

EU Direct Tax Newsalert

European Commission proposes mandatory disclosure rules for intermediaries



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On 21 June 2017, the European Commission (EC) adopted a 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 stated objective of this proposal, which provides for mandatory disclosure of cross-border arrangements by intermediaries or taxpayers to the tax authorities and mandates automatic exchange of this information among Member States, is to enhance transparency, reduce uncertainty over beneficial ownership and dissuade intermediaries from designing, marketing and implementing harmful tax structures.

Background

The proposed measure amends Council Directive 2011/16/EU on administrative cooperation in the field of taxation. The proposal by the EC is in response to political pressure and recommendations by the TAXE I and II and PANA special committees of the European Parliament to disincentivize what they regard as aggressive tax planning schemes and the intermediaries that advise taxpayers. On 25 May 2016, the Council also tasked the EC "to consider legislative initiatives on mandatory disclosure rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes". It must be noted that in its proposal, the EC does not define the term "aggressive tax planning" but rather resorts to a number of pre-determined hallmarks, which are features rendering a cross-border arrangement to be reportable.

Scope: The proposed measure applies to a cross-border arrangement which is defined as an arrangement or series of arrangements in either more than one Member State or a Member State and a third country. A cross-border arrangement also covers dual resident taxpayers and taxpayers carrying out a business through a permanent establishment (PE) in another jurisdiction insofar as the cross-border arrangement forms part or the whole of the business of that PE. Alternatively, the proposed measure may also apply to cross-border arrangements with a tax-

related impact in at least two jurisdictions.

Reportable cross-border arrangement definition: For such arrangements to require being reported to the tax authorities, at least one of the hallmarks must be met. These hallmarks may be generic or specific.

Generic hallmarks include, for example, an arrangement or series thereof whereby the taxpayer is under the obligation to not disclose how such arrangement can secure a tax advantage *vis-à-vis* other intermediaries or the tax authorities or when the intermediary receives a fee for its services proportionate to the amount of the tax advantage. Specific hallmarks include (but are not limited to) the use of losses to reduce tax liability, conversion of income into lower-taxed revenue streams and circular transactions. These kind of general and specific hallmarks will serve as indicators rendering a cross-border arrangement reportable insofar as they meet the main benefits test, which states that the main benefit for setting up a structure is to obtain a tax advantage. Additionally, specific hallmarks related to cross-border transactions, transfer pricing and automatic exchange of information, which do not need to comply with the main benefits test, are included in the proposal.

Intermediary definition: An intermediary is defined as any person carrying out a responsibility *vis-à-vis* the taxpayer for designing, marketing, organising or managing the implementation of the tax aspects of a cross-border arrangement or series of arrangements. An intermediary may also be a person who directly or indirectly provides material aid, assistance or advice as regards any of the abovementioned activities.

In order for an intermediary to fall under the scope of the proposal, at least one of the following conditions has to be met:

- i. incorporated in and/or governed by the laws of a Member State; or
- ii. resident for tax purposes in a Member State; or
- iii. registered with a professional association related to legal, taxation or consultancy services within a Member State; or
- iv. based in at least one Member State from where the person exercises their profession or provides legal, taxation or consultancy services.

Key provisions

The intermediary is under the obligation to disclose information with the competent authorities on a reportable cross-border arrangement within five working days beginning on the day when the arrangement is made available for implementation to the taxpayer or where the first step of such arrangement has already been implemented.

Insofar as the intermediary is entitled to a legal profession privilege under national law, the disclosure obligation shifts to the taxpayer. Equally, insofar as there is no intermediary (e.g. because the taxpayer implements a scheme in-house or the intermediary does not have presence within the EU), it is the taxpayer's responsibility to disclose such information within five working days beginning on the day after the arrangement or the first step thereof has been implemented.

To the extent that the disclosure obligation falls on the taxpayer, the timing for disclosure is therefore placed slightly later.

Where more than one intermediary is involved, the reporting responsibility remains with the intermediary carrying out the design and implementation of the structure.

To the extent that the obligation to report falls on the taxpayer and the arrangement is used by more than one taxpayers who are associated enterprises, only the taxpayer in charge of agreeing to the arrangement with the intermediary will have to file the information.

Insofar as the intermediary files information on a reportable cross-border arrangement or series of arrangements, the Member State in which the information was filed will, by means of an automatic exchange, communicate that information to all other Member States.

The automatic exchange of information will take place every three months. The information to be communicated contains:

- i. the value of the transaction or series of transactions arising from the cross-border arrangement;
- ii. the identification of other Member States that may be involved in or concerned by the cross-border arrangement;
- iii. the identification of any person in other Member States that may be affected indicating to which Member States the taxpayers and intermediaries are linked;
- iv. identification of intermediaries and taxpayers (name, residence, taxpayer identification number and where appropriate their associated enterprises);
- v. details of the hallmarks that make the cross-border arrangement reportable;
- vi. a summary of the content of the arrangement in abstract terms having regard for commercially sensitive information;
- vii. the date on which implementation or the first step thereof is expected to start or has started;
- viii. details of the national tax provisions creating an advantage.

Practical aspects: The EC will adopt standard forms to be used across the EU for the automatic exchange of information as well as develop and support a secure Member State central directory on administrative cooperation in the field of taxation where the disclosed information will be recorded. The EC will also have access to the disclosed information contained in that directory. However, its access will be limited to certain elements of the information.

Implementation: Member States will need to take the necessary measures to require intermediaries and taxpayers to file information on reportable cross-border transactions that were implemented between the date of the formal adoption of the proposal by the Council and 31 December 2018. The provisions of the proposed measure are set to apply as per 1 January 2019 with the first information being disclosed by the end of the first quarter of 2019 (being 31 March 2019).

Penalties: It is up to the Member States to lay down rules on penalties for failure to comply with the provisions of this proposal. Those penalties must nonetheless be effective, proportionate and dissuasive.

Next steps

The Commission's proposal will now be sent to the Council and the European Parliament. The Directive needs to be formally adopted by the Council by unanimous vote, after consultation of the European Parliament.

