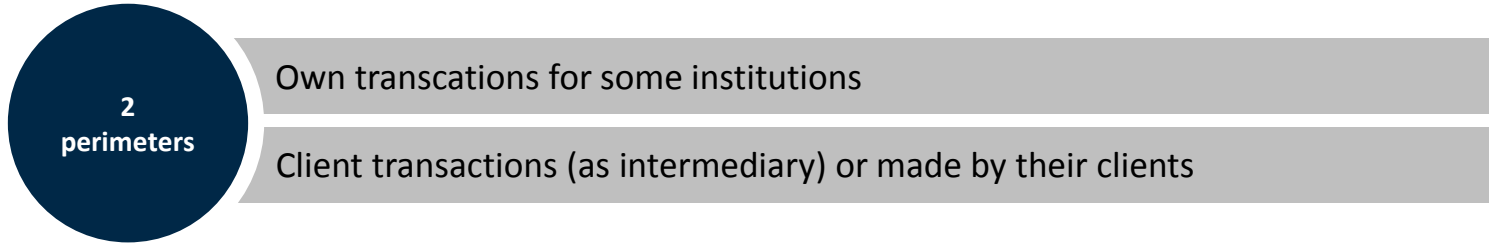
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Section 3

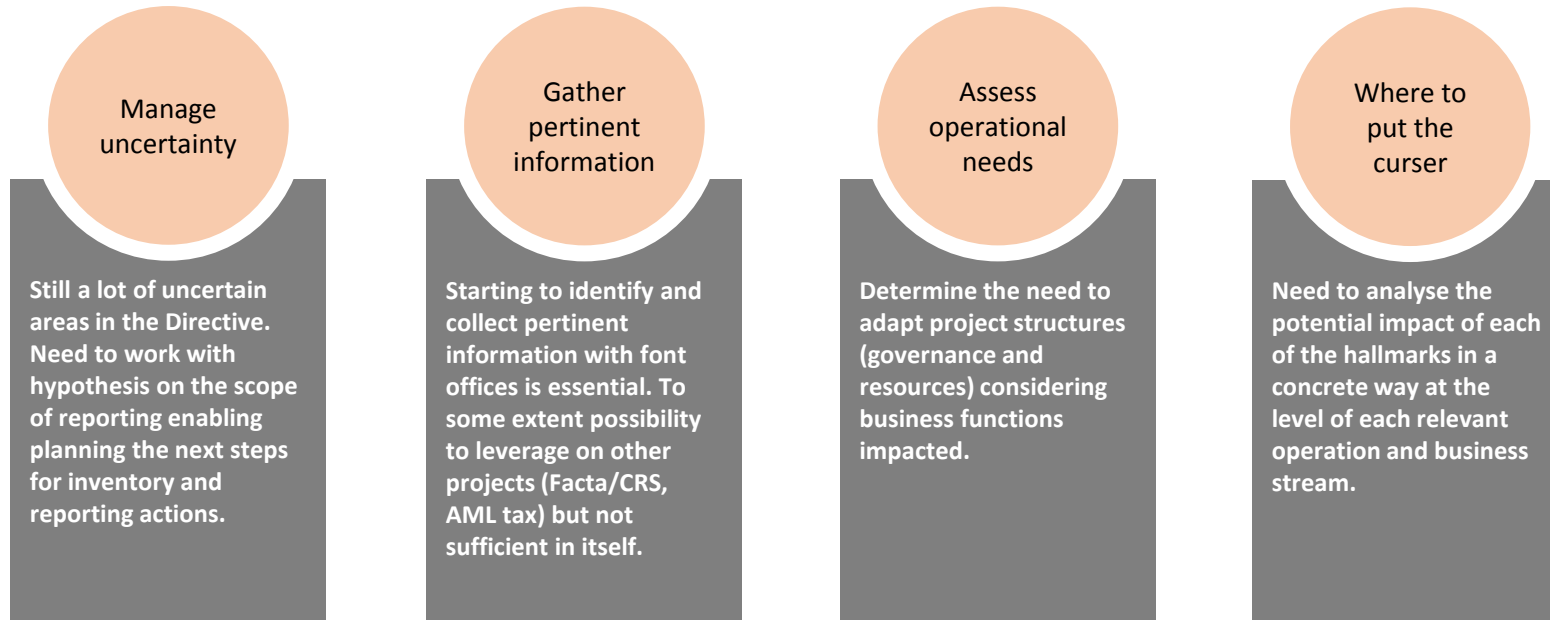
Conclusion – Actions plan

Key aspects for actors

Where to start with reporting



We see actually four key challenges. By recognising these challenges, we can ensure that the scope of the project addresses these risks in advance.



Need of immediate actions

- Screening of the transactions and categorize them.
- Impact assessment : Need to analyse the potential impact of each of the hallmarks in a concrete way at the level of each relevant operation and business stream.
- Establish a first draft inventory (prudent approach) : in case of doubt the recommended approach is to report.
- Update procedures.
- Define processes from the identification of the arrangement (at on boarding but also on an ongoing basis) to its (potential) reporting
- Define role and responsibilities within the relevant business lines.
- Train the teams in particular the front officers.
- Ensure that your KYT and KYC are in « good order » (...know or could be reasonably expected to know...)



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