TAX newsletter
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Mandatory disclosure of potentially harmful tax planning arrangements by intermediaries

On 13 March 2018, the Council of the European Union reached political agreement on a European Commission's Directive proposal to introduce -through an amendment to Directive 2011/16/EU on administrative cooperation in the field of taxation- mandatory disclosure rules for intermediaries who design, market, organise, make available for implementation or provide assistance or advice in relation to certain cross-border arrangements. In accordance with the proposed Directive, intermediaries, such as lawyers, accountants or advisers, must report and Member States must subsequently exchange information on potentially aggressive tax planning arrangements with a cross-border element concerning at least one EU Member State and arrangements designed to circumvent reporting obligations involving automatic exchanges of information or to conceal beneficial ownership information.

Intermediaries covered by the reporting obligation are those who are tax residents, have a permanent establishment, or are incorporated or registered with a professional association in an EU Member State. Where no intermediary is liable to reporting because, for instance, a taxpayer implements an arrangement in-house or when the intermediary does not have an EU presence, or in case disclosure would breach the legal professional privilege, the reporting obligation shifts to the taxpayer, be it an individual or corporate taxpayer. The reporting deadline is thirty days after the arrangement is made available or is ready for implementation or after the first step of such arrangement has been implemented.

Member States must transpose the Directive into domestic legislation by 31 December 2019 and apply it as from 1 July 2020. However, intermediaries and taxpayers will be required to file information on reportable arrangements the first step of which was implemented between the date of entry into force of the Directive (which could be after a few months) and 1 July 2020. Information must be filed by 31 August 2020. EU Member States' tax authorities will exchange reported information automatically within the EU on a quarterly basis through a centralised database. The first automatic exchange of information among Member States should have been completed by 31 October 2020.

The term aggressive tax planning is undefined, but the Directive refers instead to specified hallmarks, which are features that should be present in an arrangement in order for it to be reportable under the Directive.

Generic hallmarks and a number of specific hallmarks may only be taken into account if they meet the "main benefit test", which is satisfied when obtaining a tax advantage constitutes the main benefit or one of the main benefits a person may reasonably be expected to derive from an arrangement.

Hallmarks which are not linked to the main benefit test concern:

- specified cross-border transactions such as arrangements involving deductible cross-border payments between associated enterprises when the recipient is not resident for tax purposes in any jurisdiction, deductions for the same depreciation claimed in more than one jurisdiction, relief from double taxation in more than one jurisdiction in respect of the same item of income or capital, arrangements including transfers of assets where there is a material difference in the amount being treated as payable in consideration for the transferred assets in the jurisdictions involved
- specified arrangements designed to circumvent reporting obligations involving automatic exchanges of information under EU or OECD laws or agreements
- arrangements involving a non-transparent legal or beneficial ownership chain under specific conditions, including lack of substantive economic activity
- transfer pricing, such as arrangements involving the transfer of hard-to-value intangibles or certain cross-border transfers of functions.

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