

European Commission proposes new transparency rules for intermediaries

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Executive summary

On 21 June 2017, the European Commission (EC or Commission) published the *Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements* (the proposal).

The proposal imposes obligations on European Union (EU) tax consultants, banks, lawyers, and other intermediaries to disclose any cross-border arrangement that contains one or more features or “hallmarks” and meets a somewhat unclear main benefit test. The hallmarks include those around confidentiality or contingent fees used in other disclosure regimes, but also hallmarks such as deductible cross-border payments which are, for a list of reasons, not fully taxable where received, or the use of losses to reduce tax liability.

Where intermediaries are outside EU jurisdiction or prevented by law (e.g., professional secrecy or legal professional privilege) from disclosing information, the obligation to disclose is transferred to the taxpayer.

National laws will provide for appropriate sanctions for non-compliance.

It is foreseen that the new reporting requirements would enter into force on 1 January 2019, with EU Member States obliged to exchange information every three months after that.

Detailed discussion

Background

The Organisation for Economic Co-operation and Development (OECD) recommended that countries consider requiring mandatory disclosures from intermediaries in Base Erosion and Profit Shifting (BEPS) Action 12.

In the proposal, the European Union has gone beyond this by mandating this across the EU, prescribing a wider range of hallmarks and requiring exchange of disclosures across EU Member States.

This is the latest in a range of initiatives by the EU intended to reduce tax evasion and avoidance. These include automatic exchange of information on tax rulings; Country-by-Country reporting; giving tax authorities access to anti-money laundering information; the Anti-Tax Avoidance Directive; measures on hybrid mismatches; reviews of preferential regimes and transfer pricing rules; strengthening anti-money laundering legislation; listing non-cooperative tax jurisdictions; revising EU Financial regulation; strengthening tax good governance clauses in EU agreements with third countries; and State aid cases.

What is the purpose of the reporting?

The main purpose of the reporting is to provide tax authorities of the Member States with information to enable them to take action, for example to better target their audits or change their legislation. Secondly, it is intended that the reporting requirements will act as a deterrent for those that promote aggressive tax planning schemes and users of such schemes. The exchange of information between Member States will make Member States aware of any tax planning arrangements that may have an impact on their tax base, regardless of where the scheme is designed and marketed.

Who has to report?

The obligation to report is imposed on natural or legal persons who are identified as intermediaries. Intermediaries are defined as “any person that carries the responsibility vis-à-vis the taxpayer for designing, marketing, organizing or managing the implementation of the tax aspects of a reportable cross-border arrangement, or series of such arrangements, in the course of providing services relating to taxation.”

The concept of intermediary also includes “any such person that undertakes to provide, directly or by means of other persons to which it is related, material aid, assistance or

advice with respect to designing, marketing, organizing or managing the tax aspects of a reportable cross-border arrangement.”

What has to be reported?

Any cross-border arrangement or series of arrangements that fulfills at least one of the hallmarks and meets a main benefit test has to be reported, as set out in annex IV of the proposed directive.

In summary, these hallmarks apply to arrangements:

- ▶ To which a confidentiality clause is attached
- ▶ Where the fee is fixed by reference to the amount of the tax advantage derived or whether a tax advantage is actually derived
- ▶ That involve standardized documentation which does not need to be tailored for implementation
- ▶ Which use losses to reduce tax liability
- ▶ Which convert income into capital or other categories of revenue which are taxed at a lower level
- ▶ Which include circular transactions resulting in the round-tripping of funds
- ▶ Which include deductible cross-border payments which are, for a list of reasons, not fully taxable where received (e.g., recipient is not resident anywhere, zero or low tax rate, full or partial tax exemption, preferential tax regime, hybrid mismatch)
- ▶ Where the same asset is subject to depreciation in more than one jurisdiction
- ▶ Where more than one taxpayer can claim relief from double taxation in respect of the same item of income in different jurisdictions
- ▶ Where there is a transfer of assets with a material difference in the amount treated as payable in consideration for those assets in the jurisdictions involved
- ▶ Which circumvent EU legislation or arrangements on the automatic exchange of information (e.g., by using jurisdictions outside exchange of information arrangements, or types of income or entities not subject to exchange of information)
- ▶ Which do not conform to the “arms’ length principle” or to OECD transfer pricing guidelines
- ▶ Which fall within the scope of the automatic exchange of information on advance cross-border rulings but which are not reported or exchanged

When is the report due?

Intermediaries are required to disclose the reportable arrangements within five days beginning on the day after the arrangement was made available to a taxpayer for implementation.

Where the disclosure obligation is shifted to the taxpayer, disclosure should take place within five days beginning on the day after implementation is begun.

Next steps

The proposal, which takes the form of an amendment to the Directive for Administration Cooperation (DAC), will be submitted to the European Parliament for consultation and to the Council for adoption. It is foreseen that the new reporting requirements would enter into force on 1 January 2019, with EU Member States obliged to exchange information every three months after that.

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