I'm a US Lawyer, What's the EU Got To Do With Me? - Navigating Ethics in Global Practice

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Standards of Tax Practice
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Panelists

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Agenda

• Background
  • Overview of EU Mandatory Disclosure Rules—DAC 6
  • Comparison to Existing US Mandatory Disclosure Rules
  • When is foreign tax avoidance/evasion a crime in the US?

• Discussion of Hypotheticals
  • Initial Comments
  • Hypotheticals
BACKGROUND
Is EU DAC6 an Ethical Rollercoaster for US Lawyers?

Potential reporting obligations for both attorneys and clients can raise a host of potential issues:

Model Rule 1.0
- Informed consent

Model Rule 1.2
- Scope of representation

Model Rule 1.4
- Communicating with the client

Model Rule 1.6
- Confidentiality

Model Rule 1.13
- Organization as client

Model Rule 4.1
- Truthfulness to others

Model Rule 8.4
- Misconduct
I. Overview of EU Mandatory Disclosure—DAC 6
Overview


- Improve the framework of tax transparency
- Deter aggressive tax planning
- Introducing an obligation to disclose information on reportable cross-border arrangements
- Exchanged between all EU tax authorities
Procedure to determine whether disclosure is required

Transaction within the definition of a “Cross-Border Arrangement”

Does it contain one or more of the Hallmarks?

Does the Main Benefit Test need to be satisfied before the Hallmark is taken into account?

Is the Main Benefit Test satisfied?

Disclosure under DAC6 required

No disclosure under DAC6 required.
Is there a “cross-border arrangement”? 

A cross-border arrangement is defined as “an arrangement concerning more than one member state or a 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.”
Are any of the Hallmarks Present?

• 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, as listed in Annex IV”

• The main benefit test only applies to some of the hallmarks

• The main benefit 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**
Are any of the Hallmarks Present?

In a nutshell:

- Transfer of hard-to-value intangibles between associated enterprises
- Intragroup transfer of functions, assets and/or risks leading to projected EBIT of less than 50% compared to EBIT without such transfer
- Transfer of assets with material difference in consideration between jurisdictions involved
- Deductible cross-border payment to associated recipient that is tax-exempt or subject to a preferential tax regime
- Deductible cross-border payment to associated recipient that is located in a tax haven or in an EU blacklist country
- Conversion of income into another type of income that is taxed at a lower level or exempt from tax (subject to ‘main benefit test’)
- Certain arrangements involving a non-transparent legal or beneficial ownership chain
What Hallmarks fall require the main benefit test?

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Covered by main benefit test?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Generic hallmarks linked to main benefit test</td>
<td>Yes</td>
</tr>
<tr>
<td>B</td>
<td>Specific hallmarks linked to main benefit test</td>
<td>Yes</td>
</tr>
<tr>
<td>C</td>
<td>Specific hallmarks related to cross-border transactions</td>
<td>Only partly</td>
</tr>
<tr>
<td>D</td>
<td>Specific hallmarks concerning automatic exchange of information and beneficial ownership</td>
<td>No</td>
</tr>
<tr>
<td>E</td>
<td>Specific hallmarks concerning transfer pricing</td>
<td>No</td>
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</tbody>
</table>
Definition of “tax advantage”

• Like ATAD, The term “tax advantage” is not defined in the directive, but ATAD refers to:

  “the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law”

• What is tax in this context?

• EU tax competences?
Who must disclose (I)?

1. EU Based Intermediaries
   - Intermediary is defined as:
     a) Any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; and/or
     b) Any person that 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
   - For intermediaries, EU based means being incorporated in, resident in, having a PE in, or being registered with a professional association in, a member state

2. EU Based Relevant Taxpayers
   - Where there is no EU based intermediary; or
   - Where the EU based intermediary has waived its obligation to report claiming legal professional privilege
   - “Relevant taxpayer” is defined as any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement such an arrangement or has implemented the first step of such an arrangement.
   - For taxpayers, EU based probably means being resident in, having a PE in, receiving income from / generating profits from, or carrying on an activity in, a member state?
Who must disclose (II)?

