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# New **EU Mandatory Disclosure Rules**

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# Mandatory Disclosure Rules

On 20 May 2015, the fourth Anti-Money Laundering Directive was adopted by the European Parliament and the Council (**AMLD 4**). The implementation of an Ultimate Beneficial Owner (UBO) register<sup>1</sup> is one of the measures included in the current AMLD 4.

While several Member States have not yet implemented this UBO-register, the European Parliament adopted in the meantime the fifth EU Anti-Money Laundering Directive of 25 May 2018 (**AMLD 5**). This Directive includes some amendments to AMLD 4 and to the UBO register, but mainly introduces mandatory disclosure rules for professional intermediaries and advisors.

In this respect, AMLD 5 obliges intermediaries to report:

- potentially aggressive tax planning arrangements with a cross-border dimension; and
- arrangements designed to circumvent reporting requirements like the Common Reporting Standard<sup>2</sup> (CRS) and the UBO reporting.

EU Member States' tax authorities will then exchange the reported information automatically within the EU through a centralized database.

The below summary provides a brief overview of the Mandatory Disclosure Rules.

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<sup>1</sup> In a nutshell, specific information shall have to be filed with regard to any natural person who ultimately owns or controls a corporate or a legal entity (the UBO). The obligation to collect and to file this information, as well as the obligation to keep it accurate, shall lie on the managers of these entities (but not on the UBOs themselves). Professionals having access to the UBO register shall have to keep the data up to date (e.g. financial institutions, AIF management companies, lawyers or notaries).

<sup>2</sup> Based on the Common Reporting Standard (CRS) financial institutions such as banks, investment entities, custodial institutions and certain insurance companies, have the obligation to identify their clients based on specific rules and need to report information to the local tax authorities about foreign accountholders who are resident of a jurisdiction that has implemented CRS. The information is exchanged with the jurisdiction where the accountholder is resident. For so-called passive non-financial entities also information needs to be reported about controlling persons who are resident in a participating jurisdiction.





## Obligation to report

### Intermediaries

#### Broad definition

The reporting obligation applies firstly to those “persons” (i.e. natural or legal persons or entities without legal personality) who are identified as intermediaries.

An intermediary is defined as

- any person that carries the responsibility vis-à-vis the taxpayer for designing, marketing, organizing or managing the implementation of a reportable cross-border arrangement (**Primary Intermediaries**); or
- any person that knows or could reasonably be 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 (**Secondary Intermediaries**).

The definition of ‘intermediaries’ includes therefore all tax advisers, accountants, lawyers, notaries and other professionals that are advising taxpayers on cross-border transactions (Primary Intermediaries). It may also include professionals involved in managing the implementation of cross-border transactions such as banks or professionals providing trust services and family offices (Secondary Intermediaries).

#### Link with EU Member State

Only intermediaries with a link to an EU Member State will be considered as intermediary within the meaning of AMLD 5. The intermediary should:

- be resident for tax purposes in a Member State;
- have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
- be incorporated in or governed by the laws of a Member State; or
- be registered with a professional association related to legal, taxation or consultancy services in a Member State.



### Multiple intermediaries

The reporting obligation applies to all intermediaries, in the Member State where they are operating as mentioned above, but also in case multiple intermediaries are involved in the same transaction. If for example an intermediary maintains a presence in several Member States, or when it engages other local independent actors in providing (tax) advice on certain arrangements, all intermediaries are required to report.

An intermediary can only be exempt from reporting if the intermediary can demonstrate (in accordance with national law) that the information has already been reported by another intermediary.

### Client-attorney and other privileges

Member States are allowed to give the intermediaries the right to a waiver from reporting on arrangements where this would breach **the legal professional privilege under the national law of that Member State**. In such cases this intermediary needs to notify other intermediaries involved in the arrangement that they should file. If there is no other intermediary involved, the taxpayer needs to be notified that the obligation shifts to him.

### Taxpayers

**In certain cases**, for instance when no intermediary is involved, when the intermediary does not have an EU presence or in case of a client-attorney privilege, **the obligation to report lies with the taxpayer**.

