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The Main Benefit Test according to the EU Directive no. 2018/822 ("DAC 6") and the implementing legislations

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The Main Benefit Test according to the DAC 6 Directive

According to the EU Directive no. 2018/822 (“DAC 6”) the main benefit test (“MBT”) is 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”* .

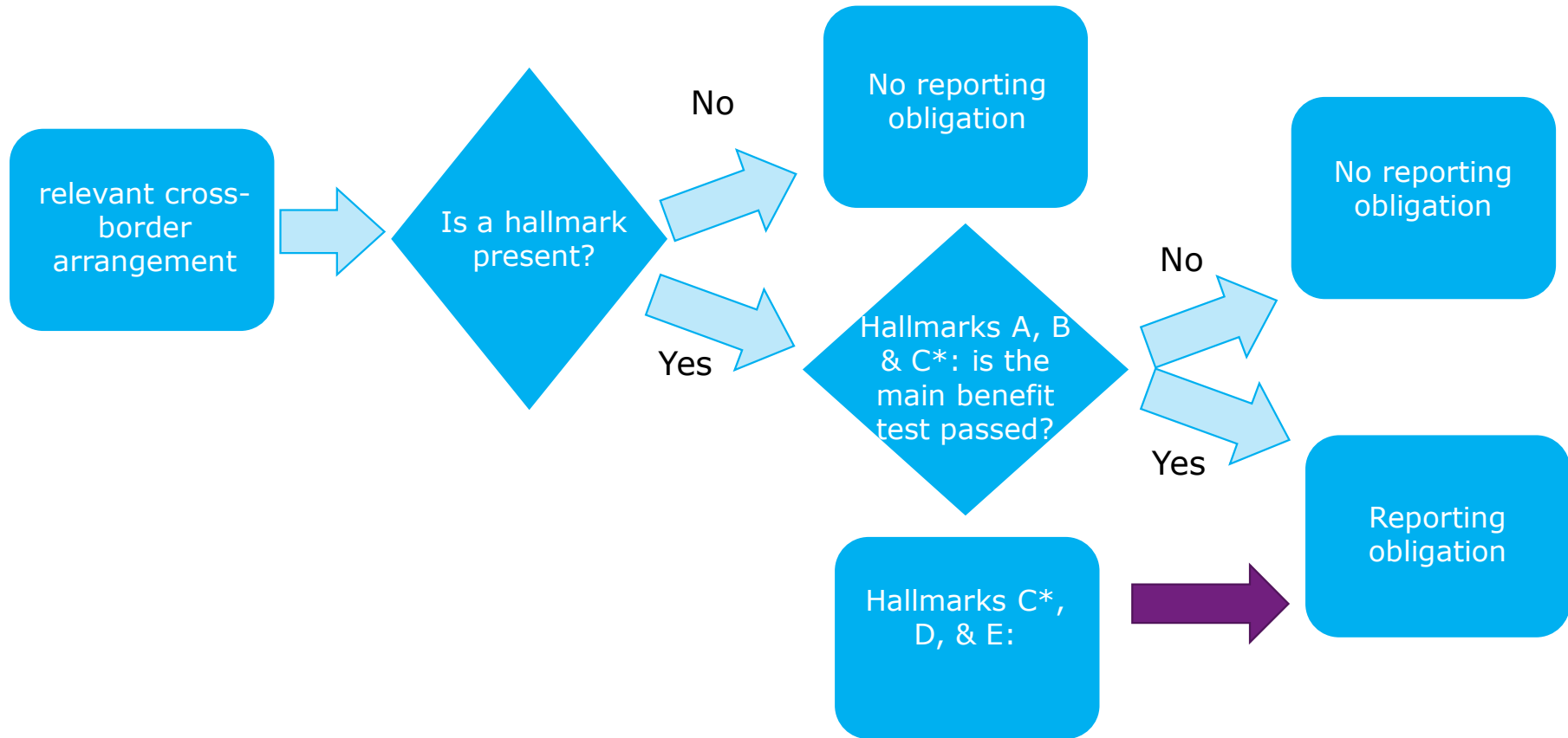
The MBT is required for the following hallmarks:

- Generic hallmarks under category A,
- Specific hallmarks under category B,
- Specific hallmarks under category C related to cross-border payments, i.e. sub point 1, b)(i), c), and d).

