

INTRODUCTION TO TAXATION

Lecture 4 - EU Law Impact on Maltese Tax Law

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Overview

1. Tax Transparency and Exchange of Information;

- DAC 1
- FATCA & CRS;
- Tax Rulings
- Country by Country Reporting;
- DAC 5
- DAC 6
- DAC 7

2. EU Direct Tax Directives:

- The Anti-Tax Avoidance Directive;
- The Parent-Subsidiary Directive;
- Interest and Royalties Directive



Tax Transparency and Exchange of Information



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Global Tax Transparency

- Tax transparency is about putting an **end to bank secrecy** and **tax evasion** through **global tax co-operation**.
- Developed as a need to **tackle tax evasion by individuals** and a **need to reduce the opportunities for aggressive tax practices by multinationals**.



Tax Evasion

TAX EVASION is usually associated with the **commission of a criminal offence**. It can be considered to consist of **wilful and conscious non-compliance with the laws of a taxing jurisdiction** which can include a **deliberate concealment of facts** from revenue authorities.

TAX EVASION is an action by which a taxpayer tries to **escape legal obligations** by **fraudulent** or **other illegal means**. It may result from the evasion of tax on income that arises from illegal activities, such as **smuggling, drug trafficking, and money laundering**. In a broader sense, tax evasion may also encompass a reckless or negligent failure to pay taxes legally due, even if there is no deliberate concealment of income or relevant information.



Three Methods of Exchange of Information

<p>Upon Request</p>	<p>Where a competent authority REQUESTS specific tax information about a taxpayer from another competent authority. Typically, the information requested relates to an examination, inquiry or investigation of a taxpayer's tax liability for specified tax years.</p>
<p>Spontaneous</p>	<p>Provision of information to another contracting party that is foreseeably relevant to that other party and that has NOT been previously requested. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials.</p>
<p>Automatic</p>	<p>Involves the systematic and periodic transmission of PRE-AGREED taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc). This information is obtained on a routine basis in the source country (generally through reporting of the payments by the payer (financial institution, employer etc).</p>

Mechanisms of Exchange of Information applicable to Malta

Malta has entered into multiple legal arrangements for Exchange of Information.

The arrangements include the following categories:

1

Upon Request

A mechanism through which **one Competent Authority in one jurisdiction REQUESTS** information from **another Competent Authority in a different jurisdiction**.

In the event that Malta is the requested jurisdiction, there are **NO domestic tax limitations on the powers of the Commissioner for Revenue** to require and access information from an information-holder in Malta.

In this respect, **limitations are circumscribed through the applicable international arrangements** designed to respect the essence **of fundamental rights**.



Mechanisms of Exchange of Information applicable to Malta

2

Automatic Exchange

A mechanism through which one Competent Authority in one jurisdiction **AUTOMATICALLY EXCHANGES pre-established categories of information** to another Competent Authority in a different jurisdiction over an interval of time.

Therefore, **certain information-holders in Malta** may systematically be required to provide information to the Commissioner for Revenue in line with the applicable international arrangements.

Mechanisms of Exchange of Information applicable to Malta

- Malta's obligations and commitments in relation to Exchange of Information are encapsulated in the:

S.L. 123.127 Cooperation with Other Jurisdictions on Tax Matters Regulations



Automatic Exchange of Information: Main Instruments

- **Directive for administrative cooperation in the field of taxation (DAC 1)**
- **Automatic Exchange of Financial Account Information (DAC 2)**
- **Exchange of Rulings (DAC 3)**
- **Country-by-Country Reporting (DAC 4)**
- **Mandatory Disclosure Rules (DAC 6)**

Directive 2011/16/EU Directive for administrative cooperation in the field of taxation (DAC 1)



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Directive for administrative cooperation in the field of taxation (DAC 1)

- The DAC directs all European Union (EU) member states to **share certain information** for taxable periods **starting on or after 1 January 2014**. The information exchanged is in relation to **residents of other member states and includes:**
 - employment income;
 - directors fees;
 - life insurance products (not covered by other directives);
 - pensions;
 - ownership and income from immovable property



FATCA & CRS



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Foreign Account Tax Compliance Act (‘FATCA’)

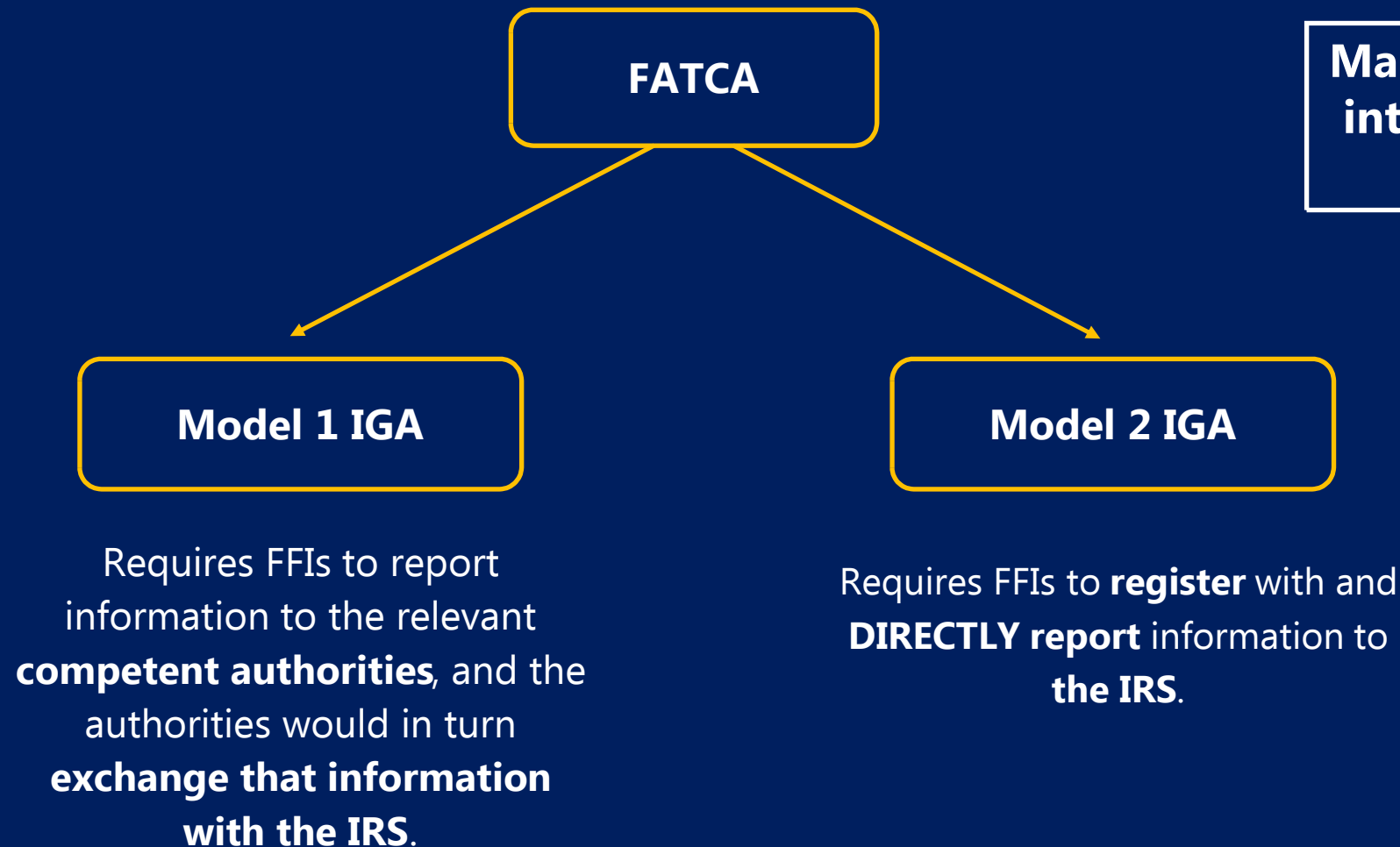
- FATCA emerged as a result of **failures by U.S. taxpayers to disclose income and assets deriving from overseas.**
- FATCA aims to **prevent US taxpayers from avoiding tax** by investing through **non-US Financial Institutions** or **offshore investment vehicles** and concealing their assets from the US tax authorities.
- Under FATCA, a designated **Foreign Financial Institution (‘FFI’)** is compelled to conduct a set due-diligence procedures in order to **identify** and **report** certain information **regarding U.S. taxpayers** who hold **financial assets** with **non-U.S. financial institutions** and other **offshore accounts.**



30% Withholding Tax where:

A non-U.S. financial institution (“FFI”) does not comply with the disclosure obligations imposed by FATCA. Withholding Tax to be applied on all relevant U.S.-sourced payments, such as dividends and interest paid by U.S. corporations.