• Disclosure obligations in a number of member states:
  • Only required to file in one member state
  • Priority determined by test related to EU nexus (different for intermediaries and taxpayers)
  • Exempt from disclosure if intermediary or taxpayer has proof that the same information has been fully disclosed in another member state

• More than one taxpayer:
  • Obligation to disclose lies with the relevant taxpayer that agreed the arrangement with the intermediary or, failing that, the relevant taxpayer that managed the implementation of the arrangement
  • Notwithstanding the above, only exempt from disclosure if taxpayer has proof that the same information has been fully disclosed in another member state

• More than one intermediary:
  • Obligation to disclose lies with all intermediaries
  • Only exempt from disclosure if intermediary (i) has proof that the same information has been fully disclosed in another member state or (ii) has invoked its right to legal professional privilege
### What must be disclosed?

<table>
<thead>
<tr>
<th>(a)</th>
<th>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</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b)</td>
<td>Details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable</td>
</tr>
<tr>
<td>(c)</td>
<td>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</td>
</tr>
<tr>
<td>(d)</td>
<td>The date on which the first step in implementing the reportable cross-border arrangement has been made or will be made</td>
</tr>
<tr>
<td>(e)</td>
<td>Details of the national provisions that form the basis of the reportable cross-border arrangement</td>
</tr>
<tr>
<td>(f)</td>
<td>Value of the reportable cross-border arrangement</td>
</tr>
<tr>
<td>(g)</td>
<td>Identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement</td>
</tr>
<tr>
<td>(h)</td>
<td>Identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked</td>
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</tbody>
</table>
Timeline

Member states must transpose the Intermediaries Directive by 31 December 2019 and apply the domestic legislation as of 1 July 2020

However, information on cross-border arrangements of which the first step was implemented between the date of entry into force (25 June 2018) and the date of application (1 July 2020) (the **Retroactive Period**) will have to be disclosed to tax authorities by 31 August 2020

The disclosed information will be automatically exchanged by tax authorities one month after the end of the quarter in which the information was filed

Therefore, the first exchange of information by tax authorities will occur by 31 October 2020

The Intermediaries Directive allows each member state to impose penalties for non-compliance
Timeline - Spain

DOCUMENTO SOMETIDO AL TRÁMITE DE CONSULTA PÚBLICA PREVIA CON FECHA 11/12/2018

Legal Professional Privilege

• Art 8ab(5) enables Member States to

  • “take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State”

• The scope and application of LPP will be determined by local law, i.e. the law applicable to the intermediary

• If a firm waives its disclosure obligation on this basis, we must notify any other intermediary or, if there is no such intermediary, the relevant taxpayer of their disclosure requirement
Legal Professional Privilege - Spain

• **Scope of LPP under the Spanish Law:**
  
  • Covers all lawyers in the exercise of their profession
  • Regardless of the type of legal service that they provide: legal advice or defense services.
  • The protection extends to the associates and staff of a lawyer or a law firm

• **Exceptions to the LPP:**
  
  • General Tax Act→ Article 93 regulates the obligation of professionals to provide information with tax relevance to the Tax Authorities, however, the same article in it’s part 5 establishes that lawyers are exempted to provide confidential data regarding their clients of which they have knowledge as a consequence of the provision of professional consulting or defense services
  
  • Law on the prevention of money laundering and terrorist financing→ waives LPP for lawyers providing advising services and establishes that lawyers are obligated subjects to report to authorities when while providing services identify suspicious transactions that could be considered as money laundering
II. Comparison to US Mandatory Disclosure Rules
US Mandatory Disclosure Rules—
How Do they Compare to New EU Rules?