On the other hand, the residual hallmarks under category C, and those under category D and E do not require the MBT, meaning that in such cases it is not relevant for the reporting obligation that the cross-border arrangement is mainly aimed at obtaining a tax advantage (or in other words, the MBT is deemed as verified).

The DAC 6 Directive does not provide any definition of the concept of “tax advantage”, which can be therefore understood in a broad sense.

The Main Benefit Test according to the DAC 6 Directive



*Only hallmarks b(i), c) and d) under category C require the MBT.

The Main Benefit Test according to the DAC 6 Directive

In order to apply the MBT, a multi-step approach shall be adopted:

STEP 1

Check the existence of hallmarks A, B, C* which require the MBT

STEP 2

Identify the tax advantage obtained compared to that obtainable as a result of the straightforward arrangement which could be implemented

STEP 3

Identify the other non-tax advantages of the cross-border arrangement

STEP 4

Comparison of the tax and non-tax advantages in order to verify the MBT passing

The Main Benefit Test according to the DAC 6 Directive

Hallmarks under category C which require the MBT passing	
C. 1, b), (i)	An arrangement that involves deductible cross-border payments made between two or more associated enterprises where although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero (LESS THAN 1 %)
C. 1, c) Exemption of that particular payment	An arrangement that involves deductible cross-border payments made between two or more associated enterprises where the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes.
C. 1, d) Preferential Regime	An arrangement that involves deductible cross-border payments made between two or more associated enterprises where the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes – Harmful Tax Practice - OECD

The Main Benefit Test according to the implementing legislations

Italy

— DAC 6, Main Benefit Test:

If a person reasonably expects to derive **mostly** a tax advantage from an arrangement, thus, the Main benefit test is verified

— Italian Ministerial Decree of November 17, 2020, article 7

Guidance to decide if the main benefit of an arrangement is driven by advantages other than the tax advantage: in case the second prevails, the main benefit test is verified.

Italian Tax Authority issued a draft Circular Letter, currently under public consultation:

[...] It follows that the tax reduction is to be understood in potential terms, i.e. the tax advantage that can be expected as a logical consequence of the facts and circumstances of the case, by comparing hypothetically the tax effects in the presence of the mechanism with tax effects without the mechanism.

It can fall within the concept of reduction of the tax:

- 1. obtaining a reduction in the tax base or tax with respect to those that can be determined in the absence of the mechanism;*
- 2. obtaining a remedy against double taxation, or an increase of the remedy;*
- 3. obtaining a tax refund or the increase thereof compared to that due in the absence of the mechanism;*
- 4. the deferral of tax payment;*
- 5. the elimination of withholding taxes or their reduction.*

The Main Benefit Test according to the implementing legislations *Italy*

Practical rules of Decree:

MBT is verified when the tax advantage exceeds 50% of the sum of the tax advantage and the non-tax advantages (i.e. amount of economic benefits deriving from the cross-border arrangement).

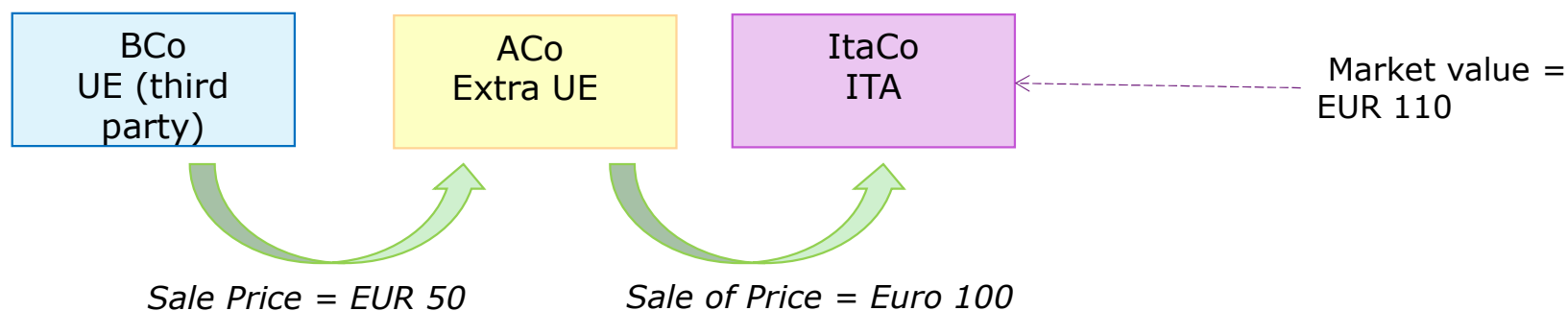
Tax advantage is determined by the difference between

- the taxes to be paid on the basis of one or more cross-border arrangement and
- the same taxes that should be due in the absence of such an arrangement.

