

EU Council adopts Directive on new mandatory transparency rules for intermediaries and taxpayers

NEW! EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

Intermediaries and taxpayers will have to report cross-border reportable arrangements where the first step of implementation is taken as of June/July 2018

Executive summary

On 25 May 2018, the Council of the European Union (the Council and the EU, respectively) formally adopted the Directive amending Directive 2011/16/EU with respect to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (the Directive).

The content of the adopted Directive corresponds to that agreed by the Economic and Financial Affairs Council of the European Union (ECOFIN) on 13 March 2018.¹

The scope of the cross-border arrangements to be reported is relatively broad and may lead to extensive reporting obligations by both intermediaries and - mainly corporate, but also individual - taxpayers. Reporting obligations for cross-border arrangements are triggered by certain hallmarks (or characteristics). These hallmarks target a relatively wide range of cross-border arrangements.

Cross-border reportable arrangements where the first step of implementation is taken after the entry into force of the Directive, which is expected to take place in four to six weeks, will have to be reported. The first reports, however, are not due until 31 August 2020 and are to be exchanged by 31 October 2020.

Detailed discussion

Background

The Directive broadly reflects the objectives of Action 12 of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) project, where related work is ongoing at an OECD level in regard to model mandatory disclosure rules covering tax avoidance arrangements. The Directive introduces 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.

Scope of the Directive

With the Directive, the European Commission seeks to boost transparency and to tackle what it sees as aggressive cross-border tax planning. The Directive imposes 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 Directive. 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.

In addition to details of the hallmarks met, a disclosure will include the names of intermediaries and relevant taxpayers, their place of residence and tax identification (TIN) number together with summary information on the arrangement itself.

If the intermediary is protected by legal professional privilege, then the obligation to disclose is transferred to any other intermediary which can disclose, and if not, then to the taxpayer. The taxpayer will also have the obligation to disclose where there is no intermediary or where intermediaries are outside EU jurisdiction. Following the reporting of the arrangements, the information about the arrangements specified by the Directive will be automatically exchanged between Member States.

The content of the adopted Directive corresponds to that agreed by ECOFIN on 13 March 2018.²

Deadline for implementation by Member States

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

Arrangements will be reportable where the first step of implementation is after the entry into effect of the Directive, which is 20 days after publication of the Directive into the *Official Journal of the European Union*. Such entry into effect is expected in June or July 2018. The first reports are due by 31 August 2020 and are to be exchanged by 31 October 2020.

Implications

The wide territorial reach of the rules will impact taxpayers and intermediaries (as defined by the Directive) both in the EU and, indirectly, in third countries. These groups are therefore advised to review current activities against the requirements set out by the Directive. Once the Directive comes into effect, it is recommended that taxpayers and intermediaries should start recording activities that will potentially need disclosure in August 2020.

Endnotes

1. See EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018. For more information on the new mandatory transparency rules, view [EY's webcast of 24 April 2018](#).
2. Ibid.

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

Ernst & Young Belastingadviseurs LLP, Rotterdam

- ▶ Marlies de Ruiter marlies.de.ruiter@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 Société d'Avocats, Paris

- ▶ Claire Acard claire.acard@ey-avocats.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

- ▶ Gerrit Groen gerrit.groen@ey.com
- ▶ 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

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2018 EYGM Limited.
All Rights Reserved.

EYG no. 03137-181Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com