• Basic Regulatory Framework
  • Reportable Transactions Disclosure (Form 8886) by Taxpayer: 26 C.F.R. § 1.6011-4
  • Reportable Transactions Disclosure (Form 8918) by Material Advisers: 26 U.S.C. § 6111
  • IRC Section 6112 List Maintenance Requirements
  • Penalties under IRC Sections 6707, 6707A and 6708 for Failing to Comply
  • IRC Section 6662 Limited Relief from Penalties for Tax Shelters

• Review of Standards Applicable to Advice
  • More Likely than Not — Greater than 50% likelihood of success if challenged
  • Substantial Authority — Weight of authorities is substantial in relation to the weight of authorities in opposition to the position (generally: 40%)
  • Reasonable Basis — More authority than a frivolous position, but less than a 33% chance of success
Five Categories of Reportable Transactions

• (1) Listed Transactions: 36 transactions: https://www.irs.gov/businesses/corporations/listed-transactions

• (2) Transactions of Interest: 6 transactions: https://www.irs.gov/businesses/corporations/transactions-of-interest

• NOTE: Transactions the “same or substantially similar” are included, meaning any transaction that is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy
  • Receipt of tax opinion is irrelevant
  • Broadly construed

DAC 6: Not tied to specific transactions, but instead must look to hallmarks
Five Categories of Reportable Transactions

• (3) Transactions with Contractual Protection
• (4) Confidential Transactions: Transaction in which an advisor who is paid at least a minimum fee ($50,000 or in some cases $250,000) and limit the taxpayer’s disclosure of the tax treatment or the tax structure of the transaction to protect the confidentiality of the advisor’s tax strategies
• (5) Loss Transactions: taxpayer claims a 165 loss of at least
  • Corps or Partnerships (with only Corps as Partners): $10 million (single year) or $20 million (multiple years)
  • Individuals, S Corps, Trusts and other Partnerships: $2 million (single year) or $4 million (multiple years)
  • Individuals or Trusts: $50,000 (single year) from 988 transaction

DAC 6: General hallmarks linked to the main benefit test

DAC 6: No directly comparable provision, except that losses, in certain situations (particularly where losses are “acquired”) are a hallmark that could trigger reporting
US Mandatory Disclosure Rules—Who Makes Disclosure?

• Taxpayers
  • Includes continuing reporting obligations and document retention requirements

• Material Advisors
  • Includes persons (individuals, trusts, estates, partnerships, associations, companies, and corporations) who:
    • Provide any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
    • Directly or indirectly derive gross income in excess of the threshold amount
      • Reportable transaction $50,000 for individuals; otherwise $250,000
      • Listed transaction: $10,000 for individuals; otherwise $25,000
  • Detailed rules for what constitutes “aid, assistance, or advice”

DAC 6: Taxpayers only have a secondary obligation to report, after “intermediaries”

DAC 6: Compare to definition of “Intermediaries” which includes those who have provided “aid, assistance or advice”
US Mandatory Disclosure Rules—What Must be Disclosed?

**Taxpayers**
- Taxpayers are required to attach Form 8886 to returns and send it to IRS Office of Tax Shelter Analysis (OTSA) each year
  - Partners and S Corp shareholders must include disclosure along with their K-1s
  - Disclosure must be included with refund/tentative carryback claim, or amended return regarding loss carryback

**Material Advisors**
- Each material advisor with respect to any reportable transaction must file a “Material Advisor Disclosure Statement” (Form 8918) with the Office of Tax Shelter Analysis describing
  - Expected tax treatment and all potential tax benefits expected to result from the transaction
  - Any tax result protection with respect to the transaction, and
  - the transaction in sufficient detail for the IRS to be able to
    (a) understand the tax structure of the reportable transaction and
    (b) identify any material advisor(s) whom the material advisor knows or has reason to know acted as a material advisor with respect to the transaction
- Statement due by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor
- Multiple material advisors to one transaction may collectively agree to only file one disclosure via a designation agreement

