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


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


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
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