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L.N. 342 of 2019

**INCOME TAX ACT
(CAP. 123)**

**INCOME TAX MANAGEMENT ACT
(CAP. 372)**

**Cooperation with Other Jurisdictions on Tax Matters
(Amendment) Regulations, 2019**

IN EXERCISE of the powers conferred by articles 76 and 96 of the Income Tax Act and article 10A of the Income Tax Management Act, the Minister for Finance has made the following regulations:-

Citation.

1. The title of these regulations is the Cooperation with Other Jurisdictions on Tax Matters (Amendment) Regulations, 2019, and these regulations shall be read and construed as one with the Cooperation with Other Jurisdictions on Tax Matters Regulations, hereinafter referred to as "the principal regulations".

S.L. 123.127

Amends
regulation 2 of
the principal
regulations.

2. In regulation 2 of the principal regulations, the definition "EU Administrative Cooperation Directive" shall be substituted by the following:

" "EU Administrative Cooperation Directive" means Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC as amended by EU Council Directives 2014/107/EU, 2015/2376/EU, 2016/881/EU and 2018/822/EU;"

Amends
regulation 5 of
the principal
regulations.

3. Regulation 5 of the principal regulations shall be amended as follows:

(a) sub-regulation (6) thereof shall be substituted by the following:

Cap. 123. "(6) In order for the Commissioner to access information, notice shall be served on a person either personally or by being sent by registered post to the last known business or private address, or through electronic communication as prescribed through guidelines published on the website of the Commissioner for Revenue under the provisions of article 96(2) of the Income Tax Act."; and

(b) sub-regulation (7) thereof shall be substituted by the following:

S.L. 373.01
S.L. 386.19
S.L. 331.10 "(7) For the purpose of the implementation and enforcement of the laws giving effect to the EU Administrative Cooperation Directive and to ensure the functioning of the administrative cooperation it establishes, the Commissioner for Revenue shall have access to the mechanisms, procedures, documents and information referred to in regulations 7 and 13 of the Prevention of Money Laundering and Funding of Terrorism Regulations, the Companies Act (Register of Beneficial Owners) Regulations, and the Trusts and Trustees Act (Register of Beneficial Owners) Regulations.".

4. Regulation 6 of the principal regulations shall be substituted by the following:

Substitutes regulation 6 of the principal regulations.

"6. (1) Where there is failure to comply with a request for information made by the Commissioner in relation to a request made by a requesting authority under the provisions of an arrangement, the requested person shall be liable to a penalty of:

(a) one thousand euro (€1,000) where the information is submitted late, that is not within the time-limit specified within the Commissioner's request; and

(b) fifty euro (€50) for every day during which the default existed:

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Provided that the penalty under this paragraph shall not exceed in total nineteen thousand, two hundred and fifty euro (€19,250).

(2) Notwithstanding the provisions of sub-regulation (1), where it is shown that the information is not provided because such information has not been kept or properly updated as required under these regulations, the person who had the duty to keep or update such information shall be liable to a penalty of nineteen thousand, two hundred and fifty euro (€19,250).

(3) Notwithstanding any action that may be taken in accordance with the provisions of sub-regulations (1) or (2) where -

(a) failure to comply with a request made by the Commissioner persists for more than six months from the date of the original request; or

(b) the requested party refuses to be served with the notice either personally or through registered mail as contemplated in regulation 5(6) and the requested party is the proper addressee of the request; or

(c) the information submitted by the requested party is found to be incorrect in such a way that it is misleading, deceitful or false,

the requested party shall be guilty of an offence and shall on conviction be liable to a fine (*multa*) of not less than five thousand euro (€5,000) and not more than thirty thousand euro (€30,000), or to imprisonment for a period of not exceeding two years, or to both such fine (*multa*) and imprisonment."

Amends
regulation 13 of
the principal
regulations.