Foreign Account Tax Compliance Act ('FATCA')



Malta entered into a Model 1 IGA



Common Reporting Standard ('CRS') (DAC 2)

- CRS has been developed by the **OECD** requiring the **REPORTING** of certain **financial accounts held with financial institutions** being **tax resident in a CRS participating jurisdiction**.
- Standardised model for exchange of information **based on the FATCA regime**. However, although CRS is **similar** to FATCA it is **NOT identical** thereto.
- Malta is a signatory to the **CRS Multilateral Competent Authority Agreement ('MCAA')**, a multilateral instrument with an ever increasing number of participating jurisdictions to exchange financial information.
- Malta implemented CRS through the adoption of **Directive 2014/107/EU** into **Subsidiary Legislation 123.127 Cooperation with Other Jurisdictions on Tax Matters Regulations**.
- Also **local guidelines** issued by CfR to help with local implementation of **both FATCA & CRS**.



Common Reporting Standard ('CRS')



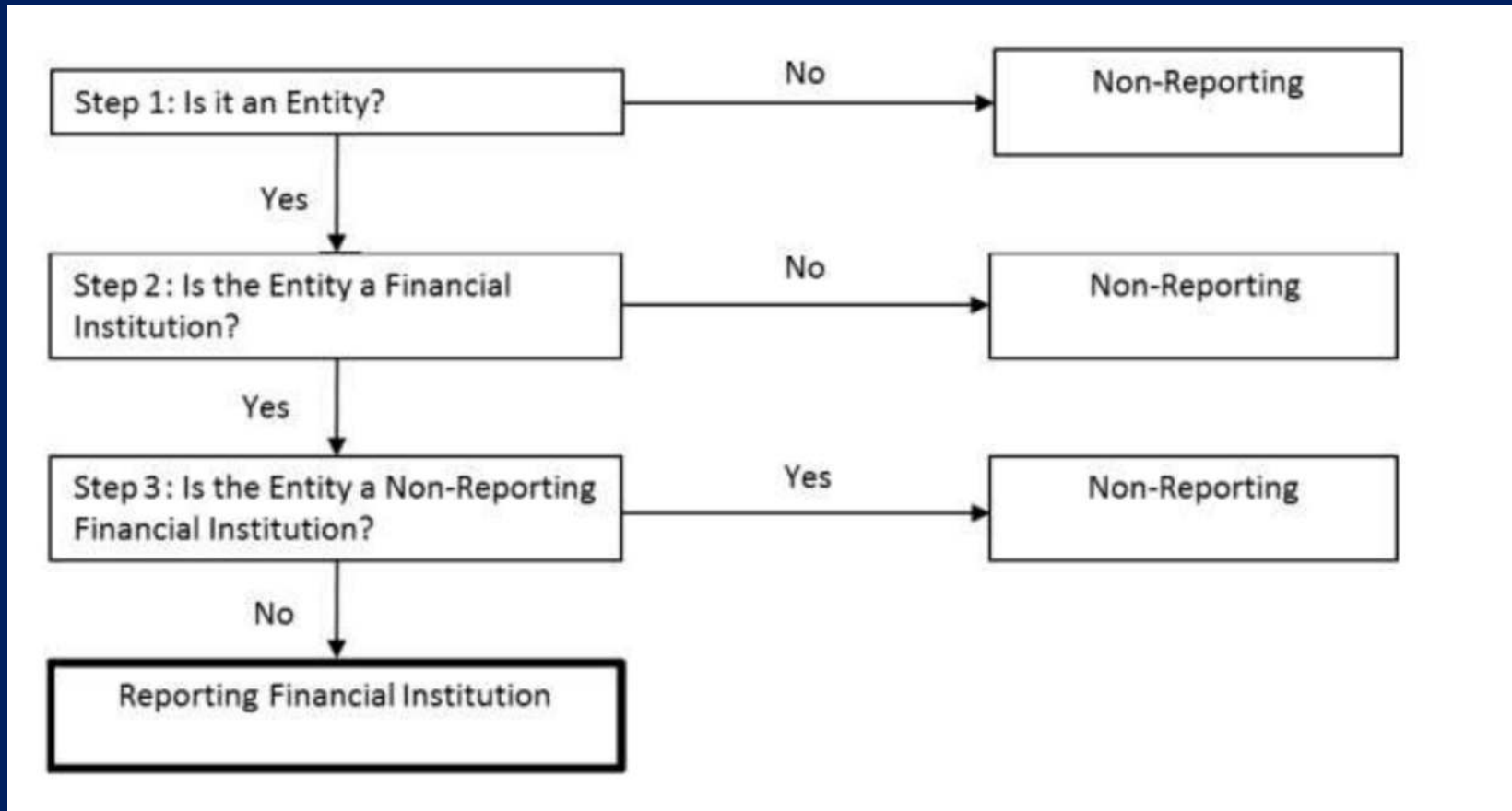
1. Entity Classification (1)

- Exercise is conducted to **determine the classification of the entity** for FATCA and CRS purposes.
- Despite there being **similarity** in the definition of “**Financial Institution**” under both FATCA and CRS, the definition should be **analysed independently**.



1. Entity Classification (2)

- The Guidelines on FATCA/CRS provide that:



The term entity includes **BOTH** legal persons & legal arrangements.

Thus, **trusts** can also be Reporting Financial Institutions despite not having legal personality.

1. Entity Classification (3)

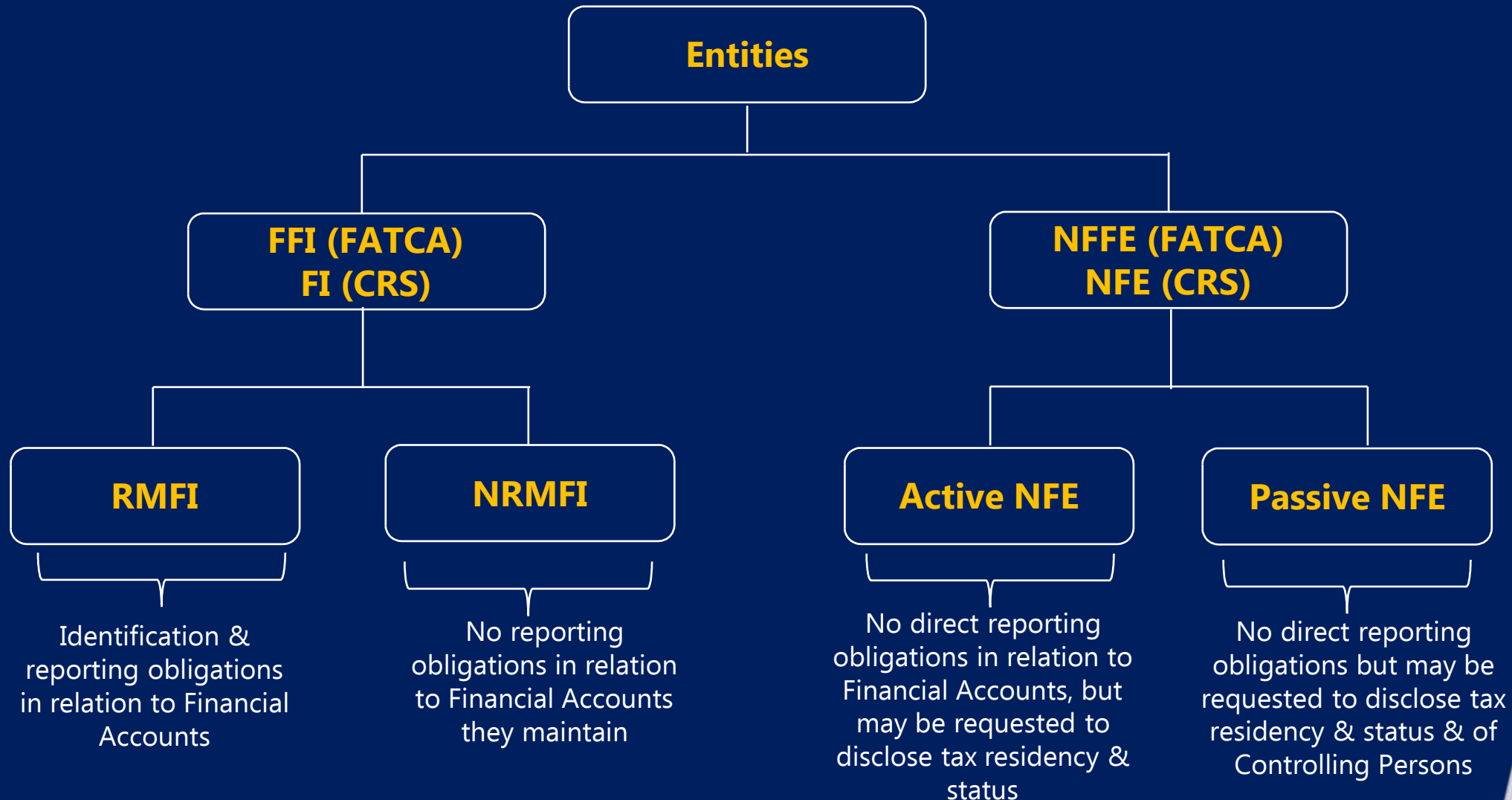
“Financial Institutions” – Any Malta Financial Institution that is **NOT** a Non-Reporting Malta Financial Institution.

