JONES DAY

COMMENTARY

MARCH 2018

EU Targets Tax Avoidance Reporting Obligations for Intermediaries

IN SHORT

The Situation: The Member States of the EU have unanimously agreed on a proposed directive establishing new and far-reaching tax reporting obligations for "intermediaries" and taxpayers.

The Result: The proposal lays down rules for mandatory disclosure of potentially aggressive tax planning schemes with a cross-border element ("arrangements").

Looking Ahead: The directive must be implemented by the EU Member States by 2020 and may have a retroactive effect on transactions that occur in the second half of 2018.

On March 13, 2018, the Council of the European Union reached a political agreement on a proposed directive that establishes new and far-reaching tax reporting obligations for intermediaries and taxpayers. The proposal aims at providing tax authorities with specific information to identify new risks of tax avoidance and take measures against harmful arrangements. To this end, national tax authorities shall automatically exchange such information with tax authorities of other EU Member States.

Reflecting elements of the OECD's Base Erosion and Profit Shifting (BEPS) project, the proposal lays down rules for mandatory disclosure of potentially aggressive tax planning schemes with a cross-border element ("arrangements") by an "intermediary." Such an intermediary is anyone who is involved in designing, marketing, organizing, making available for implementation, or managing the implementation of a reportable cross-border arrangement, including those who are "reasonably expected to know" of such arrangements (e.g., banks, tax consultants, or lawyers).

In case the disclosure obligation would not be enforceable upon an intermediary due to a legal professional privilege, the intermediary shall be entitled to waive its reporting obligation and then will be required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their disclosure obligations. Also, where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house, the taxpayer must disclose the arrangement.

Reportable cross-border arrangements are cross-border arrangements that contain at least one of the generic or specific hallmarks set out in an annex to the proposed directive, including certain transfers of hard-to-value intangibles and arrangements involving tax deductible payments to associated enterprises that are resident in tax havens or that benefit from a preferential regime. Other hallmarks include the entitlement to receive a fee that is set by reference to the amount of the tax advantage resulting from the arrangement and the conversion of income into capital, gifts, or categories of income that are more favorably taxed. Certain of these hallmarks will only give rise to reporting obligations if at least one of the main benefits that, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage ("main benefit test").

> "Member States will be obliged to impose penalties on intermediaries that do not comply with the transparency measures..."

Arrangements shall be reported to the national tax authorities within 30 days from the day after the arrangement is made available or ready for implementation or, if earlier, the day in which the first step in the implementation of the arrangement took place.

Member States will be obliged to impose penalties on intermediaries that do not comply with the transparency measures and will be required to automatically exchange the information they receive through a centralized database.

The directive is expected to enter into force in the summer of 2018 and must be implemented by the EU Member States by December 31, 2019. Moreover, by August 31, 2020, intermediaries and taxpayers must disclose reportable arrangements the first steps of which are being implemented after the entry into force of the directive, which may be as soon as the summer of 2018.

AUTHORS

THREE KEY TAKEAWAYS

1. The EU proposal is designed to provide tax authorities with specific information for identifying new risks of tax avoidance and take measures against harmful arrangements.
2. The proposal sets rules for mandatory disclosure of potentially aggressive tax planning schemes with a cross-border element ("arrangements") by an "intermediary."
3. National tax authorities will automatically exchange information with tax authorities of other EU Member States.


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