5. Regulation 13 of the principal regulations shall be amended as follows:

(a) sub-regulations (7), (8), (9) and (10) thereof shall be re-numbered as sub-regulations (8), (9), (10) and (11) respectively;

(b) immediately after sub-regulation (6) thereof there shall be added the following new sub-regulation:

"Automatic exchange of information on reportable cross-border arrangements.

(7) (a) Intermediaries shall file information that is within their knowledge, possession or control on reportable cross-border arrangements with the Commissioner within thirty (30) days beginning:

(i) on the day after the reportable cross-border arrangement is made available for implementation; or

(ii) on the day after the reportable cross-border arrangement is ready for implementation; or

(iii) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first:

Provided that intermediaries referred to in paragraph (b) of the definition "intermediary" shall also be required to file information within thirty (30) days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

(b) In the case of marketable arrangements, a periodic report shall be made by the intermediary every three (3) months, providing an update which contains new reportable information as referred to in sub-paragraphs (i), (iv), (vii) and (viii) of paragraph (o) that has become available since the last report was filed.

(c) An intermediary is liable to file information on reportable cross-border arrangements with the Commissioner for Revenue in the following instances, taken in the following order:

(i) the intermediary is resident in Malta for tax purposes;

(ii) the intermediary is not resident for tax purposes in any EU Member State (including Malta) but has a permanent establishment in Malta through which the services with respect to the arrangement are provided;

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(iii) the intermediary is incorporated in Malta or is governed by the laws of Malta and the provisions of sub-paragraphs (i) and (ii) do not apply;

(iv) the intermediary is registered with a professional association related to legal, taxation or consultancy services that is established in Malta and sub-paragraphs (i), (ii) and (iii) do not apply.

(d) Where information is to be filed with the Commissioner and the same information is to be filed with any other competent authority of an EU Member State, the intermediary shall be exempt from filing the information in Malta if it has proof that the same information has been filed in another EU Member State:

Provided that the proof may be in such form as the Commissioner may determine.

Cap. 377. (e) An intermediary whose profession is referred to in article 3 of the Professional Secrecy Act has the right to a waiver from filing information on a reportable cross-border arrangement where the reporting of such information would constitute an offence under article 257 of the Criminal Code. In such circumstances, the intermediary must notify, without delay and in any event no later than seven working days from the relevant date established by paragraph (a), any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under sub-regulation (6):

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Provided that intermediaries may only be entitled to a waiver under this paragraph to the extent that they operate within the limits of the relevant national laws that define their professions:

Provided further that where an intermediary has waived such reporting obligation, the intermediary shall provide an annual update to the Commissioner, consisting of a list of the reportable cross-border arrangements where the reporting obligation has been waived on to another intermediary or the relevant taxpayer. Such information shall be in such form as the Commissioner may determine.

(f) Where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph (e), the obligation to file information on a reportable cross-border arrangement shall lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

(g) The relevant taxpayer with whom the reporting obligation lies shall file the information with the Commissioner within thirty (30) days, beginning on:

(i) the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or

(ii) when it is ready for implementation by the relevant taxpayer, or

(iii) when the first step in its implementation has been made in relation to the relevant taxpayer,

whichever occurs first:

(h) A relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the Commissioner for Revenue, in the following instances, taken in the following order:

(i) the relevant taxpayer is resident in Malta for tax purposes;

(ii) the relevant taxpayer is not resident for tax purposes in any EU Member State (including Malta) but has a permanent establishment in Malta benefiting from the arrangement;

(iii) the relevant taxpayer receives income or generates profits in Malta, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any EU Member State and the provisions of sub-paragraphs (i) and (ii) do not apply;

(iv) the relevant taxpayer carries on an activity in Malta, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any other EU Member State and sub-paragraphs (i), (ii) and (iii) do not apply.

(i) Where, pursuant to paragraph (g), there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has proof that the same information has been filed in another EU Member State:

Provided that the proof may be in such form as the Commissioner may determine.

(j) Where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement shall lie with all intermediaries involved in the same reportable cross-border arrangement. An intermediary shall be exempt from filing the information only to the extent that it has proof that the same information referred to in paragraph (o) has already been filed by another intermediary:

Provided that the proof may be in such form as the Commissioner may determine.

