

EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers

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Intermediaries and taxpayers will have to report cross-border reportable arrangements of which the first step of implementation is set after 25 June

Executive summary

On 5 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) was published in the [Official Journal of the European Union](#). The Directive will enter into force 20 days after its publication. This means that the Directive will enter into force on 25 June 2018.

Cross-border reportable arrangements where the first step of implementation is taken between the date of entry into force of the Directive (25 June 2018) and the date of application of the Directive (1 July 2020), will have to be reported by 31 August 2020 and are to be exchanged between EU Member States by 31 October 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.

Detailed discussion

Background

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 across Member States.

Scope of the Directive

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, and other intermediaries to disclose any cross-border arrangement that contains one or more features or “hallmarks,” if they are identified as intermediaries for the purposes of the Directive. The geographical scope of the new reporting requirements comprises arrangements within the EU, as well as between Member States and third countries.

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

In addition to details of the hallmarks being met, a disclosure will include the names of the intermediaries and relevant taxpayers, their place of residence and tax identification (TIN) number together with summary information on the arrangement itself.

If the intermediary is protected by legal professional privilege, then the obligation to disclose is transferred to any other intermediary which can disclose, and if not, then to the taxpayer. The taxpayer will also have the obligation to disclose where there is no intermediary or where intermediaries are outside EU jurisdiction. Following the reporting of the arrangements, the information about the arrangements specified by the Directive will be automatically exchanged between Member States.

The content of the adopted Directive corresponds to that agreed by ECOFIN on 13 March 2018.¹

Deadline for implementation by Member States

Member States shall adopt and publish national laws required to comply with the Directive by 31 December 2019. National laws will provide for penalties for non-compliance, which according to the Directive should be scoped in a way that is effective, proportionate and dissuasive.

During the transition period, reportable arrangements will be reportable where the first step of implementation is made between the date of entry into force of the Directive (25 June 2018) and the date of application of the Directive (1 July 2020). The first reports are due by 31 August 2020 and are to be exchanged by 31 October 2020.

After the transition period, a reportable arrangement shall be reported within 30 days beginning on the day after the arrangement: (i) was made available for implementation, or (ii) was made ready for implementation, or (iii) when the first step in the implementation was undertaken, whichever occurs first. The Directive will also require intermediaries who provided aid, assistance or advice to file the information with the authorities within 30 days beginning on the day after they provided such aid, assistance or advice.

Implications

The wide territorial reach of the rules will impact taxpayers and intermediaries (as defined by the Directive) both in the EU and, indirectly, in third countries. These groups are therefore advised to review current activities against the requirements set out by the Directive. Once the Directive comes into effect on 25 June 2018, taxpayers and intermediaries should start recording activities that will potentially need disclosure in August 2020.

Endnote

1. See EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018. For more information on the new mandatory transparency rules, view [EY's webcast](#) of 24 April 2018.

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