



Mandatory Disclosure of Aggressive Tax Planning Arrangements

The ECOFIN Council, has on the on 13 March 2018, agreed on a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation implementing mandatory automatic exchange of information in relation to reportable cross-border arrangements in order to disclose potentially aggressive tax planning situations.

In order for a cross-border arrangement to require being reported to the tax authorities, a tax advantage should constitute the main benefit or one of the main benefits a person is expected to derive from an arrangement.

For example:

- the trade in loss-making companies to reduce tax liability under certain conditions;
- conversion of income into lower-taxed revenue streams;
- circular transactions, and those relating to certain cross-border transactions, more specifically, deductible cross-border payments between associated enterprises in cases where:
 - the recipient is not resident for tax purposes in any jurisdiction, or
 - the recipient is resident for tax purposes in a jurisdiction levying corporate income tax at the rate of zero or almost zero, or
 - the recipient is resident for tax purposes in a jurisdiction which is included in a list of third-country jurisdictions which have been assessed by EU Member States collectively or within the framework of the Organisation for Economic Co-operation and Development as non-cooperative, or
 - the payment benefits from full exemption from tax in the jurisdiction where the recipient is resident for tax purposes, or
 - the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.
- deductions for the same depreciation;
- relief from double taxation in more than one Member State;
- material difference in the amount being treated as payable in consideration for the transferred assets in the jurisdictions involved.

An Intermediary for the purposes of this Directive is defined as (a) any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement, and (b) any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to a reportable cross-border arrangement.

The intermediary must disclose information to the competent authorities on a reportable cross-border arrangement within thirty days beginning on the day after the arrangement is made available or is ready for implementation to the taxpayer or when the first step of such arrangement has been implemented – the reporting date.

To the extent that the intermediary is entitled to legal professional privilege the disclosure obligation shifts to any other intermediary in the first instance or to the taxpayer in the absence of any other intermediary. It is interesting to note that it is up to individual member states to establish under local rules which



intermediaries are subject to legal professional privilege. Wherever there is no intermediary required to report, including because the taxpayer implements a scheme in-house or the intermediary does not have presence within the EU, it is the taxpayer's responsibility to disclose such information by the reporting date. In addition, taxpayers shall file information about their use of reportable arrangements in each of the years for which the arrangement is used.

Insofar as the intermediary files information on a reportable cross-border arrangement or series of arrangements, the Member State in which the information was filed will, by means of an automatic exchange, communicate that information to all other Member States. The automatic exchange of information shall take quarterly.

It is up to the Member States to lay down rules on effective, proportionate and dissuasive penalties for failure to comply with the provisions of this Directive.

The first reportable transactions will be those where the first implementation step of a reportable arrangement occurs between June 2018 and 1 July 2020 (the date of application of the Directive). This information will then be required to be filed by 31 August 2020.

Member States must transpose the Directive into their national laws and regulations by 31 December 2019. The first automatic exchange of information should be communicated among Member States by 31 October 2020.

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PLEASE FEEL FREE TO CONTACT US WITH ANY QUESTIONS OR QUERIES.

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