DAC 6: Content is similar but timing is different—reporting is due within 30 days after implementation (or a transaction is ready for implementation)
Penalties

Taxpayers
• Under Section 6707A: Any person who fails to include on any return or statement any information with respect to a reportable transaction is subject to a maximum penalty of:
  • in the case of a listed transaction:
    $100,000 in the case of a natural person; and
    $200,000 in any other case; and
  • in the case of any other transaction than a listed transaction:
    $10,000 in the case of a natural person; and
    $50,000 in any other case

Material Advisors
• Under Section 6707/6111: Penalty for failure to disclose a reportable transaction is $50,000 or for listed transactions, the greater of $200,000 or 50% of gross income derived by the material advisor before the return is filed (75% if the material advisor intentionally disregarded the disclosure requirement)
• Penalties for failing to produce a list upon request are $10,000 per day for each day after the due date
How Does Privilege Affect Mandatory Disclosure?

• Generally, mandatory disclosure is required regardless of privilege (i.e., an exception to privilege)
  • Even if information underlying information is privileged, mandatory disclosure and list maintenance is still required
  • Unclear whether mandatory disclosure constitutes a waiver of privilege with respect to underlying legal advice
• Explicit carve-out from Section 7525 tax practitioner privilege for advice re: tax shelters

DAC 6: Privilege creates an exception to intermediary reporting, but that merely shifts reporting obligation to taxpayer—unclear to what extend jurisdictions will continue to allow privilege to extend to this type of advice
Is Protective Disclosure the Answer?

• In US
  • If a taxpayer is uncertain whether a transaction must be disclosed, the taxpayer may disclose the transaction and indicate on the disclosure statement that the statement is being filed on a protective basis
  • IRS will not treat disclosure statements filed on a protective basis any differently than other disclosure statements
III.
When is Foreign Tax Avoidance/Evasion a Crime in the US?
U.S. Criminal Conduct

Criminal Intent

- U.S. criminal conduct requires *mens rea*, or criminal intent
- Willfulness is a statutory element of most Title 26 (Internal Revenue Code) crimes
- The term “willfulness” has been defined as the “voluntary, intentional violation of a known legal duty”
- The term has been described as a “specific intent to violate a known legal duty”
Willful Blindness

- Generally, a crime cannot be committed under U.S. law without an intentional act that the actor knew to be against the law.

- This requires the defendant’s knowledge of the law and the defendant’s intent to violate the law.

- Under the conscious avoidance (or “willful blindness”) doctrine, however, the knowledge requirement can be satisfied without actual knowledge that the underlying conduct was criminal.
  - This requires that the defendant had an awareness of a high probability of the existence of the fact and a deliberate effort to remain ignorant of the fact.
  - Under this doctrine, the actor turned a “blind eye” to his or her conduct and failed to make reasonable and appropriate inquiry.
When Criminal Liability Can Arise

• Intentional violation of a criminal statute
  • Willful blindness.

• Aiding and abetting. An additional provision of U.S. criminal law that applies to situations where it cannot be shown the party personally carried out the criminal offense, but is an accessory to the crime

• Conspiracy. Knowingly conspired to facilitate a criminal offense
U.S. Criminal Conduct

Doctrine of Vicarious Criminal Liability

- Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents, assuming their acts meet the *mens rea* requirement.

- To hold a corporation liable for these actions, the government must establish that the corporate agent's actions:
  - Were within the scope of the agent’s duties *and*
  - Were intended, at least in part, to benefit the corporation.
U.S. Criminal Conduct

Doctrine of Vicarious Criminal Liability

- Although acts of lower level employees may conceivably lead to vicarious liability, the role and conduct of management is a key factor in the government's evaluation of the merits of any potential case.

- Under this doctrine, corporations have been held vicariously criminally liable based on the conduct of their employees.