There are **four types** of “Financial Institutions” under FATCA & CRS:

1	Depository Institution	An entity that accepts deposits in the ordinary course of banking or similar business.
2	Custodial Institution	Holds, as a substantial portion of its business, financial assets for the account of others.
3	Investment Entity	<p>An entity which “primarily” conducts as a business, or are managed by an entity that conducts as a business, one or more of the following activities for/on behalf of other persons:</p> <ul style="list-style-type: none"> ➤ Trading in money market instruments; ➤ Foreign Exchange; ➤ Index Rate and index instruments, ➤ Transferable securities & commodity futures; ➤ Individual and collective portfolio management ➤ Investing, administering or managing funds/money on behalf of other persons.
4	Specified Insurance Company	An entity is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a cash value insurance contract or annuity contract.



1. Entity Classification (4)



1. Entity Classification (5)

- If the entity is not a Financial Institution (i.e. neither an RMFI and neither a Non-Reporting Malta Financial Institution, a further classification must be made:

Passive NFE / NFFE

An NFE/NFFE that is **NOT** an **Active NFE/NFFE**.

Active NFE/ NFFE

An Entity is an Active NFE/NFFE if **LESS** than **50%** of its income is **passive income** and **LESS** than 50% of its assets produce or are held for the production of passive income.

Examples of 'passive income' include rental income and interest income.



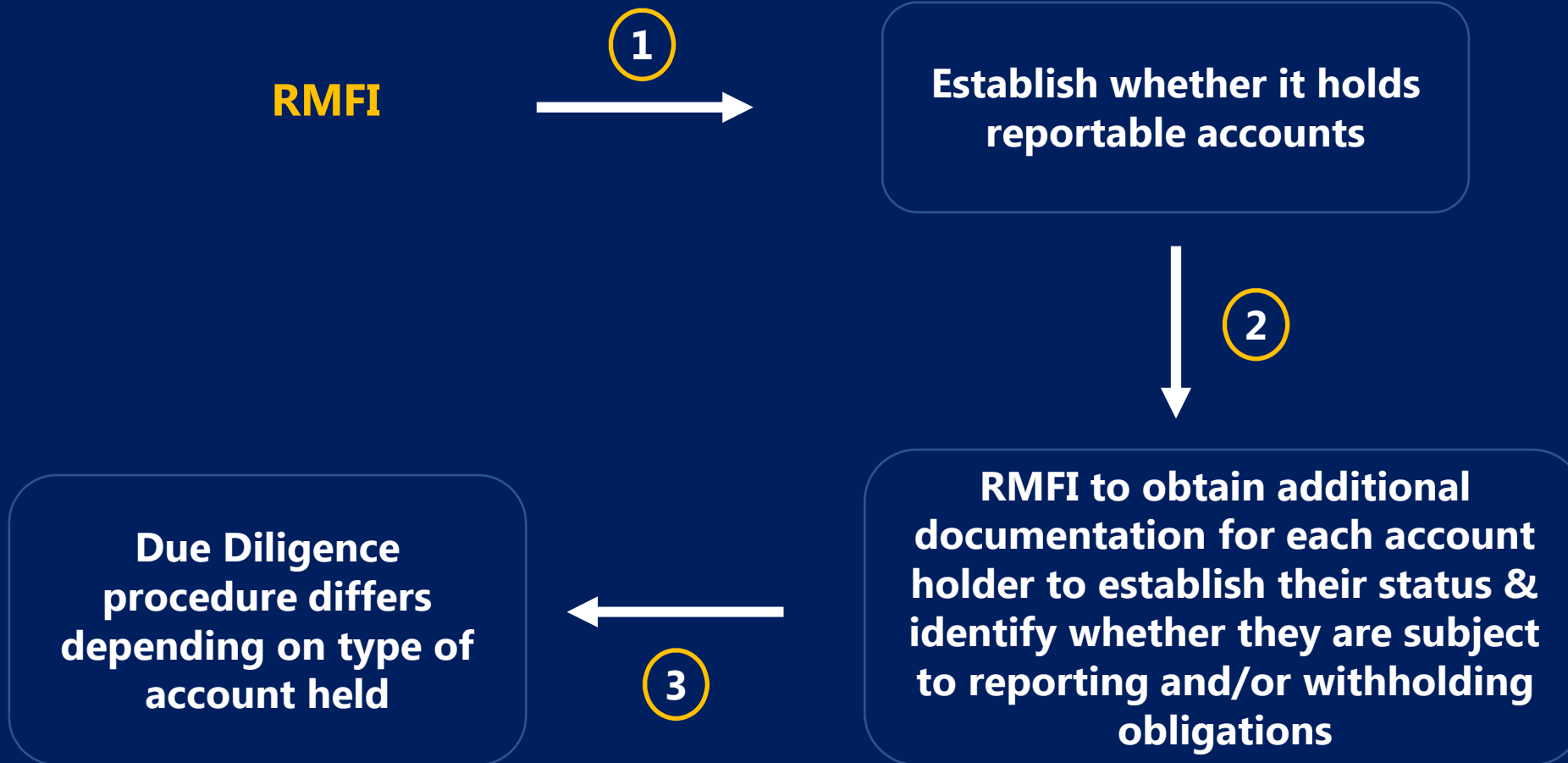
FATCA & CRS – Practical Example

- ABC Limited is a public limited liability company incorporated under the laws of Malta and principally acts as the financing arm of a group of companies.
- The Group of Companies contains a diverse portfolio of business entities involved in the manufacture of natural stone, property development and property letting.
- In pursuit of its role in the financing of said Group companies, ABC Limited provides interest-bearing lending intra-Group. ABC Limited has additionally entered into long-term operating leases, both with Group companies and with third parties, on its investment property portfolio consisting of certain office and industrial buildings.

**FATCA/CRS Entity Classification:
PASSIVE NFE**



2. Due Diligence



3. Reporting

- Once a RMFI has applied the procedure and due diligence in respect of the accounts it holds and has identified **Reportable Accounts**, then it must **report information in relation to those accounts** to the Commissioner for Revenue.
- Reporting must be completed annually:
 - by **30 April** of a calendar year for the previous calendar year (if reporting through XML reporting);
 - by **30 March** of a calendar year for the previous calendar year if the Malta Reporting Financial Institution will be reporting through alternative reporting (excel spreadsheet) or will be submitting a nil return.