(k) (i) Where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information in accordance with paragraph (f) shall be the one that features first in the list below:

(A) the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;

(B) the relevant taxpayer that manages the implementation of the arrangement.

(ii) Any relevant taxpayer shall only be exempt from filing the information to the extent that it has proof that the same information referred to in paragraph (o) has already been filed by another relevant taxpayer:

Provided that the proof may be in such form as the Commissioner may determine.

(l) A relevant taxpayer shall file information as the Commissioner may determine, about the use of the arrangement to the tax administration in each of the years for which they use it.

(m) Intermediaries and relevant taxpayers shall file information on reportable cross-border arrangements the first step of which was implemented between 25th June 2018 and 1st July 2020. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020.

(n) The competent authority in Malta shall, by means of an automatic exchange, communicate the information specified in paragraph (o) to the competent authorities of all other EU Member States.

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(o) The information to be communicated by the competent authority in Malta pursuant to paragraph (n) shall contain the following, as applicable:

(i) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;

(ii) details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;

(iii) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;

(iv) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;

(v) details of the national provisions that form the basis of the reportable cross-border arrangement;

(vi) the value of the reportable cross-border arrangement;

(vii) the identification of the EU Member State of the relevant taxpayer(s) and any other EU Member States which are likely to be concerned by the reportable cross-border arrangement;

(viii) the identification of any other person in an EU Member State likely to be affected by the reportable cross-border arrangement, indicating to which EU Member States such person is linked:

Provided that information as defined under sub-paragraphs (i), (iii) and (viii) shall not be communicated to the European Commission.

(p) The fact that the Commissioner does not trigger an enquiry in relation to a reportable cross-border arrangement shall not in any way affect any of the powers of the Commissioner under the provisions of the Income Tax Management Act.

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(c) immediately after paragraph (d) of sub-regulation (8) thereof, as re-numbered, there shall be added the following new paragraph:

"(e) for the information laid down in sub-regulation (7), within one month of the end of the quarter in which the information was filed. The first information shall be communicated by 31 October 2020."; and

(d) sub-regulation (9) thereof, as re-numbered, shall be amended as follows:

(i) the definition "automatic exchange of information" shall be substituted by the following:

" "automatic exchange of information" means:

(a) for the purposes of sub-regulations (1), (3), (4) and (7), the systematic communication of pre-defined information to another EU Member State, without prior request, at pre-established regular intervals. For the purposes of sub-regulation (1), reference to available information relates to information in the tax files of Malta, which is retrievable in accordance with the procedures for gathering and processing information in Malta;

(b) for the purposes of sub-

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regulation (2), the systematic communication of pre-defined information on residents in other EU Member States to the relevant EU Member State of residence, without prior request, at pre-established regular intervals;

(c) for the purposes of the provisions of these regulations that implement the EU Administrative Cooperation Directive, other than sub-regulations (1), (2), (3), (4) and (7), the systematic communication of predefined information provided in paragraphs (a) and (b);";

(ii) the following new definitions shall be added immediately after the definition of "advance pricing arrangement":

" "arrangement" shall also include a series of arrangements. An arrangement may comprise more than one step or part;

"cross-border arrangement" means an arrangement concerning either more than one EU Member State or an EU Member State and a third country where at least one of the following conditions is met:

(a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

(d) one or more of the participants in the arrangement carries on an activity in

another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

(e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership;

"reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV;

"hallmark" means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV;

"intermediary" means any person:

(a) that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement;

(b) that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be 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, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement:

Provided that any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available

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information and their relevant expertise and understanding.

In addition to the above, in order to be an intermediary, a person shall meet at least one of the following additional conditions:

(a) be resident for tax purposes in an EU Member State;

(b) have a permanent establishment in an EU Member State through which the services with respect to the arrangement are provided;

(c) be incorporated in, or governed by the laws of an EU Member State;

(d) be registered with a professional association related to legal, taxation or consultancy services in an EU Member State.