Examples on how to apply such principles are provided in draft Circular letter

The Main Benefit Test according to the implementing legislations

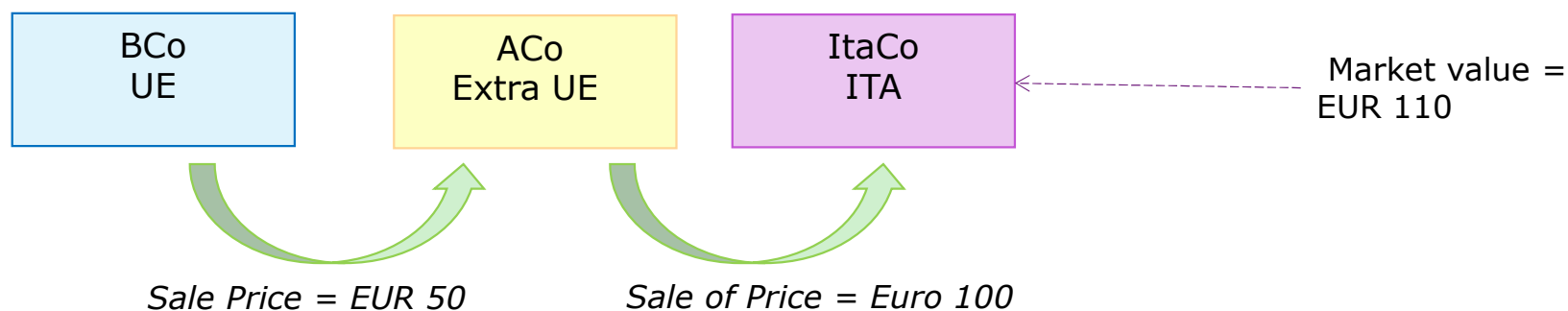
Example: MBT in case of purchase from a procurement hub located in a Tax Haven (hallmark C.1. b.1)



MBT	Extra-tax advantage	Tax advantage
a) Tax saving in Italy (24%100)		24
b) Foreign Tax		0
Tax Advantage (a-b)		24
Extra tax advantage (110-100)	10	
MBT = 24/(24+10)		70.6%

The Main Benefit Test according to the implementing legislations

Example: MBT in case of purchase from a procurement hub located in a Tax Haven (hallmark C.1. b.1)



MBT	Extra-tax advantage	Tax advantage
a) Tax saving in Italy (24%100)		24
b) Foreign Tax (30%)		15
Tax Advantage (a-b)		9
Extra tax advantage (110-100)	10	
MBT = 9/(9+10)		47.3%

The Main Benefit Test according to the implementing legislations

United Kingdom

According to the latest UK-EU Trade and Cooperation Agreement, United Kingdom will (for the near future) apply reduced reporting obligations under DAC 6 by limiting its application to cross-border arrangements falling within the hallmarks under category D (corresponding to the automatic exchange of information and beneficial ownership). Consequently, as the MBT is not applicable under Category D, the MBT will no longer be applicable under the UK's rules.

Notwithstanding the reduced scope, the requirements set out in the DAC 6 Directive will continue to be applicable where an EU intermediary is involved in a cross-border transaction, so UK businesses (or their EU-based advisors) which are part of cross-border arrangements involving the EU will still need to consider the full scope of DAC 6 as implemented in that relevant EU member state.

The Main Benefit Test according to the implementing legislations

Germany

According to the implementing legislation, a tax advantage should be considered to arise if, through the arrangement, taxes are refunded, tax rebates are granted or increased, tax claims are waived or reduced or the arising of tax claims is prevented or shifted to other tax periods.

The guidance clarifies that MBT is not verified if the relevant tax advantage is limited to Germany, allowed by the internal regulations or in line with the principles of the applicable law.

Whitelist cases - Ruprecht

France

The implementing legislation does not provide any definition of "tax advantage".

The French Tax Authorities indicate that the benefit of tax incentives obtained in France and consistent with the object of the tax law is not considered as a tax advantage for the MBT purpose.