- In contrast, individuals are exposed to criminal liability only when they, themselves, intentionally and knowingly engage in illegal conduct.
Foreign Tax Evasion

Pasquanto and the Revenue Rule

• Under the common law doctrine of the Revenue Rule, the tax laws of another country will not be enforced; that rule has been a barrier to one country seeking to collect taxes in another country.

• In Pasquanto v. United States, 544 U.S. 349 (2005), the U.S. Supreme Court held that a scheme conducted in the U.S. to evade Canadian excise taxes through smuggling alcohol into Canada from the United States is not barred by the Revenue Rule and can be prosecuted under the wire fraud statutes.

• The case has been interpreted to mean that if the activities that constitute foreign tax evasion occur in the United States through the use of interstate wires, then foreign tax evasion may constitute a violation of the federal wire fraud statute.

• Tax evaded as a result of a mail or wire fraud scheme constitutes proceeds under the money laundering statutes, and, if these proceeds subsequently were transferred or deposited in another bank, within or without the U.S., the U.S. may consider the U.S. recipients to be in violation of money laundering provisions; i.e., the taxpayer acquired proceeds of a specified unlawful activity (SUA) and then engaged in a financial transaction with those proceeds.
The Broad Potential Reach of Pasquantino

- Activities in U.S.
  - The scheme (involving continuous, substantial and egregious conduct) must occur in the United States plus the involvement of the U.S. mail or wires
  - Under DOJ policy:
    - Absent unusual circumstances, the Tax Division will not approve of mail or wire fraud charges if a case involves only one person’s tax liability
    - The Tax Division may approve mail, wire or bank fraud charges in tax-related cases involving schemes to defraud the Government or other persons if there was a large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of, or in addition to, Title 26 violations
    - While tax crimes are not listed as an SUA, mail fraud can constitute an SUA and the Tax Division may authorize mail fraud and money laundering charges based on mail fraud in unusual circumstances

- Extraterritorial Activities.
  - If the scheme occurs outside the United States, it would be extraterritorial and not within the ambit of the mail or wire fraud statutes
  - The U.S. Attorneys’ Manual requires that prosecutors obtain the approval of a specialized office within the DOJ before initiating any investigation in which jurisdiction to prosecute is based solely on the extraterritorial provisions of U.S. money laundering laws
DISCUSSION OF HYPOTHETICALS
Initial Comments

• In this section, we set forth four scenarios for discussion involving the possible application of DAC 6

• An approach to evaluating a person’s obligations under DAC 6:
  • Identify the item or items potentially subject to DAC 6
  • Do the item or items relate to covered taxes (such as income, corporate, capital gains, inheritance); VAT, customs and excise levies are excluded
  • Is there a cross-border arrangement?
  • Is the cross-border arrangement reportable (hallmarks)
  • Is there a reporting intermediary?
  • If not, then reporting by taxpayer
  • Reporting: when, what information, by whom, and to which tax authorities
Additional Comments

• The UK is expected to implement DAC 6 despite Brexit
  • Don’t overlook UK corporate criminal offences of failure to prevent criminal facilitation of tax evasion (UK and foreign), based on strict liability standard

• Scope of DAC 6 broad and subject to forthcoming local law implementation and guidance

• Likely encompasses commercial tax planning that normally would not be viewed as aggressive tax planning

• An intermediary broadly defined and includes in-house personnel

• Transnational organizations need to carefully consider intermediary rules

• Transactions subject to DAC 6 also potentially subject to other bilateral or multilateral exchange of information provisions
Scenario #1

• Tax Advisers LLP is a law firm established and operating in New York.
• Its sole office is in New York
• One of its clients, Snacking Corp., was acquired by Hungry Foods SA (Spain) in 20 July 2018, which involved significant tax planning provided by Tax Advisers LLP
• One of the lawyers at Tax Advisers LLP attends an overseas legal conference in September 2018 and hears about the rules of DAC 6, which is news to her
• Should she be worried about how DAC 6 might apply to her practice and firm?
DISCUSSION

• What obligations does Tax Advisers LLP have to an EU Member State?
  - Is there nexus under DAC6?
  - What does Tax Advisers LLP need to communicate to its client?