	FATCA	CRS
Who	Accounts held by U.S. Specified Persons; and Non-US entity with one or more controlling persons that is U.S.	Accounts held by persons tax resident in: <ul style="list-style-type: none"> - All EU Member States; - Signatories of the Multilateral Competent Authority
What	Account holder information Financial information	Account holder information Financial information

Council Directive (EU) 2015/2376

Exchange of Tax Rulings

(DAC 3)



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Exchange of Tax Rulings (DAC 3)

- The competent authority in Malta, where an **advanced cross-border ruling** OR an **advance pricing arrangement** was **issued, amended** or **renewed** after 31 December 2016 shall, by automatic exchange, communicate information thereon to the competent authorities of all other EU Member States as well as to the European Commission,



Which Rulings are in Scope?

Advance Cross-Border Ruling

- Means any **agreement, communication**, or any **other instrument** or **action** with similar effects, including one issued, amended or renewed in the context of an enquiry in terms of article 13 of the Income Tax Management Act, including a tax audit, and which **meets the following conditions**:

- i. issued, amended or renewed by the Commissioner, or on behalf of, the Government of Malta, irrespective of whether it is effectively used;
- ii. issued, amended or renewed, to a particular person or a group of persons, and upon which that person or a group of persons is entitled to rely;
- iii. concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of Maltese law relating to taxes;
- iv. relates to a cross-border transaction or to the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment; and
- v. is made in advance of the transactions or of the activities in another jurisdiction potentially creating a permanent establishment or in advance of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place.

Which Rulings are in Scope?

Advance Pricing Arrangement

- Means any **agreement**, **communication** or any **other instrument** or **action** with similar effects, including one issued, amended or renewed in the context of an enquiry in terms of article 13 of the Income Tax Management Act, including a tax audit, and which meets the following conditions:
 - i. is issued, amended or renewed by the Commissioner, or on behalf of, the Government of Malta or more EU Member States irrespective of whether it is effectively used;
 - ii. issued, amended or renewed, to a particular person or a group of persons, and upon which that person or a group of persons is entitled to rely;
 - iii. determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

Council Directive (EU) 2016/881 Country-by-Country Reporting (DAC 4)



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Country-by-Country Reporting (CbCR) (1)

- Being active in different countries, multinational enterprises (MNE Groups) have the possibility of engaging in aggressive tax-planning practices that are **NOT AVAILABLE** for domestic small and medium-sized enterprises.
- As a result, tax authorities felt the need to be in receipt of information on MNE Groups regarding their structure, transfer-pricing policy and internal transactions, so as to enable such authorities to ascertain whether such companies have engaged in harmful tax practices.
- Accordingly, with a view of increasing transparency on the activities of qualifying MNE Groups, the Council of the EU introduced mandatory automatic CbCR through the issue of **Directive 2016/881/EU** (commonly known as '**DAC4**').
- The CbCR Directive was transposed into Maltese legislation by virtue of **Legal Notice 400 of 2016**, amending Subsidiary Legislation 123.127 Cooperation with Other Jurisdictions on Tax Matters Regulations.

MNE Group

The Regulations apply for MNE Groups having a total **consolidated group revenue of at least EUR 750 million** (or an equivalent amount in local currency) during the fiscal year immediately preceding the reporting year



Country-by-Country Reporting (CbCR) (2)

- CbC reporting requires **MNE Groups** to file a report, providing a breakdown of:

- | |
|--|
| ▪ Revenues; |
| ▪ Profit (loss) before income tax; |
| ▪ Income tax paid and income tax accrued |
| ▪ Stated capital |
| ▪ Accumulated earnings |
| ▪ Number of employees |
| ▪ Tangible assets other than cash and cash equivalents |

Information is on a jurisdiction per jurisdiction basis, in respect of EACH tax jurisdiction in which the MNE Group does business

- A Malta resident reporting entity is required to file the CbC report in Malta within **12 MONTHS** from the **last day of the fiscal year of the multinational group**.

Council Directive 2011/16/EU Directive on Administrative Cooperation (‘DAC 6’)



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DAC 6 – Disclosure Elements

❖ TAXES IN SCOPE

Any EU member state tax, except VAT, customs, excise duties and compulsory social security contribution.

❖ ARRANGEMENT

Any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event, whether or not legally enforceable.

❖ CROSS-BORDER

Arrangements concerning more than 1 Member State or a Member State and a Third Country.

❖ HALLMARKS

Characteristics in a transaction that could potentially enable tax avoidance or abuse.

❖ INTERMEDIARY

Reporting Obligation is with EU-based intermediaries.



DAC 6 – Reportability



DAC 6 imposes the **obligation for intermediaries to disclose** reportable cross-border arrangements (**RCBA's**) where at **least ONE (1) of the Hallmarks** is satisfied.

Responsibility to Report

The reporting obligation under DAC 6 is mainly with **EU based intermediaries**

Primary Intermediary

- ❖ a person (natural or legal) that **designs, markets, organises or makes available for implementation or manages the implementation of** a reportable cross-border arrangement.
- ❖ such person has a **FULL UNDERSTANDING** of the material aspects of the arrangement, including the **legislation being relied on** and the **conditions that need to be met** to achieve the planned outcome.

Secondary Intermediary

- ❖ a person 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.

Legal Professional Privilege (LPP)

Article 13(7)(e) of the Regulations

“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.**”

Article 3 of the Professionals Secrecy Act

“**advocates**, notaries, legal procurators, social workers, psychologists, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers and insurance sub-agents, officials and employees of the State”



Legal Professional Privilege (LPP)

- Non-disclosing intermediaries, such as lawyers, who have claimed LPP, are nevertheless bound by the following **obligations**:

- 1 **Notification of waiver applicability** to another intermediary, or the relevant taxpayer, within 7 days from the date when the reporting trigger point arises;
- 2 **Annual reporting requirement** to Commissioner for Revenue detailing those reportable cross-border arrangements in respect of which the reporting obligation was waived to another intermediary or the relevant taxpayer.



Hallmarks (1)

- A hallmark is a characteristic of a cross-border arrangement which can be considered as indicative of a potential risk of **tax fraud** or **tax evasion** - however, the existence of a hallmark **does not constitute a finding of tax avoidance** but represents a tax planning arrangement which is desirable for tax authorities to have a closer look at.
- Where a cross-border arrangement falls under any one of the categories of hallmarks (and also satisfies the main benefit test ("MBT") for certain hallmarks), such cross-border arrangement becomes a **reportable cross-border arrangement**.
- There are **FIVE** main categories of hallmarks:



The Main Benefit Test

Certain hallmarks are linked to the Main Benefit Test, and consequently, an arrangement falling within such hallmarks **will ONLY be reportable to the extent the MBT is satisfied.**

The Main Benefit Test:

“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 an **OBJECTIVE TEST** one and does not take into account the **purpose** or **intentions** of the participants to the arrangement.

Therefore, the fact that a **person does not actively seek to obtain a tax advantage** will **NOT** be a determinative factor when considering whether a cross-border arrangement meets the MBT.



What needs to be reported?

Specific Hallmarks AEOI & BO (D)

Schemes which may undermine automatic exchange of information

D.1 Arrangements which have the effect of **undermining reporting requirements under agreements for the automatic exchange of information**. For example, arrangements designed to, or having the effect of, **circumventing the Common Reporting Standard (CRS)** (e.g. transferring funds to an entity or jurisdiction which is not within the scope of the automatic exchange of information).

Schemes involving non-transparent legal or beneficial ownership chain

D.2 Arrangements involving the use of **legal arrangements or structures which obscure beneficial ownership** (i.e. beneficial owners are made unidentifiable) and involve the **use of offshore entities** and structures with **no real substantive economic substance**.

What needs to be reported?

Specific Hallmarks concerning Transfer Pricing (E)

Arrangements involving unilateral safe harbour rules

E.1 An arrangement which involves the use of **unilateral safe harbour rules** (these are rules that we do not have in Malta however such rules would relieve or reduce or eliminate the transfer pricing obligations of one of the participants in the arrangement).

