

Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers

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Executive summary

On 13 March 2018, the Council of the European Union (the Council and the EU, respectively) reached a political agreement on the draft Directive amending Directive 2011/16/EU with respect to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (the Amendment).

While the overall objective of the Amendment is to provide EU Member States (Member States) with an additional tool with which to tackle perceived tax avoidance and aggressive tax planning, the Amendment leaves those terms undefined, instead imposing a new obligation on EU-based tax consultants, banks, lawyers, and other intermediaries to disclose any cross-border arrangement that contains one or more features or "hallmarks," if they are identified as intermediaries for the purposes of the Amendment. The geographical scope of the new reporting requirements comprises arrangements within the EU, as well as between Member States and third countries.

The hallmarks cover a broad range of structures and transactions, including certain deductible payments which are taxed at a rate of zero or nearly zero when received and intercompany transactions which meet specific transfer pricing hallmarks, such as any transfer of hard-to-value intangibles. Some of the hallmarks will only trigger reporting requirements when they also fulfil the main

benefit test. Where intermediaries are outside EU jurisdiction or are prevented by law from disclosing information, the obligation to disclose is transferred to the taxpayer. Following the reporting of the arrangements, the information about the arrangements specified by the Amendment will be automatically exchanged between Member States.

Member States must adopt and publish national laws required to comply with the Amendment by 31 December 2019, at the latest. National laws will provide for penalties for non-compliance, which according to the Amendment should be scoped in a way that is effective, proportionate and dissuasive.

Member States will apply the new reporting requirements from 1 July 2020, but such requirements will cover arrangements where the first step of implementation begins after the entry into effect of the Amendment, being 20 days after publication of the Amendment into the *Official Journal of the European Union*. Such entry into effect is foreseen in June or July 2018. The first information shall be reported by 31 August 2020 and exchanged by 31 October 2020.

Detailed discussion

Background

The Amendment broadly reflects the objectives of Action 12 of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting project, where related work is ongoing at an OECD level in regard to model mandatory disclosure rules covering tax avoidance arrangements. The Amendment will introduce mandatory disclosure rules across the EU, going beyond the OECD recommendations by prescribing a wider range of hallmarks and introducing automatic exchanges of the disclosures across Member States.

What is the purpose of the reporting?

The main purpose of the reporting and subsequent exchange is to provide the tax authorities of Member States with information to enable them to take early action when potentially aggressive tax arrangements are designed and implemented, for example to better target their audits or to propose changes to legislation. The EU also expects that the reporting requirements will act as a deterrent to those who promote aggressive tax planning schemes, as well as users of such schemes.

Who has the obligation 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 designs, markets, organizes or makes available for implementation or manages the implementation of the reportable cross-border arrangement."

The concept of intermediary also includes "any person that has undertaken to provide, directly or by means of other persons, aid, assistance or advice" with respect to the activities mentioned immediately above.

In addition to the above conditions, in order to be considered an intermediary, a person shall have a connection with the EU established through at least one of the following: (a) being a tax resident in a Member State; (b) having a permanent establishment in a Member State through which the services related to the reportable arrangements are provided; (c) being incorporated in or governed by the laws of a Member State; (d) being registered with a professional association related to legal, taxation or consultancy services in a Member State.

Moreover, if multiple intermediaries are involved in advising on the same arrangement, each of the intermediaries will be required to report the arrangement, unless it can prove that the arrangement has been reported already to the Member State to which the reporting obligation exists by another intermediary.

Where no intermediaries in the meaning of the Amendment are involved in an arrangement that meets the reporting requirements (e.g., if an intermediary is not EU-based), or an EU-based intermediary is prevented by law (e.g., legal professional privilege) from disclosing information, the obligation to disclose is transferred to the taxpayer.

What arrangements are reportable?

Any cross-border arrangement or series of arrangements that fulfills at least one of the hallmarks has to be reported, as set out in Annex IV of the Amendment.

For the purposes of the Amendment, cross-border arrangements are those which concern either more than one Member State or a Member State and a third country.

Though Member States are required to have legislation in place which creates the reporting obligation from 1 July 2020, the legislation will cover arrangements retrospectively. If the first step of implementation of an arrangement occurs

as of the date when the Amendment enters into force (which is predicted to be June or July 2018) then such an arrangement will have to be reported in 2020.

The main benefit test

The hallmarks can be distinguished between those for which first the main benefit test needs to be fulfilled as a gateway criterion before these hallmarks will trigger a reporting obligation, and those which by themselves will trigger a reporting obligation.