• Would the answer to the above question be different if Tax Advisers LLP was a member of a global network of independent law firms registered in an EU Member State?

• Do the ABA Model Rules cover interactions with foreign governments? Or a US client’s obligations to a foreign agency?

• Is the attorney living up to Rule 1.1’s competence standards?
  - Rule 1.1 (Comment [8])
Scenario #2

• Tax Boutique LLP is a Chicago law firm with a branch office in Ireland
• It advised an EU Member State client on a transfer pricing matter involving hard-to-value intangibles in November of 2018
• It worked with a global professional services firm under a Kovel Agreement
• It learns that it may have an obligation to report to an EU Member State under DAC 6
• Will Tax Boutique LLP be required to report?
• If not, because of professional privilege, who is required to report?
• What obligations does the firm have to an affected client and the professional services firm regarding any potential reporting?
DISCUSSION

• Informing the client
  ▪ What needs to be communicated to comply with Model Rule 1.4?
  ▪ Does Model Rule 1.2(d) affect what advice a lawyer can give to the client about reporting the transaction?
  ▪ Would the client reporting involve criminal/fraudulent elements?
  ▪ Is non-reporting a crime?

• Consent required?
  ▪ Does the lawyer need a client’s informed consent consistent with Model Rule 1.0(e) to proceed with reporting?
DISCUSSION (continued)

• Who reports?
  • If there are multiple intermediaries, can a US firm forego reporting?
    ▪ Model Rule 1.2

• and
Scenario #3

• Tax Partners LLP, a global law firm with branch offices in several EU Member States, advises Big Corp on a cross-border transaction with EU tax implications in November 2018

• It worked with a number of other intermediaries, including an investment bank, accountants, and lending banks

• Tax Partners LLP informs Big Corp about the firm’s obligation to report to the appropriate EU Member State. Big Corp tells Tax Partners LLP that under no circumstances can the firm disclose the details of the transaction to the Member State.

• Can Tax Partners LLP obey the wishes of Big Corp?
• Can Tax Partners LLP withdraw from representing Big Corp to avoid disclosure?
DISCUSSION

• Confidentiality
  • ABA Model Rule 1.6 provides, for example, that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except in limited circumstances

• Accurate Reporting
  • ABA Model Rules 4.1(a) and 8.4 provide that a lawyer may not make a false statement of a material fact or law or a fraudulent statement. Thus, lawyer may not be involved or associated with reporting that incorporates or continues a false or fraudulent statement.
    • Nevertheless, Model Rule 4.1 Comments [1] and [3] warn against misrepresentation and what constitutes statements of fact
  • A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, but an EU Member State is not a tribunal. ABA Model Rule 3.3.
DISCUSSION (continued)

• **Withdrawal**
  • A lawyer shall withdraw from an ongoing representation if the representation will result in violation of the rules of professional conduct or other law. ABA Model Rule 1.16(a)
    ▪ If withdrawal is necessary, how does this interact with Model Rule 1.4 on communication with the client?

• **Organization as a Client**
  • If the tax director forbids Tax Partners, should the firm go up the management chain? How does Model Rule 1.13(c) apply?

• **Former Client**
  • What if Big Corp had fired Tax Partners after the transaction occurred but before reporting to the EU Member State was required?
    ▪ Model Rule 1.6, Comment [1]
Scenario #4

- A Swiss private bank (SwissCo) has a EU client (Client) that is concerned with exchange of information under CRS. It refers the EU Client to its US trust company affiliate (US TrustCo), resident in South Dakota, to provide advice to the EU client.

