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Euro Tax Flash from KPMG's EU Tax Centre

ECOFIN agrees on Mandatory Disclosure Requirements for Intermediaries and makes further revisions to the EU Blacklist

ECOFIN – Code of Conduct Group – Mandatory Disclosure Requirements – EU Blacklist – Tax Transparency – Tax Intermediaries

On March 13, 2018, the ECOFIN Council reached political agreement on rules requiring intermediaries (and taxpayers) to disclose information on potentially aggressive tax planning arrangements. The Council also decided to further amend the EU blacklist of non-cooperative jurisdictions by removing Bahrain, the Marshall Islands and Saint Lucia from the list and adding the Bahamas, Saint Kitts and Nevis, and the US Virgin Islands.

Mandatory disclosure requirements

On June 21, 2017, the European Commission presented a proposal for a Council Directive as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (see ETF 330). The proposal, which amends the Directive on administrative cooperation in the field of taxation (DAC 6), introduces an obligation on intermediaries to disclose potentially aggressive tax planning arrangements and the subsequent exchange of this information between tax administrations.

The Bulgarian Presidency has made this file a priority, continuing the progress made by the Estonian Presidency in this respect. During the meeting on March 13, the ECOFIN debated and voted in favour of a revised proposal.

The proposal of March 9, 2018, contains, in particular, amendments to the initial text presented by the EU Commission regarding the scope of reportable cross-border arrangements. The amendments are a response to concerns from some Member States that this would lead to over-reporting. The key amendments related to the disclosure procedure are as follows:

- The definition of an intermediary subject to the reporting obligation is clarified and broadened to include any person who designs, markets, organizes or makes available for implementation or manages the implementation of a reportable arrangement. It also covers those persons who know or could reasonably be expected to know that they have undertaken to provide assistance with respect to a reportable arrangement.
- In case of multiple reporting obligations, e.g. if an intermediary is required to file the information in several Member States, or if several intermediaries are involved, the compromise text details where and how the filing should take place.
- The reporting obligation rests explicitly on all intermediaries, and exemption from filing is granted only to the extent that proof can be provided that information has already been filed.
- If there is no intermediary, the obligation to disclose shifts to the taxpayer for whom the arrangement was designed. Clarifying rules are also provided in case of multiple filing obligations for the taxpayer.
- Following concerns expressed by some Member States, it was explained that the absence of a reaction by tax authorities to a reported arrangement does not imply acceptance of the validity or tax treatment of such arrangement.
- The originally proposed retroactive effect, which was widely discussed, is limited. Only arrangements implemented between the date of entry into force (20 days after publication of DAC 6 in the official journal) and the date of application (July 1, 2020) of DAC 6 will have to be reported by August 31, 2020.

Similar to the European Commission's initial draft, no definition of the concept of 'aggressive tax planning' is provided. However, the annex to the Directive provides a number of 'hallmarks' that are a strong indication of tax avoidance or abuse. A cross-border arrangement becomes reportable, if it meets one or more of the hallmarks (consisting of five headings, A through E), while certain hallmarks can only be taken into account if a "main benefit" test is also satisfied.

- The main benefit test is extended and redrafted along the lines of the principle purpose test in BEPS Action 6. It is satisfied if it can be established that the main benefit or one of the main benefits which, 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.
- The generic hallmarks (heading A) mainly relate to the engagement between the intermediary and the taxpayers.
- The specific hallmarks that are covered by the main benefit test refer, for example, to certain acquisitions of a loss-making company, the conversion of income into a category of revenue taxed at a lower level, or circular transactions (heading B). Deductible cross-border payments that benefit from a preferential tax regime or a tax exemption (including being subject to a zero, or almost zero corporate income tax rate) are also covered (heading C). It has, however, been clarified that the mere presence of these conditions does not imply that the main benefit test is satisfied.
- Specific hallmarks that do not have to meet the main benefit test include transactions where the recipient is not tax resident anywhere or in a jurisdiction included on an EU or OECD blacklist. Other examples include hallmarks concerning arrangements designed to circumvent rules on the automatic exchange of financial information and beneficial ownership (heading D) and hallmarks concerning transfer pricing, for instance arrangements which involve the use of unilateral safe harbour rules or the transfer of hard-to value intangibles (heading E).