Transfers between associated enterprises of HTVI

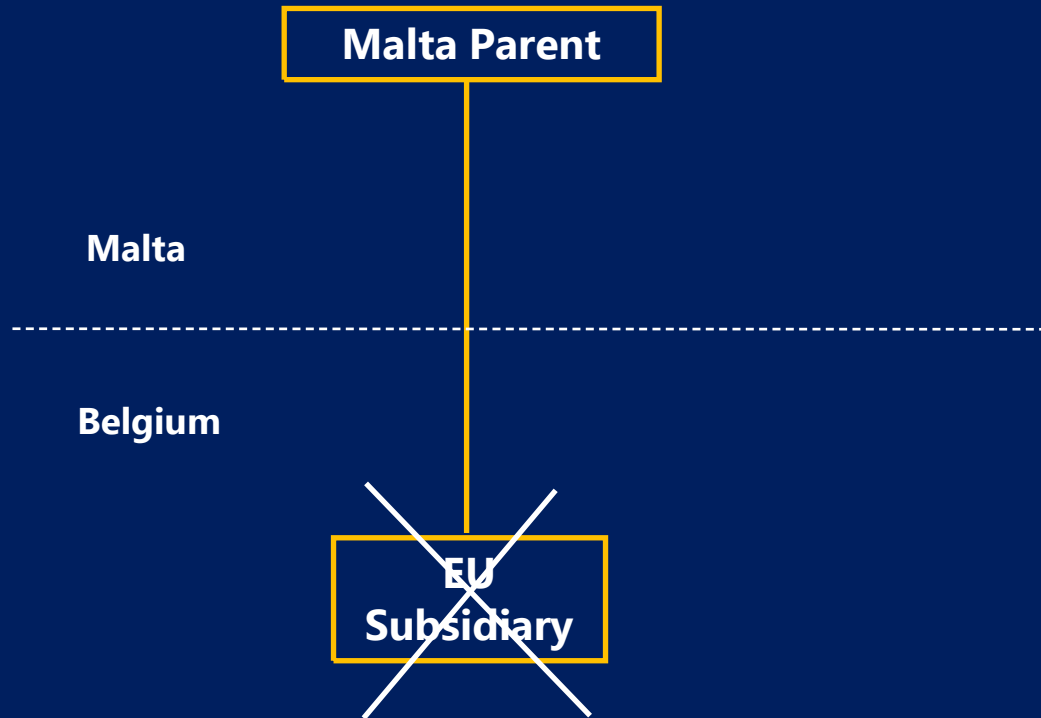
E.2 An arrangement involving the **transfer of hard-to-value intangibles (HTVI)** between **associated enterprises**.

Cross-border transfer of functions and/or risks and/or assets

E.3 An arrangement involving an intragroup **cross-border transfer of functions and/or risks and/or assets** where the **projected annual EBIT** during the three years after the transfer are **less than 50% of the projected annual EBIT had the transfer not been made**. **[Example]**



Hallmark E.3 - Cross Border Merger Example



N.B. In Malta, NO DAC 6 reportability arises in relation to local mergers (i.e. merger between two MT companies)

Moreover, given the intra-group requirement only simplified cross-border mergers will qualify.

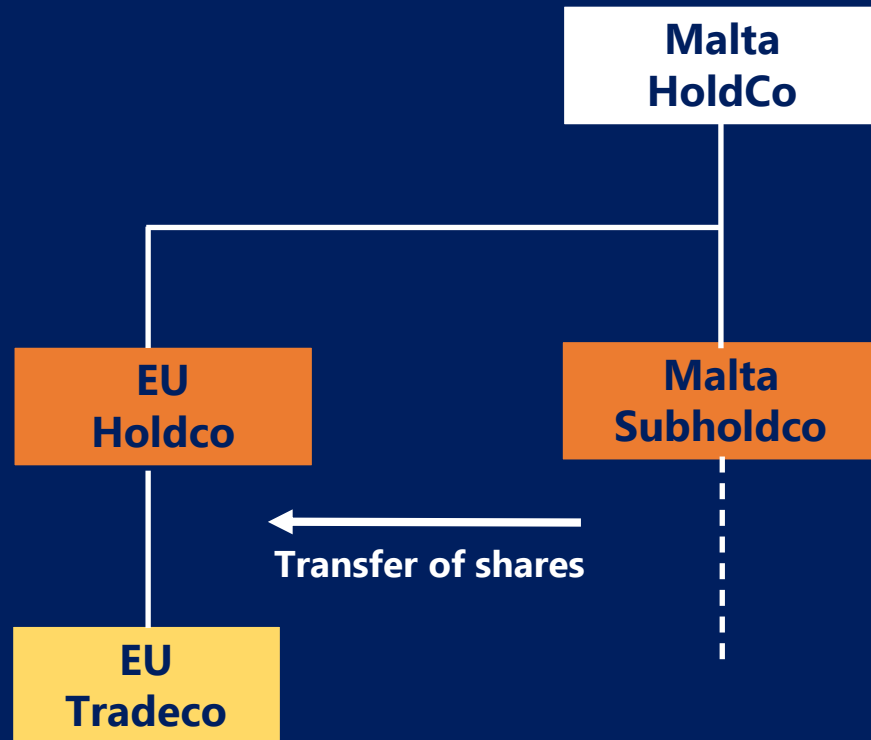
Facts

- The EU Subsidiary will be merging into its Malta Parent, as a result of which the Malta parent will acquire all the assets and liabilities of the EU Subsidiary.

Core Issues

- Is there a cross-border element? **Yes**
- In the 3-year period following the cross-border merger, is the projected EBIT of the transferor (the EU Subsidiary) reduced by 50%? **Yes – EU Subsidiary will be disappearing so EBIT will drop to 0.**
- **NO MBT** needs to be satisfied - the fact that the companies have economic or business reasons to merge is **NOT RELEVANT** to disregard potential reportability.

Hallmark E.3 - Cross-Border Transfer of Shares Example



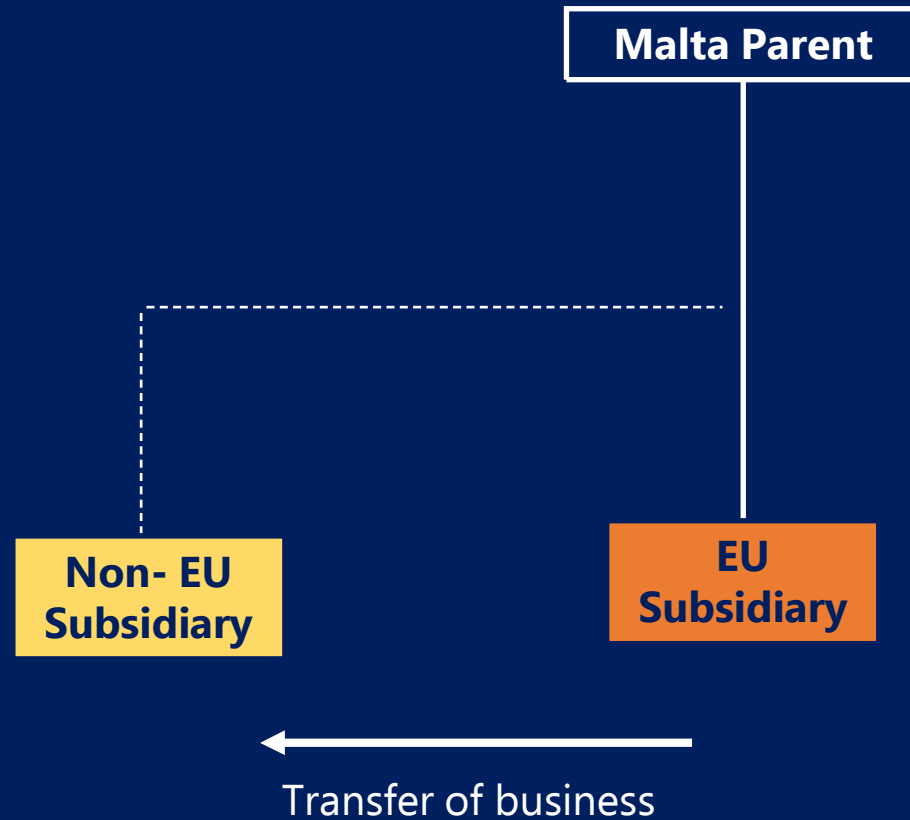
Facts

- EU Tradeco is one of the income generating assets held by the Malta Subholdco. EU Tradeco is profitable and distributes most of its profits annually.
- Malta Subholdco transfers EU Tradeco to EU Holdco at market value.