"relevant taxpayer" means 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 has implemented the first step of such an arrangement.

For the purposes of sub-regulation (7), "associated enterprise" means a person who is related to another person in at least one of the following ways:

(a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;

(b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights;

(c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital;

(d) a person is entitled to 25% or more of the profits of another person:

Provided that:

(i) if more than one person participates, as referred to in paragraphs (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises;

(ii) if the same persons participate, as referred to in paragraphs (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises;

(iii) for the purposes of this definition, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person;

(iv) in indirect participations, the fulfilment of requirements under paragraph (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%;

(v) an individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person;

"marketable arrangement" means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised;

"bespoke arrangement" means any cross-border arrangement that is not a marketable arrangement."; and

(e) immediately after paragraph (d) of sub-regulation (10) thereof, as re-numbered, there shall be added the following new paragraph:

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"(e) the provisions of sub-regulations (7) and (8)(e) shall be on 1 July 2020."

Substitutes
regulation 21 of
the principal
regulations.

6. Regulation 21 of the principal regulations shall be substituted by the following:

"Data
protection.

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21. (1) All exchange of information made pursuant to these regulations involving the processing of personal data shall be conducted in accordance with Regulation (EU) 2016/679 (General Data Protection Regulation) and the Data Protection Act. Nevertheless, by application of Article 23(1)(e) of Regulation (EU) 2016/679, Articles 12 to 22 and Article 34, as well as Article 5, in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, shall not apply, as the provision of information under this regulation constitutes a necessary measure in the interest of taxation matters.

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(2) Reporting Malta Financial Institutions and the competent authority in Malta shall be data controllers for the purpose of Regulation (EU) 2016/679 and the Data Protection Act.

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(3) Notwithstanding the provisions of sub-regulation (1), the Commissioner shall ensure that each Reporting Malta Financial Institution informs each individual reportable person concerned that the information relating to him referred to in regulation 13(2) will be collected and transferred in accordance with these regulations. The Commissioner shall also ensure that the Reporting Malta Financial Institution provides to that individual all information he is entitled to under the Regulation (EU) 2016/679 and the Data Protection Act in sufficient time for the individual to exercise his data protection rights and, in any case, before the Reporting Malta Financial Institution concerned reports the information referred to in regulation 13(2) to the competent authority in Malta.

(4) Information processed in accordance with these regulations shall be retained for no longer than necessary to achieve the purposes of these regulations, and in any case no longer than nine years from the end of the year from when the information was reported to the Commissioner."

7. Immediately after sub-regulation (5) of regulation 22 of the principal regulations there shall be added the following new sub-regulation:

Amends regulation 22 of the principal regulations.

"(6) A standard form, including the linguistic arrangements, shall be adopted by the EU Commission in accordance with the procedure referred to in Article 26(2) of the EU Administrative Cooperation Directive before 30 June 2019. The automatic exchange of information on reportable cross-border arrangements pursuant to regulation 13(7) shall be carried out using this standard form. This standard form shall not exceed the components for exchange of the information listed in regulation 13(7)(o) and other relating fields linked to these components which are necessary to achieve the objectives of regulation 13(7)."

8. Regulation 33 of the principal regulations shall be amended as follows:

Amends regulation 33 of the principal regulations.

(a) immediately after paragraph (e) of sub-regulation (1) thereof there shall be added the following new paragraph:

"(f) where a Reporting Malta Financial Institution relies on an invalid self-certification, and such Reporting Malta Financial Institution knows or has reason to know that this is invalid, to a penalty of five thousand euro (€5,000). An account holder who provides a false self-certification, including signing or otherwise positively affirming a false self-certification, shall also be liable to a penalty of five thousand euro (€5,000)."; and

(b) sub-regulation (2) thereof shall be substituted by the following:

"(2) In addition and without prejudice to any penalties incurred in terms of sub-article (1), where a Reporting Malta Financial Institution is found to have submitted information that is misleading, deceitful or false, every director, manager or other principal officer of such Reporting Malta Financial Institution shall be guilty of an

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offence and shall on conviction be liable to a fine (*multa*) of not less than ten thousand euro (€10,000) and not more than thirty thousand euro (€30,000), or to imprisonment for a period of not exceeding two years, or both such fine (*multa*) and imprisonment:

Provided that a director, manager or other principal officer of such Reporting Malta Financial Institution shall not be guilty of such an offence in virtue of this sub-regulation if he proves that he was unaware and could not with reasonable diligence be aware of such act or omission and that he did everything within his power to prevent that act or omission."