A taxpayer is to be understood as any person:

- to whom a reportable cross-border arrangement is made available for implementation; or
- who is ready to implement a reportable cross-border arrangement; or
- who has implemented the first step of such an arrangement.

In case more than one taxpayer would be obliged to report on the same arrangement, the obligation shall first rest with the taxpayer that agreed the reportable cross-border arrangement with the intermediary, and then with the taxpayer that manages the implementation of the arrangement.

A taxpayer can only be exempt from reporting to the extent it can demonstrate (in accordance with national law) that the information has already been reported by another taxpayer.







## Reportable cross-border arrangements

Arrangements are subject to the mandatory disclosure obligation insofar as they qualify as (i) cross-border arrangements and (ii) reportable. Note that arrangements pertaining solely to indirect taxes such as VAT or customs duties, are excluded.

Cross-border arrangements concern either more than one Member State, or a Member State and a third country. Purely domestic situations and situations having no link to any EU Member State are out of scope.

AMLD 5 does not include a definition of aggressive tax planning. Instead it includes a list of “hallmarks” to determine whether a cross-border arrangement is reportable or not.

## Hallmarks

A hallmark is defined as “a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance” and are divided into:

1. Generic hallmarks (subject to “main benefit test”):
  - Confidentiality clauses;
  - Contingency fees linked to the tax advantage;
  - Standard documentation and structure.
2. Specific hallmarks (subject to “main benefit test”):
  - Loss-making company acquisitions;
  - Income conversion (e.g. into capital);
  - Circular transactions (round tripping of funds).
3. Specific hallmarks related to cross-border transactions:
  - Mismatches and double dips
4. Specific hallmarks related to disclosure rules
  - Automatic exchange of financial information
  - Beneficial ownership made unidentifiable
5. Specific hallmarks related to transfer pricing

The so-called generic hallmarks and some of the specific hallmarks only apply if the **main benefit test** is satisfied.

This test is met if it can be established that **the main benefit or one of the main benefits** which, taking into account all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the **obtaining of a tax advantage**.

### General hallmarks subject to 'main benefit test'

Participant agrees with condition of confidentiality not to disclose how the arrangement could secure a tax advantage

Intermediary is entitled to receive fixed fee linked to (the amount of) the tax advantage derived

Providing advice that has been standardised and made available to more than one taxpayer without a need for customisation

### Specific hallmarks subject to 'main benefit test'

Acquiring a loss-making company and using the losses to reduce the tax liability

The conversion of income into another category of revenue taxed at lower level or exempt

Use of linked companies or entities with no substance and with circular transactions taking place between them

### Specific hallmarks related to cross-border transactions

Deductible payments to tax jurisdictions with no corporate tax or zero or almost zero rates

Deductible payments to tax jurisdictions which are included in the EU list of non-cooperative third-country jurisdictions

A payment mentioned in an arrangement where the recipient is not resident for tax purposes in any jurisdiction

The same asset is subject to depreciation in more than one jurisdiction

In transfers of assets across borders, there is a material difference in the amount treated as payable for these assets in the jurisdictions involved

Relief from double taxation on the same income or capital in more than one jurisdiction

A payment mentioned in an arrangement is given a full tax exemption in the jurisdiction where it should be taxed, or benefits from a preferential tax regime



### Specific hallmarks related to disclosure rules

An arrangement which may have the effect of undermining the reporting obligation or any equivalent agreements on the automatic exchange of financial account information

An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures where the beneficial owner is made unidentifiable

### Specific hallmarks related to transfer pricing

Arrangements involving the transfer of hard to value intangible assets

Arrangements that involve the use of unilateral use of safe harbour rules

An arrangement involving the intra-group cross-border transfer of functions/risks/assets if EBIT-test is met

## Information to be disclosed

The information that shall be disclosed to the tax authorities includes:

- identification of intermediaries and relevant taxpayers;
- details of the relevant hallmarks;
- summary of the content of the arrangement;
- date of first step of implementation;
- details of the national provisions forming the basis of the arrangement;
- value of the arrangement;
- Member States involved in the arrangement;
- identification of any other person in a Member State likely to be affected by the arrangement.