The test will be satisfied if it can be established that the main benefit or one of the main benefits which, considering all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

Hallmarks

In summary, the following hallmarks define an arrangement only when they fulfill the main benefit test:

- ▶ Generic hallmarks
 - A confidentiality clause is imposed on the participant
 - The fee is fixed by reference to the amount of the tax advantage derived or whether a tax advantage is actually derived
 - Standardized documentation and/or structure is leveraged, which does not need to be substantially tailored for implementation
 - ▶ Specific hallmarks
 - A loss-making company is acquired in order to reduce tax liability
 - Income is converted into capital or other categories of revenue which are subsequently taxed at a lower level or are exempt from tax
 - Circular transactions resulting in the round-tripping of funds occur
 - ▶ Specific cross-border hallmarks
 - Deductible cross-border payments are utilized which are not fully taxable where received for the following reasons: zero or almost zero tax rate, full tax exemption, preferential tax regime. (For these specific categories it is stipulated in the Amendment that fulfillment of the conditions specified in this hallmark alone cannot lead to the conclusion that the main benefit test is met.)
- The following hallmarks will trigger a reporting obligation by themselves:
- ▶ Specific cross-border hallmarks
 - Deductible cross-border payments are utilized which are not fully taxable where received for the following reasons: recipient is not a tax resident anywhere, involved jurisdictions assessed by Member States collectively or within the OECD as non-cooperative
 - The same asset is subject to depreciation in more than one jurisdiction
 - Relief from double taxation in respect of the same item of income is claimed in different jurisdictions
 - 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
 - ▶ Specific hallmarks related to the automatic exchange of information and beneficial ownership
 - EU legislation or any equivalent agreements on the automatic exchange of financial account information is/are circumvented (e.g., by using jurisdictions outside exchange of information arrangements, or types of accounts, products, investments, income or entities not subject to exchange of information)
 - Non-transparent legal or beneficial ownership chains are used (e.g., not carrying a substantive economic activity supported by adequate staff, equipment, assets and premises, or established, managed or controlled from a different jurisdiction than that of the beneficial owners of the assets held by such structures, or unidentifiable chains)
 - ▶ Specific hallmarks related to transfer pricing
 - Unilateral safe harbor rules are used
 - Transactions involve intangibles which are hard-to-value due to the lack of comparable intangibles or due to difficulties in predicting the level of ultimate success of the intangible at the time of transfer
 - Restructuring results in significant profit shifts following the transfer of functions, and/or risks and/or assets between jurisdictions

What information must be reported?

The information to be reported shall include, in particular, the following details: (a) the intermediaries and relevant taxpayers; (b) the hallmarks being met; (c) the arrangement, such as summarized content, the date on which the first step in implementing has been made, the value of the cross-border arrangement; (d) national provisions that form the basis of the arrangement; and (e) Member States or persons likely to be affected by the arrangement.

When must reporting be made?

Intermediaries (or the taxpayers, when the obligation to disclose the reportable arrangements is transferred to them) shall file the information within 30 days beginning on the day after the arrangement: (i) was made available for implementation, or (ii) was made ready for implementation, or (iii) when the first step in the implementation was undertaken, whichever occurs first.

The Amendment requires intermediaries who provided aid, assistance or advice to file the information with the authorities within 30 days beginning on the day after they provided such aid, assistance or advice.

The first report must be filed by 31 August 2020.

What happens with the reported information?

The competent authority of a Member State to which the information has been reported shall communicate it to the competent authorities of all other Member States by means of the automatic information exchange protocols. The automatic exchange of information shall take place within one month from the end of the quarter in which the information was reported. The first information shall be exchanged in this manner by 31 October 2020.

The Amendment specifically states that the absence of a reaction by the tax authorities to a reported arrangement does not imply that they accept its effectiveness.

Next steps

A [press-release](#) of the Council on the reached agreement states that the Council will adopt the Amendment without further discussion once the text has been finalized in all official languages of the EU. After that, the Amendment will be published in the *Official Journal of the European Union*. The Amendment shall enter into force on the 20th day following the date of its publication in the *Official Journal of the European Union*. It is foreseen that the Amendment would enter into force in June or July 2018. Member States must transpose the Amendment into their national legislation by 31 December 2019 at the latest, and exchange the first information by 31 October 2020, and every three months thereafter.

Given the very broad nature of some of the concepts in the Amendment, extensive guidance will be required at a national level as national government and tax authorities implement these new provisions

Implications

The wide territorial reach of these new rules will impact taxpayers and intermediaries (as defined by the Amendment) both in the EU and, indirectly, in third countries. These groups are therefore advised to make close assessment of current activities against the characteristics set out by the Amendment.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Belastingadviseurs LLP, Rotterdam

- ▶ Marlies de Ruiten marlies.de.ruiten@nl.ey.com
- ▶ Ronald van den Brekel ronald.van.den.brekel@nl.ey.com

Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich

- ▶ Klaus von Brocke klaus.von.brocke@de.ey.com
- ▶ Marta Castelon marta.castelon@de.ey.com

Ernst & Young LLP (United Kingdom), London

- ▶ Chris Sanger csanger@uk.ey.com
- ▶ Matthew Mealey mmealey@uk.ey.com

Ernst & Young LLP, Global Tax Desk Network, New York

- ▶ Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- ▶ David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young LLP, Washington, DC

- ▶ Rob Thomas rob.l.thomas1@ey.com

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