Tax - Breaking News

June 2018

Consistent with our commitment to keep you updated on most significant international tax developments, we outline the new Mandatory Disclosure Rules for Intermediaries and Taxpayers.

Introductory Remarks

- On 5 June 2018, Directive 2018/822/EU was published in the Official Journal of the European Union, which amended Directive 2011/16/EU on administrative cooperation in the field of taxation.
- This Directive (referred to as DAC 6) introduces an obligation for **intermediaries** to disclose potentially aggressive cross-border tax-planning arrangements involving at least one EU Member State (M-S) to the Tax Authorities. It will be mandatory to automatically exchange such information between Tax Authorities of one or more Member States or a Member State and a third country.

The new Mandatory Disclosure Rules

- The Directive does not define "**aggressive tax-planning**". However, it is provided that an arrangement should be reported if it reveals certain features referred to as "**Hallmarks**" which essentially indicate a risk of tax avoidance or abuse. Some of these "Hallmarks" should be further linked to the so-called "**main benefit test**", which would indicate that the taxpayer will obtain a tax advantage from the arrangement.
- **Intermediaries**, individuals or legal entities with presence in an EU M-S, must disclose relevant information to the Tax Authorities, in case they design, promote, organize or make available or manage the implementation of reportable cross-border arrangements.
- There is no reporting obligation for intermediaries when:
  - The intermediary is subject to a legal professional privilege under the M-S national law;
  - The intermediary is located outside the EU;
  - The taxpayer designs and implements a scheme in-house.

  In all the above cases as well as when there is no intermediary, the **taxpayer** is obliged to disclose the relevant information.
- In case of multiple intermediaries, the reporting obligation burdens all intermediaries and the exception from filing is granted only to the extent that the relevant information has already been filed in another Member State.

Timeline

- The Directive should be incorporated into domestic law until **31 December 2019**. The new reporting requirements shall apply as of **1 July 2020**. However, the Directive will enter into force on **25 June 2018** (20 days after its publication to the Official Journal of EU), which gives the Directive a clear retroactive effect.
- Arrangements should be reported within 30 days after their implementation. The first reporting shall take place by 31 August 2020 (to include reportable arrangements form the effective date of the Directive). The reported information shall be automatically exchanged quarterly via a central directory. The first exchange of information between the Tax Authorities will take place by 31 October 2020.

Penalties

- According to the Directive, Member States must provide penalties for infringements of the mandatory disclosure rules, under the general condition that any penalties should be effective, proportionate and dissuasive.

KPMG comments

- Although the definition of "aggressive" tax-planning is unclear, it is essential for intermediaries and taxpayers to accurately assess in advance whether or not a tax-planning arrangement is potentially aggressive and, as a result, whether it should be reported (and thus exchanged).

- The new rules seem, at least, to discourage all arrangements that involve deductible cross-border payments to countries with a zero or almost a zero rate of corporate tax or to countries where the payments benefit from a preferential tax regime.
- The reported (and exchanged) aggressive tax-planning arrangements may not be timely assessed by the Tax Authorities. The lack of an immediate reaction does not imply acceptance of the validity or tax treatment of the arrangements. On the contrary, it is possible that the reported information may trigger a tax audit at a later stage.
- The Directive explicitly refers to the OECD recommendations and seems to be aligned with Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project, as well as the OECD Model Mandatory Disclosure Rules for Common Reporting Standard (CRS) Avoidance Arrangements and Opaque Offshore Structures. However, the EU Directive goes beyond the OECD recommendations, as it imposes reporting obligations on both intermediaries and/or taxpayers not only for CRS but also for all cross-border potentially aggressive tax-planning arrangements.

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