

European Commission paper offers guidance on hallmarks making cross-border arrangements reportable under new mandatory transparency rules

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Executive summary

On 25 June 2018, the Council of the European Union (EU) Directive 2018/822 of 25 May 2018 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) entered into force.¹ The Directive sets forth rules on the mandatory disclosure and automatic exchange of certain cross-border reportable arrangements.

Based on the Directive, Member States (MS) are required to transpose the Directive into national laws by 31 December 2019. However, the Directive includes a provision that requires cross-border reportable arrangements, where the first step of implementation is taken between 25 June 2018 and the date of application of the Directive (1 July 2020), to be included in the reporting obligation which will be introduced through such national legislation. The first reporting is required by 31 August 2020.

The scope of the cross-border arrangements to be reported is relatively broad and may lead to extensive reporting obligations for 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.

Currently, besides the text of the Directive, there is no explanatory guidance describing the intentions behind the Directive. This makes it difficult for intermediaries and taxpayers to determine the scope of the cross-border reportable arrangements to be reported in 2020. For more insights into the type of cross-border arrangements intended to be covered, EY made a request to the European Commission for the [document used in the deliberations between EU MS when developing the Directive](#).² It is important to note that the document was discussed on 27 September 2017, while the Directive was adopted on 25 May 2018. Consequently, some of the hallmarks were significantly changed throughout the process. However, the document provides more insights into the intentions behind the hallmarks included in the Directive.

Detailed discussion

Scope of the Directive

The Directive broadly reflects the objectives of Action 12 (*Mandatory Disclosure Rules*) of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) project. The Directive introduces mandatory disclosure rules across the EU, but it goes beyond the OECD recommendations by introducing automatic exchanges of the disclosures between MS.

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, other intermediaries or relevant taxpayers to disclose any cross-border arrangement that contains one or more features or "hallmarks."

The hallmarks cover a broad range of structures and transactions. They cover certain deductible payments taxed at a rate of zero or nearly zero when received and intercompany transactions meeting 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 meet the main benefit test.

Implementation of the Directive

Until now, no sufficient explanatory guidance has been released at the EU level, and the MS have yet to transpose the Directive into their national laws (by 31 December 2019). In the meantime, the Directive requires the cross-border reportable arrangements, where the first step of implementation has been taken as of 25 June 2018, to be reported by 31 August 2020. Therefore, intermediaries or the relevant taxpayers are faced with the challenge of interpreting the provisions of the Directive in order to track their activities that are potentially reportable as of 25 June 2018. Since reporting obligations for cross-border arrangements are triggered by certain hallmarks (or characteristics), the interpretation of these hallmarks becomes crucially important for compliance with the new mandatory disclosure rule.

As noted, EY made a request to the European Commission for the document discussed during the negotiations on the Directive. This request was made in accordance with Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Such guidance was made available to us. The Commission department on Taxation and the Customs Union prepared the document in September 2017 in response to numerous requests from the EU MS for clarification of the hallmarks (the Document). The Document contains one example and brief description of origin per each hallmark set out in the Directive to provide more guidance on interpretation of the Directive provisions and to facilitate its implementation. As noted, the document was discussed on 27 September 2017, while the Directive was adopted on 25 May 2018. Consequently, some of the hallmarks were significantly changed throughout the process. However, the document provides more insights into the intentions behind the hallmarks included in the Directive.

Implications

The broad wording of the hallmarks could lead to their misinterpretation. The Document may, therefore, be useful for taxpayers and intermediaries analyzing the provisions of the Directive to better understand the legislator's intention behind them.

Endnotes

1. See EY Global Tax Alerts, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018 and [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018. For more information on the new mandatory transparency rules, view [EY's webcast](#) of 24 April 2018.
2. Document reference number WK 9981/2017 INIT of 21/9/2017.

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