Core Issues

- Is there a cross-border element? **Yes**
- In the 3-year period following the transfer of the shares, is the projected EBIT of the transferor (the Malta Subholdco) reduced to less than 50%? **Further assessment required – preparation of 3-year projections for comparison purposes.**
- **NO MBT** needs to be satisfied- the fact that the companies have economic or business reasons to merge is **NOT RELEVANT** to disregard potential reportability.

Hallmark E.3 - Cross-Border Transfer of Business Example



Facts

- The EU Subsidiary will be transferring its business to the Non-EU Subsidiary (does not have any other assets generating income).
- Post-transfer the EU Subsidiary would not derive any income.

Core Issues

- Is there a cross-border element? **Yes**
- In the 3-year period following the transfer of the business, is the projected EBIT of the transferor (the EU Subsidiary) reduced to less than 50%? **Yes, the EBIT is reduced to zero.**
- **NO MBT** needs to be satisfied- the fact that the companies have economic or business reasons to merge is **NOT RELEVANT** to disregard potential reportability.

Anti-Money Laundering Information (DAC 5)



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Anti-Money Laundering Information (DAC 5)

- **No Automatic Exchange of Information Obligations**
- In December 2016, the European Council introduced the mandatory **access to anti-money-laundering information by tax authorities** through Council Directive (EU) 2016/2258 ('DAC5') amending Directive 2011/16/EU.
- DAC5 obliges member states to **grant tax authorities access to beneficial ownership information and customer due diligence, documentation and other information** collected pursuant to the **anti-money laundering legislation**.



Council Directive 2021/514/EU Directive on Administrative Cooperation (‘DAC 7’)



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DAC 7: Overview

- By virtue of **Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 7)** the EU rules on automatic exchange of information have been extended to **digital platforms**.

Entry Into Force

Member States are required to transpose provisions of DAC 7 into national law by **31 December 2022**, with the new rules applying from **1 January 2023**, However, Legal Notice has **NOT** been issued in Malta as yet.

Who is captured?

The rules impose an obligation upon **“reporting platform operators”** to collect, verify and report specific information with respect to **“reportable sellers”** that have undertaken **“relevant activities”** through their platforms.



DAC 7: Crucial Terms

Platform



Any **software**, including a website or applications accessible by users and **allowing sellers to be connected to other users for the purpose of carrying out a relevant activity**, directly or indirectly, to such users, and includes any arrangement for the collection and payment of a consideration in respect of a relevant activity.

Reporting Platform Operator



Any **platform operator** that is:

- A resident in Malta, for tax purposes, in a Member State;
- Incorporated in a Member State;
- Has its place of management in a Member State;
- Has a permanent establishment in a Member State

Reportable Seller



A reportable seller includes a seller (an individual or entity platform user that is registered on the platform and carries out a relevant activity) that is **resident in a Member State** or that **rents out immovable property which is located in a Member State**. Certain sellers are excluded.

Relevant Activity



Platform operators are subject to reporting obligations in respect of '**relative activities**' which include:

- Rental of immovable property;
- Personal services;
- Sale of goods;
- Rental of any mode of transport

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EU Tax Directives

The Anti-Tax Avoidance Directive (Directive 2016/1164)



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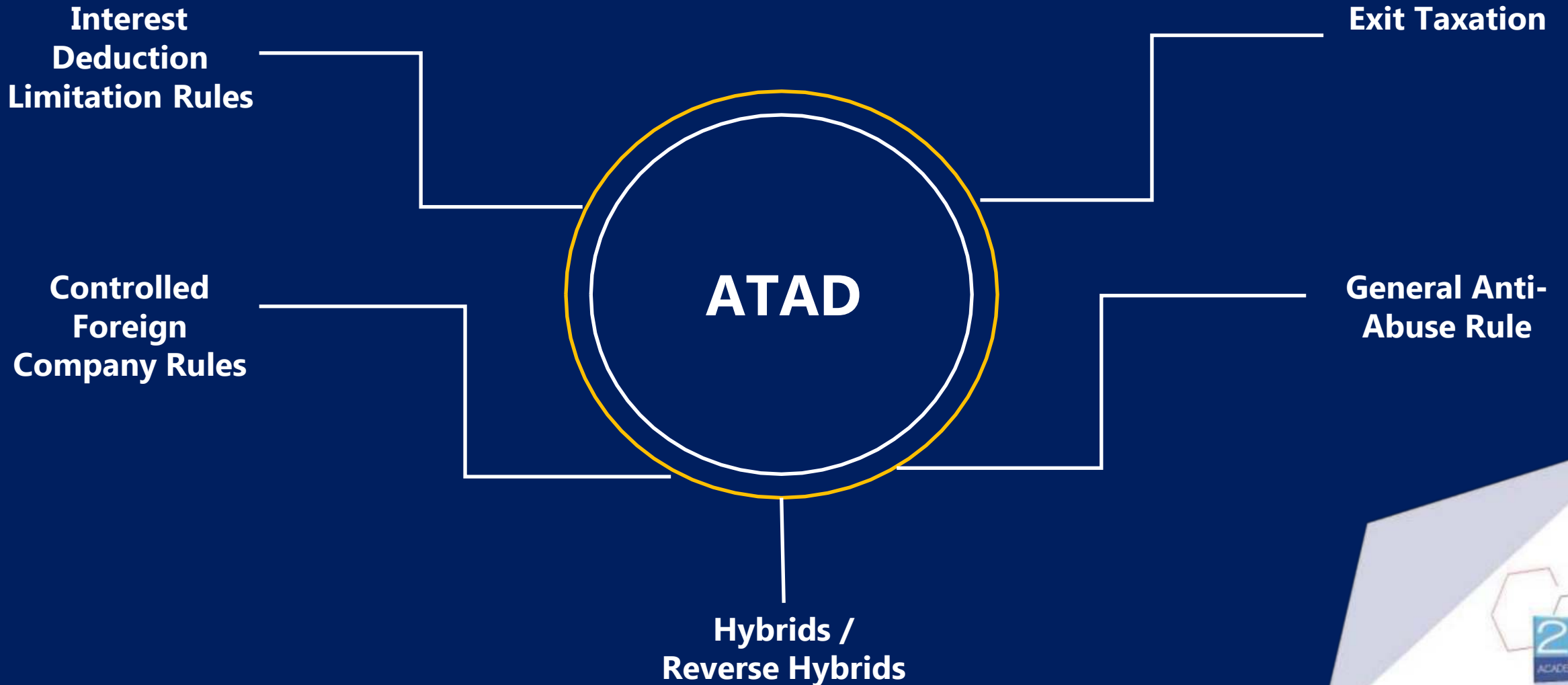
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The Anti-Tax Avoidance Directive (ATAD)

- On 28 January 2016 the Commission presented its proposal for an Anti-Tax Avoidance Directive as part of the Anti-Tax Avoidance Package.
- The Anti-Tax Avoidance Directive contains **FIVE** legally-binding anti-abuse measures, which all Member States should apply against **common forms of aggressive tax planning**.
- On 11 December 2018, further to the publication of Legal Notice 411 of 2018, EU Anti-Tax Avoidance Directive (ATAD EU 2016/1164) of July 2016 was transposed into Maltese law. The Legal Notice contained **four out of the five** measures targeted by ATAD.
- In addition, on 24 December 2019, further to the publication of Legal Notice 348 of 2019, Council Directive (EU) 2017/952 was transposed, **targeting hybrid mismatch arrangements**.