Amends
regulation 35 of
the principal
regulations.

9. Regulation 35 of the principal regulations shall be amended as follows:

(a) sub-regulation (1) thereof shall be substituted by the following:

"(1) Where a person comes within the scope of the penalties as set out in these regulations, the Commissioner shall advise such person by means of a default notice regarding which penalty the Commissioner intends to impose and the reason for its imposition:

Provided that in such cases, reference to the specific legal provision would constitute sufficient notice.";

(b) immediately after sub-regulation (1) thereof, as substituted, there shall be added the following new sub-regulation:

"(1A) The default notice referred to in sub-regulation (1) shall inform the defaulter of his rights and provide a remedy to the defaulter to contest the existence of the default within ten days from the date of such notice.";

(c) in sub-regulation (2) thereof, for the words "to its registered office informing it of its rights under the provisions of sub-regulation (3)" there shall be substituted the words "to the last known business or private address";

(d) immediately after sub-regulation (4) thereof there shall be added the following new sub-regulation:

"(4A) The demand notice referred to in sub-regulation (4) may be served on the relevant person either personally or by being sent by registered post to the last known business or private address."; and

(e) immediately after sub-regulation (6) thereof there shall be added the following new sub-regulation:

"(7) Where the relevant person refuses to be served with the notice either personally or through registered mail as contemplated in sub-regulations (2) and (4A) and the notice is properly addressed to the relevant person, the relevant person shall be guilty of an offence and shall on conviction be liable to a fine (*multa*) of not less than five thousand euro (€5,000) and not more than thirty thousand euro (€30,000), or to imprisonment for a period not exceeding two years, or to both such fine (*multa*) and imprisonment."

10. Regulation 44 of the principal regulations shall be amended as follows:

Amends
regulation 44 of
the principal
regulations.

(a) paragraph (a) of sub-regulation (1) thereof shall be substituted by the following:

"(a) where a Reporting Malta Financial Institution relies on an invalid self-certification, and such Reporting Malta Financial Institution knows or has reason to know that this is invalid, to a penalty of five thousand euro (€5,000). An account holder who provides a false self-certification, including signing or otherwise positively affirming a false self-certification, shall also be liable to a penalty of five thousand euro (€5,000);"; and

(b) sub-regulation (2) thereof shall be substituted by the following:

"(2) In addition, and without prejudice to any penalties incurred in terms of sub-regulation (1), where a Reporting Malta Financial Institution is found to have submitted information that is misleading, deceitful or false, every director, manager or other principal officer of such Reporting Malta Financial Institution shall be guilty of an offence and shall on conviction be liable to a fine (*multa*) of not less than ten thousand euro (€10,000) and not more than thirty thousand euro (€30,000), or to imprisonment for a period of not exceeding two years, or both such fine

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(*multa*) and imprisonment:

Provided that a director, manager or other principal officer of such Reporting Malta Financial Institution shall not be guilty of such an offence in virtue of this sub-regulation if he proves that he was unaware and could not with reasonable diligence be aware of such act or omission and that he did everything within his power to prevent that act or omission."

Adds new regulation to the principal regulations.

11. Immediately after regulation 49 of the principal regulations there shall be added the following regulation:

"Imposition of penalties.

