EU directive on administrative cooperation in field of taxation amended

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Corporate Tax, European Union

Introduction

The European Union has added further impetus to its objective of providing greater transparency with regard to harmful tax practices through an amendment to EU Directive 2011/16/EU. The amendment builds on the Common Reporting Standard, which allows for the automatic exchange of information on financial accounts held by non-tax residents at an international level and the Organisation for Economic Cooperation and Development's Base Erosion and Profit Shifting project. In brief, EU Directive 2011/16/EU has the introduced the mandatory reporting of cross-border arrangements that are indicative of potentially aggressive tax planning. The relevant disclosure requirements must be followed by intermediaries and, in some instances, taxpayers.

Hallmarks

One of the directive's key points is that it provides no definition of 'aggressive tax planning'. Instead, taxpayers must adhere to the list of hallmarks found in Annex IV of EU Directive 2011/16/EU, which include general and specific features that are deemed potential indicators of tax avoidance or abuse. Alongside broadly drafted key definitions (eg, 'intermediary' and 'cross-border arrangement'), the hallmarks appear to give the directive a broad scope. The reason given for this is that the intricacies and complexity of aggressive tax-planning arrangements are constantly evolving and modified in response to countermeasures from tax authorities.

Under EU Directive 2011/16/EU, a 'cross-border arrangement' is an arrangement that concerns more than one EU member state or an EU member state and a country outside the European Union. In a similarly broad fashion, an 'intermediary' is anyone who has (or could be reasonably expected to have) knowledge of (or who directly or indirectly aids or offers advice regarding) the design, marketing, organisation, offer or management of a reportable cross-border arrangement. However, a waiver may be issued by an EU member state where the reporting obligation would breach legal professional privilege under the national law of that country.

The various hallmarks appear to have been introduced to provide expansive powers of scrutiny. Generic hallmarks under Category A of the directive, specific hallmarks under Category B and certain hallmarks in Paragraph 1 of Category C are subject to the 'main benefit test'. These hallmarks can be considered only if it is established that the principal benefit or one of the main benefits of an arrangement is to obtain a tax advantage. However, other sections, such as Section D concerning the exchange of information and beneficial ownership, are not subject to the 'main benefit test' and make it possible for arrangements that may undermine reporting obligations under the laws

implementing EU legislation or any equivalent agreements on the automatic exchange of financial accounting information, including agreements with third countries to be under the purview of mandatory reporting. Category E encompasses specific hallmarks concerning transfer pricing.

Comment

The first reports will be due in August 2020 and will involve information on transactions since June 2018. This deadline is fast approaching and a robust understanding of EU Directive 2011/16/EU must be achieved by both intermediaries and taxpayers in order to minimise potential exposure to penalties as well as reputational and client relationship risks.

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