- The much-debated provision authorizing the European Commission to amend the hallmarks through delegated acts is deleted and an assessment of the hallmarks' relevance is introduced every two years.

According to the amended Directive, intermediaries are required to file information on reportable cross-border arrangements within 30 days beginning from the day of implementation, whereas the original proposal called for reporting within 5 days.

Finally, the text of the Directive is accompanied by a statement from the Council supporting international cooperation in this field.

The final text of the Directive is expected to be formally adopted without further discussion in the next couple of months. Member States will then have to implement the Directive by December 31, 2019, and apply its provisions on July 1, 2020. Information on cross-border arrangements - of which the first step was implemented between the date of entry into force (20 days after publication of DAC 6 in the official journal) and the date of application (July 1, 2020) of DAC 6 - will have to be reported by August 31, 2020.

The reported information will be automatically exchanged each quarter by the competent authorities of each Member State via a central directory on administrative cooperation, to be developed by the Commission by the end of 2019. The automatic exchange of information will take place within one month of the end of the quarter in which the information was filed, with the first information having to be communicated by October 31, 2020.

EU Tax Centre comment

The new disclosure requirements will have a material impact on (tax) intermediaries and taxpayers engaged in cross-border transactions and arrangements. In this respect, the EU Directive goes beyond the OECD recommendations on BEPS Action 12, in particular in light of the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures published on March 9, 2018.

It is also remarkable that the term 'arrangement', a term crucial to the Directive, has not been defined, leaving the door open for varying interpretations. As a consequence, a wide range of transactions, including transactions that do not meet the definition of aggressive tax planning – such as arrangements set up to avoid double taxation – may potentially fall within the scope of the new disclosure requirement. It remains to be seen how Member States will implement the rules and whether local tax authorities will issue clarifying guidance.

Although the Directive will, in principle, apply to all types of direct taxes levied by a Member State, it will not apply to value added tax, customs duties, excise duties or to compulsory social security contributions.

Second Revision of the 2017 EU Blacklist of non-cooperative tax jurisdictions

The EU blacklist of non-cooperative jurisdictions for tax purposes is part of the EU's effort to clamp down on tax avoidance and harmful tax practices and follows the European Commission's Anti-Tax Avoidance Package presented in January 2016.

The initial EU list of non-cooperative jurisdictions for tax purposes was first issued on December 5, 2017 (see ETF 345). Of the 92 jurisdictions chosen for screening, 17 jurisdictions were placed on the blacklist. On January 23, 2018, the ECOFIN decided to remove Barbados, Grenada, South Korea, Macao SAR, Mongolia, Panama, Tunisia and the United Arab Emirates from the blacklist, based on the Code of Conduct Group's assessment of the commitments made by these jurisdictions (see ETF 353).

On March 13, 2018, the ECOFIN agreed on a second revision of the list, moving Bahrain, the Marshall Islands and Saint Lucia from the blacklist (Annex I of the conclusions – non-cooperative jurisdictions) to the grey list (Annex II - cooperation with respect to commitments taken). At the same time, the Council also decided to remove Malaysia and the Labuan Islands from the grey list.

Agreement was also reached on seven Caribbean jurisdictions whose screening process had been put on hold as they were recently affected by tropical storms. In the light of the responses received from those countries, the Council decided to add the Bahamas, Saint Kitts and Nevis as well as the US Virgin Islands to the blacklist, while placing Anguilla, Antigua, Barbuda, the British Virgin Islands and Dominica on the grey list.

Nine jurisdictions are therefore left on the list of non-cooperative jurisdictions: American Samoa, the Bahamas, Guam, Namibia, Palau, Saint Kitts and Nevis, Samoa, Trinidad and Tobago, and the US Virgin Islands.

Although the Council recommended that the list be revised at least once a year, the Code of Conduct Group may suggest an update at any time. Commitments taken by the grey-listed jurisdictions will be monitored and should be implemented by the end of 2018 for most countries, with a possible extension to 2019 for developing countries.

EU Tax Centre comment

With this second revision of the EU Blacklist, the Council shows that the list is a living document and that commitments made by listed jurisdictions are taken into account immediately. However, such revisions are likely to attract criticism, in particular as regards the perceived lack of transparency and credibility of both the existing blacklist and the underlying listing process, which was also discussed during the European Parliament's plenary sitting on February 28.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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