50. (1) Where an intermediary or relevant taxpayer that has an obligation to file information with the Commissioner fails to comply with any of the obligations set out in the EU Administrative Cooperation Directive, it shall be liable to the following penalties:

(a) where such intermediary or relevant taxpayer fails to retain the documentation and information it collected in the course of meeting its reporting obligations as provided in these regulations for a minimum period of five years starting from the end of the year to which the information relates, to a penalty of two thousand five hundred euro (€2,500);

(b) where such intermediary or relevant taxpayer fails to report any of the information required to be reported in terms of regulation 13(7) within the time stipulated therein, to a penalty of:

(i) two hundred euro (€200); and

(ii) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total twenty thousand euro (€20,000).

(2) Where an intermediary or relevant taxpayer that has an obligation to file information with the Commissioner fails to report the information required to be reported in terms of regulation 13(7) in a complete and accurate manner, it shall be liable to a penalty of:

(a) two hundred euro (€200);
and

(b) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total twenty thousand euro (€20,000).

(3) Where an intermediary or relevant taxpayer that has an obligation to file information with the Commissioner fails to comply with a request for information made by the Commissioner, it shall be liable to a penalty of:

(a) one thousand euro (€1,000);
and

(b) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total thirty thousand euro (€30,000).".

12. Section VIII of Annex I to the principal regulations shall be amended as follows:

Amends Annex I to the principal regulations.

(a) sub-paragraph C(17)(a) thereof shall be substituted by the following:

"(a) a retirement or pension account that satisfies the following requirements:

(i) the account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits);

(ii) the account is tax-favoured (that is, contributions to the account that would otherwise be subject to tax are deductible or excluded from

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the gross income of the Account Holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);

(iii) information reporting is required to the tax authorities with respect to the account;

(iv) withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events; and

(v) either (i) annual contributions are limited to an amount denominated in Euro that corresponds to USD 50 000 or less; or (ii) there is a maximum lifetime contribution limit to the account of an amount denominated in Euro that corresponds to USD 1 000 000 or less, in each case applying the rules set forth in paragraph C of Section VII for account aggregation currency translation.

A Financial Account that otherwise satisfies the requirement of sub-paragraph C(17)(a)(v) will not fail to satisfy such requirement solely because such Financial Account may receive assets or funds transferred from one or more Financial Accounts that meet the requirements of sub-paragraph C(17)(a) or (b) or from one or more retirement or pension funds that meet the requirements of any of sub-paragraphs B(5) to (7);"; and

(b) paragraph D(5) thereof shall be substituted by the following:

"5. The term "Controlling Persons" means the natural persons who exercise control over an entity. In the case of a trust, that term means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.

The term "Controlling Persons" must be interpreted in a manner consistent with the definition of "Beneficial Owner" contained in regulation 2 of the Regulations as

well as that contained in regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations (S.L. 373.01), and the level of control must also be determined in line with such definitions."

13. Immediately after Annex III of the principal regulations there shall be added the following new Annex:

Adds new
Annex to the
principal
regulations.

"Annex IV

HALLMARKS

In the context of Annex IV, any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex I of these Regulations.

Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under sub-paragraphs (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the "main benefit test".

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.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in sub-paragraphs (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

Part II. Categories of hallmarks

A. Generic hallmarks linked to the main benefit test

1. 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.

2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:

(a) the amount of the tax advantage derived from the

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arrangement; or

(b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and, or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.

2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:

(a) the recipient is not resident for tax purposes in any tax jurisdiction;

(b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:

(i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or

(ii) is included in a list of third-country

jurisdictions which have been assessed by EU Member States collectively or within the framework of the OECD as being non-cooperative;

(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;

(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:

(a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;

(b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;

(c) the re-classification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;

(d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to

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reporting under the automatic exchange of Financial Account information;

(e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;

(f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

(a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and

(b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and

(c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

1. An arrangement which involves the use of unilateral safe harbour rules.

2. An arrangement involving the transfer of hard-to-value intangibles. The term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:

(a) no reliable comparables exist; and

(b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used

in 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.

3. An arrangement involving an intra-group cross-border transfer of functions and, or risks and, or assets, if 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% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.