The Anti-Tax Avoidance Directive



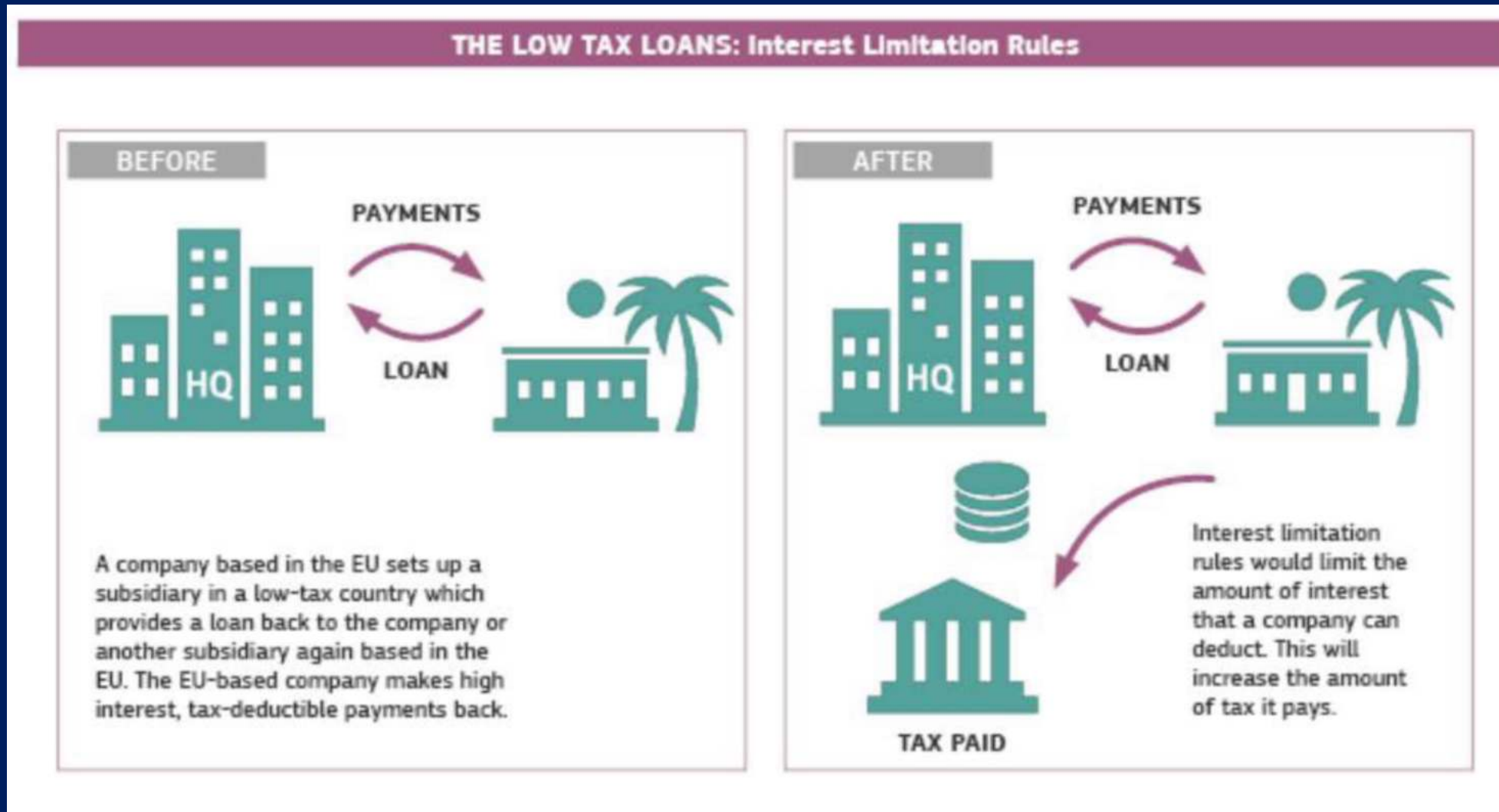
The Anti-Tax Avoidance Directive

Controlled foreign company (CFC) rule	To deter profit shifting to a low/no tax country.
Exit taxation	To prevent companies from avoiding tax when re-locating assets.
Interest limitation	To discourage artificial debt arrangements designed to minimise taxes.
General anti-abuse rule	To counteract aggressive tax planning when other rules don't apply.
Switchover rule	To prevent double non-taxation of certain income.

Interest Limitation Rule

- The Income Tax Act already contained restrictive rules with respect to deductibility of interest.
- ATAD now introduces a **CAPPING** on the amount of **borrowing costs** which a taxpayer may claim as deductible:
- **“Borrowing costs”** are:
 - interest expenses on all forms of debt, and other economically similar transactions; and
 - expenses incurred in the raising of finance
- The rule provides to **borrowing costs that exceed interest income** – i.e. **Exceeding Borrowing Costs** (EBC). The EBC that a taxpayer may deduct are capped at **30%** of the taxpayer’s earnings before interest, tax, depreciation and amortisation (**EBITDA**).
- Taxpayers may nevertheless deduct up to **€3,000,000** or even **all of their borrowing costs** if the entity is a **STANDALONE entity** (i.e. not part of any groups). In case of groups, the €3,000,000 limit is group-wide and not per entity.

Interest Limitation Rule



Source: European Commission

Exit Taxation Rule

- Exit tax is a form of **tax on unrealised capital gains**, being triggered where a taxpayer **moves his assets or his tax residence outside of the Maltese income tax net**.
- In such instances, Malta would **tax the economic value of the unrealised capital gains**, which has happened on its territory before the assets or the residence is transferred in the following circumstances:

1. a transfer of assets from a head office located in Malta to a PE in another jurisdiction and vice versa – Malta loses right to tax from such transfer;
2. a transfer of residence of a Maltese resident entity to another jurisdiction (to the exclusion of assets which remain effectively connected to a Maltese PE);
3. a transfer of business carried on in Malta by the taxpayer's PE, to another jurisdiction.

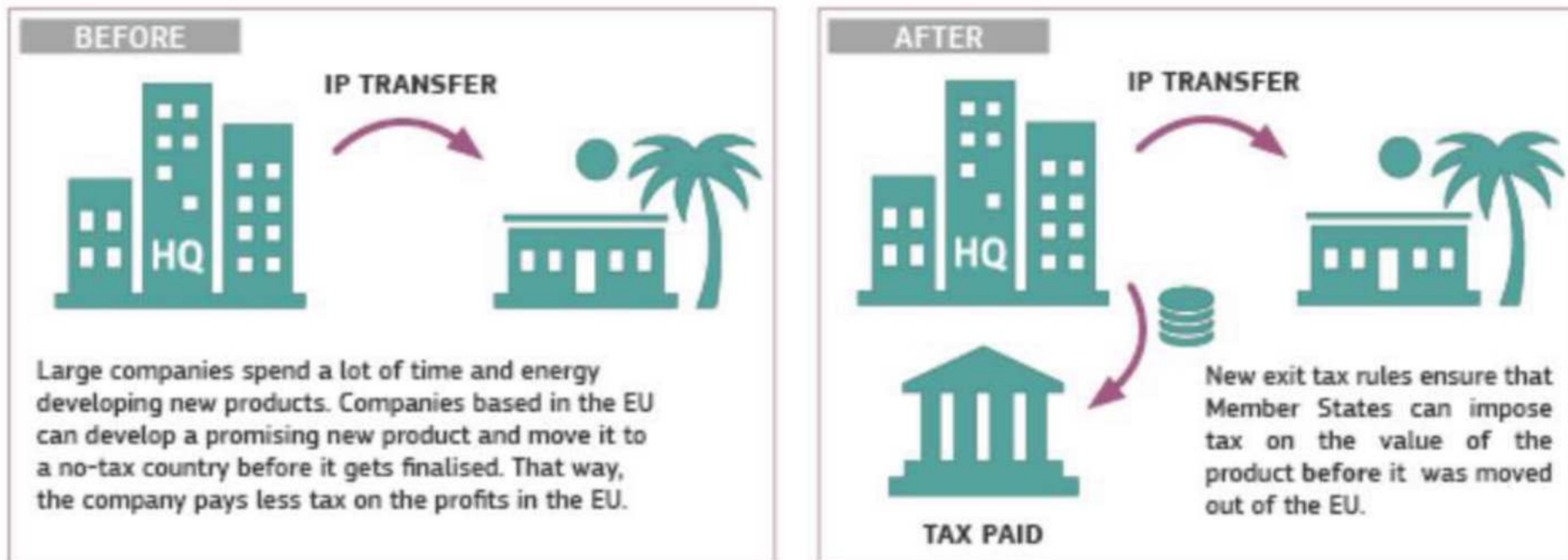
**Deemed
Transfer of
Assets
i.e. Capital
Gain Derived**

N.B. Movement of assets, including **liquid cash** between a parent company and its subsidiaries falls **OUTSIDE** the scope of ATAD as otherwise **would hinder freedom of establishment and freedom of movement of capital**.