## Penalties

Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to the AMLD 5. The penalties provided for should be “effective, proportionate and dissuasive”.

It is not clear yet to whom the penalties will be applicable, to the organization of the intermediary or the taxpayer.

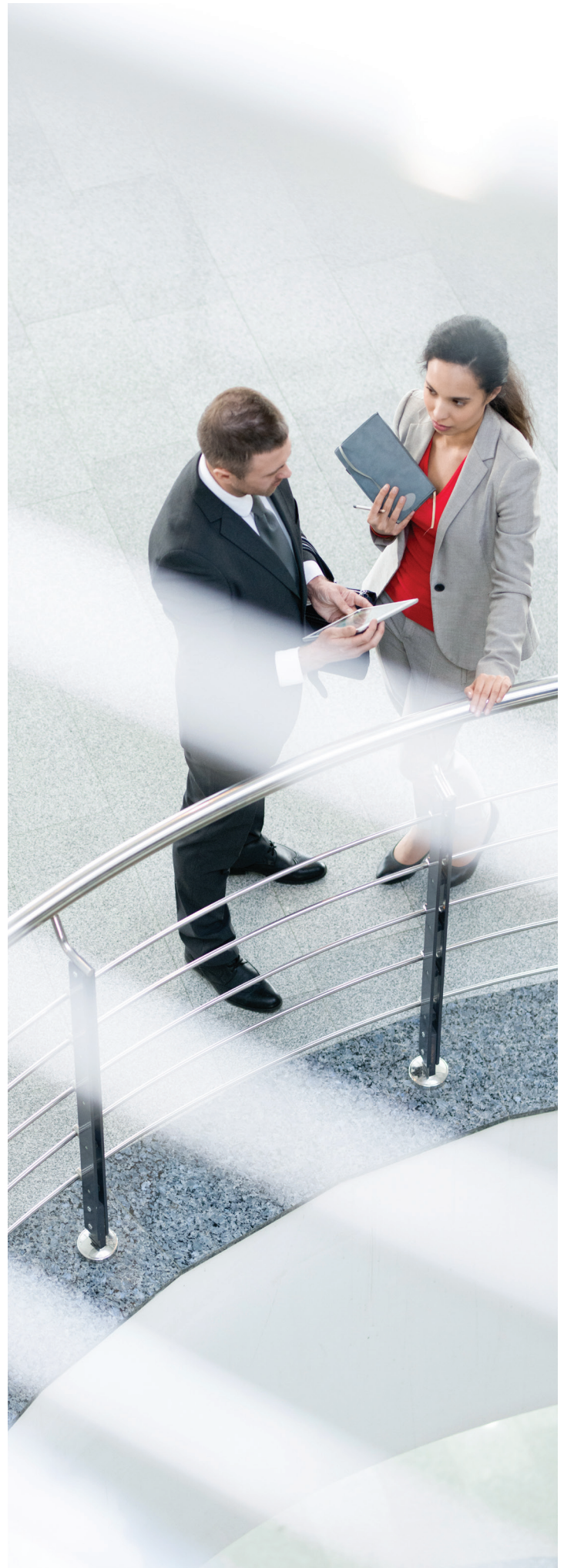
## Timing

Intermediaries or taxpayers shall be required to file information on the reportable cross-border arrangements within thirty days beginning:

- on the day after the arrangement is made available for implementation; or
- on the day after the arrangement is ready for implementation; or
- when the first step in the implementation has been made; whichever occurs first.

Intermediaries providing aid, assistance or advice shall also be required to file information within thirty (30) days beginning on the day after they provided aid, assistance or advice.

The subsequent automatic exchange of information on these arrangements shall happen within one month from the end of the quarter in which the information was filed.