- USTrustCo, in coordination with SwissCo, proposes a plan to move the Client’s assets to the United States in a complex plan that involves a US discretionary irrevocable trust and several LLCs that will preclude disclosure under CRS.

- What are the disclosure obligations of SwissCo and USTrustCo under DAC 6?
DISCUSSION

• What are USTrustCo’s obligations in on-boarding the Client?

• How do SwissCo and USTrustCo deal with DAC6, particularly a cross border arrangement that has a possible impact on the automatic exchange of information or the identification of beneficial ownership
  ▪ Is this “skirting” involvement in a crime or fraud under Model Rules 1.2(d) or 8.4?

• Would the due diligence actions of USTrustCo and SwissCo change if:
  • The Client’s sole motivation in moving his assets to the US was privacy?
  • The client is non-compliant in his home country and the movement of the US is intended to facilitate his continued non-compliance and disclosure to his home country?
APPENDIX

ABA MODEL RULES AND DETAILED DAC6 HALLMARKS
• Rule 1.1 Competence

COMMENT:

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
• Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(6) to comply with other law or a court order
• Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

**Client-Lawyer Relationship**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
• Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

*Client-Lawyer Relationship*
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
• Rule 1.4: Communications

Client-Lawyer Relationship

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished

(3) keep the client reasonably informed about the status of the matter

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation
• **Rule 1.4: Organization as Client**

*Client-Lawyer Relationship*

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
• Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6
• **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
DAC6 - Category A & B Hallmarks
(Subject to Main Benefit Test)

**A:** An arrangement where:
1. There is a condition of confidentiality in respect of how the arrangement could secure a tax advantage
2. Fees are contingent upon the amount of the tax advantage derived from the arrangement
3. There is substantially standardised documentation and / or structure and is available to more than one taxpayer without a need for substantial customisation

**B:** An arrangement where:
1. Contrived steps are taken in relation to loss-making companies
2. Income is converted into another category of income which is taxed at a lower rate.
3. There are circular transactions resulting in the round-tripping of funds or offsetting / cancelling transactions
Category C Hallmarks that are subject to Main Benefit Test

Cross-border transactions involving a deductible payment made between 2 or more associated persons* where:

(*broadly, enterprises are associated if one enterprise has a 25%+ participation in the management, control, capital or profits of the other)

- the recipient’s residence jurisdiction has no tax or a zero or almost zero tax rate (para 1(b)(i)),

- the payment benefits from a full exemption from tax in the recipient’s residence jurisdiction (para 1(c)), or

- the payment benefits from a preferential tax regime in the recipient’s residence jurisdiction (para 1(d))
DAC6 - Category C Hallmarks

**Category C Hallmarks that are not subject to Main Benefit Test**

- Cross-border arrangements involving a deductible payment made between 2 or more 25%+ associated persons where the recipient is not tax resident in any tax jurisdiction

- Cross-border arrangements involving a deductible payment made between 2 or more 25%+ associated persons where the recipient is resident in an EU Blacklist or OECD non-cooperative jurisdiction (see Appendix 1 for list of jurisdictions)

- Cross-border arrangements where there are deductions for the same depreciation on an asset in more than one jurisdiction

- Cross-border arrangements where relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction

- Cross-border arrangements which include transfers of assets where there is a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved
**Specific hallmarks concerning Common Reporting Standard (CRS) and beneficial ownership**

1. Arrangements 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 take advantage of the absence of such legislation or agreements.
   - In summary, arrangements designed to circumvent CRS which provides for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for that exchange worldwide
   - See page 12 of Intermediaries Directive for non-exhaustive list of arrangements which will fall within this hallmark
   - Preamble to Intermediaries Directive states that when Member States are implementing this hallmark they should use the OECD’s Report on Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures as a source of illustration or interpretation to the extent that the report is aligned with the provisions of EU law

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 the Fourth Anti-Money Laundering Directive, are made unidentifiable
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 intragroup 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
Thank You!

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