Exit Taxation Rule

THE PATENT FLIGHT: New Exit Taxation Rules



Source: European Commission

General Anti-Abuse Rule (GAAR)

- ATAD also requires Member States to introduce a **GAAR**.
- Malta already contains a long-standing GAAR in its income tax legislation, so ATAD GAAR re-emphasised the **GAAR already existing in Maltese tax legislation**.
- In this regard, the Regulations provide that for the purposes of calculating the tax liability of a taxpayer, an **arrangement or a series of arrangements** can be **IGNORED** where it has been **put into place for 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 and are not genuine having regard to all relevant facts and circumstances.
- An arrangement or a series thereof can be regarded as **non-genuine** to the extent that they are **NOT** put into place for **valid commercial reasons which reflect economic reality**.



General Anti-Abuse Rule (GAAR)



Source: European Commission

Controlled Foreign Company (“CFC”) rules

- **NEW** concept introduced into Maltese law.
- A **CFC** is defined in the Regulations as:

- an entity in which a **Maltese resident taxpayer alone or together with its associated enterprises** holds a **direct or indirect participation of MORE than 50% of the voting rights**, or owns directly or indirectly, **more than 50% of the capital** or is entitled to receive **more than 50% of the profits** of that entity; and
- the **actual corporate tax paid by the entity** is **LOWER** than the difference between the tax that would have been charged on the entity **under the Income Tax Acts** and the **actual foreign corporate tax paid**.

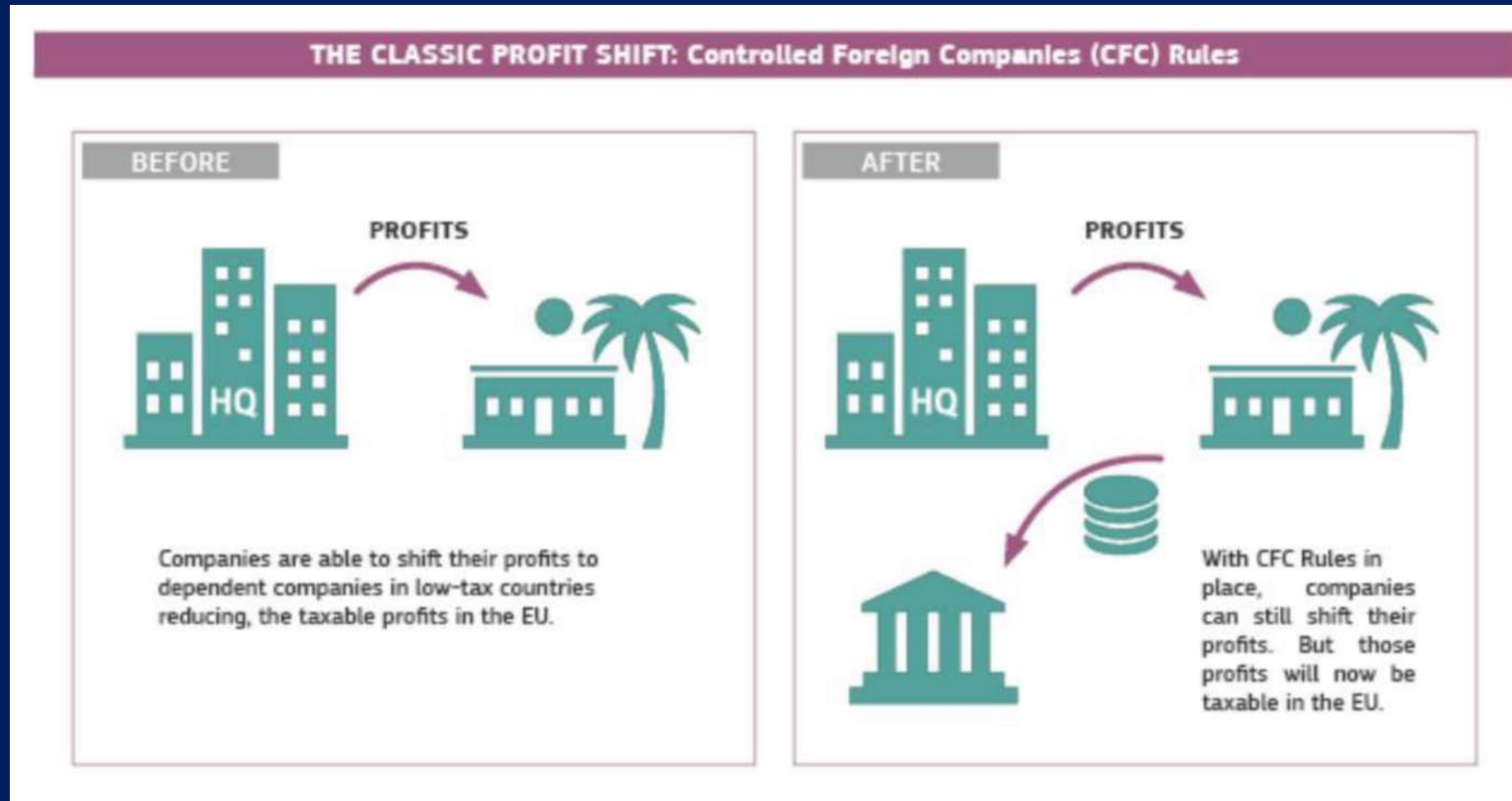
Control Test

Low Tax Test

- Where an entity/permanent establishment is considered to be a CFC, the Regulations require the **not distributed income of the CFC** arising from **non-genuine arrangements** which have been put in place for the essential purpose of obtaining a tax advantage to **be included in the tax base of the resident entity.**



Controlled Foreign Company ("CFC") rules



Source: European Commission

Controlled Foreign Company ("CFC") rules

$$35\% - 10\% = 20\%$$

$$20\% > 10\%$$

Low tax test is met

Malta

35% tax



Panama



10% tax



Eur 200
income



EU Tax Directives

The Parent-Subsidiary Directive (Directive 2011/966/EU)



Diploma in Law (Malta)



CAMILLERI PREZIOSI
ADVOCATES

MAMO TCV
ADVOCATES

The Parent- Subsidiary Directive

What is the aim of the Directive?

Promotes cooperation between Member States by **eliminating certain tax obstacles** on **profit distributions** between companies located in different EU Member States.

When an EU subsidiary distributes dividends or other types of profits to their parents companies, **NO double taxation should arise.**

Accordingly, Member State in which **parent company is located** should provide for an **EXEMPTION** from **taxation on the dividends** received from the subsidiary, **OR** otherwise **allow deductions** for the amounts of **foreign tax suffered by the subsidiary.**

Also **REMOVES withholding taxes** on any **payments of dividends** or profit distributions between **associated companies** within different member states

The Parent- Subsidiary Directive

Distributions received by a **parent company** in **one MS** from its **subsidiary** in **another MS**

Distributions of profits **by companies** of **one MS** to companies of another MS **of which they are subsidiaries**

Distributions of profits received by **permanent establishments** situated in a MS, of companies of other MS, which come from their subsidiaries of a MS **other than** that **where the permanent establishment is situated**

Distributions of profits by companies of a MS to **permanent establishments** situated in another MS of companies of the same Member State of which they are subsidiaries.

The Parent-Subsidiary Directive



EU Tax Directives

The EU Directive on Interest and Royalties (Directive 2003/49/EC)



Diploma in Law (Malta)



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The EU Directive on Interests and Royalties

What is the aim of the Directive?

Adopted in 2003 in a bid to **put cross-border interest and royalty payments on an equal footing with domestic payment**, by eliminating juridical double taxation and cash-flow disadvantages.

The I+R Directive is designed to **eliminate withholding tax obstacles** in the area of cross-border interest and royalty payments within a group of companies by abolishing withholding taxes on **royalty payments and on interest payments** arising in a Member State.

The **SOURCE STATE** shall **EXEMPT** the interest and royalty payments from any taxes in that State provided that the **beneficial owner of the payment** is a **company** or **permanent establishment** in **another Member State**.

A company of a Member State shall be treated as the beneficial owner of interest or royalties **only if it receives those payments for its own benefit** and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

The EU Directive on Interests and Royalties

The benefits of the I+R Directive are **ONLY** granted to companies which are:

- **subject to corporate tax in the EU;**
- **tax resident in an EU Member State;**
- **of a type listed in the annex to the Directive;**
- **certain types of companies that were added subsequently by other EU Council Directives**