## Entry into force

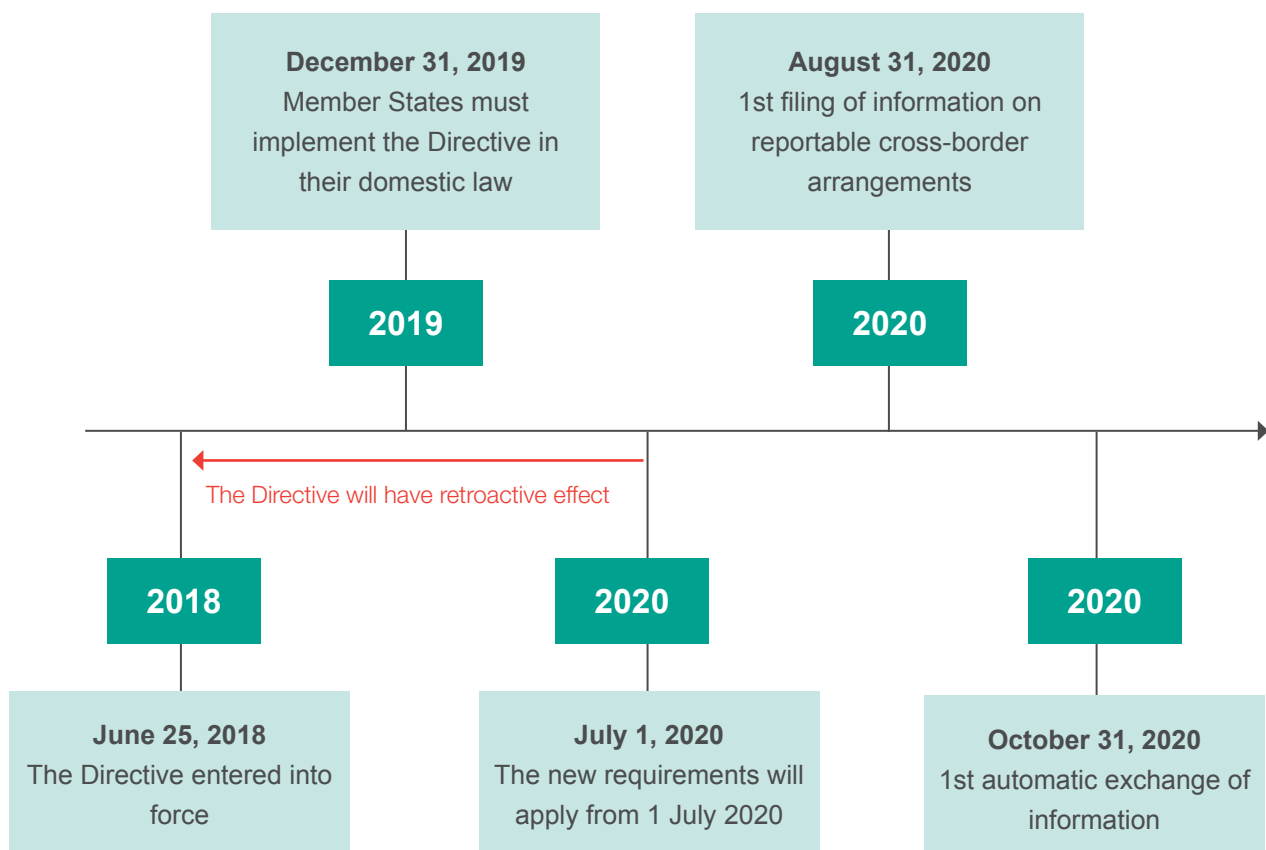
The Directive enters into force on 25 June 2018. Member States have to implement the Directive by **31 December 2019** at the latest and shall apply the provisions from 1 July 2020 onwards.

However, the Directive shall enter into force with **retroactive effect**: intermediaries and taxpayers are already obliged to file information on reportable cross-border arrangements of which the first step was implemented (e.g. the conclusion of an agreement or the incorporation of an entity) in the time frame between:

- The date of entry into force of the Directive (25 June 2018); and
- The date of application of the Directive (1 July 2020).

The deadline to file these arrangements is **31 August 2020**.

Due to the potentially wide scope of the ALMD 5, clarification and extensive guidance will be required upon its implementation into domestic rules of the EU Member States.





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