August 2017

Statement
of the European Tax Adviser Federation
ETAF

on the
Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

ETAF www.etaf.tax is a European umbrella organisation for 250,000 tax professionals from France, Germany, Italy and Belgium. ETAF was launched in January 2016 as an international non-profit organisation (AISBL), governed by Belgian law and located in Brussels. The main role and mission of ETAF is to represent the tax profession at European level in liaising closely with European policy makers to promote good legislation in tax and professional matters.

ETAF is a registered organisation in the EU Transparency Register with the register identification number 760084520382-92.

I. Introduction

On 21 June 2017, the European Commission presented its proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (COM (2017) 335 final) together with Annex IV (COM (2017) 335 final - ANNEX 1). The draft Directive shall regulate the exchange of information between the Member States or the Member States and the Commission with regard to information on cross-border tax arrangements. The European Tax Adviser Federation (ETAF) has analysed the proposal and calls for the inclusion of the following remarks.

II. Preliminary remarks

As in previous statements, we would like to emphasize once again that measures to tackle tax avoidance and profit shifting are absolutely necessary. Tax models of internationally active corporations, which have become widely public in the last years, carry the risk to permanently damage confidence in taxation in general and in the fairness of the tax systems in particular. They also harm the uniformity of taxation in an unacceptable manner. Last but not least, small and medium-sized enterprises suffer a competitive disadvantage because they have to bear higher tax rates compared to internationally active groups.

To successfully fight tax avoidance and profit shifting, their causes must be addressed preliminary. Correctly, the Commission notes that cross-border tax models are based on different tax laws in the Member States or third countries. It has to be mentioned clearly that various States use these different tax law regimes in a targeted manner in order to attract companies. This happens by means of low tax rates, exempting individual types of income or taxing them lower. Also some expenditure types get preferential treatments through increased deductibility. These differences are likely to be the reasons for cross-border tax arrangements.

These differences could be more effectively tackled if the different treatments were broken down in the Member States. Therefore, we are in principle in favor of the Commission's proposal for a **Common Consolidated Corporate Tax Base** as well as the treatment of hybrid financing. The objective of the planned reporting obligation is, inter alia, to provide the Member States with early information on possible cross-border tax design models that may be seen as "aggressive". It could therefore increase the transparency with regard to the causes of tax avoidance and thus contribute to reducing the differences in the tax systems. To this extent, the ETAF supports the planned measures in principle.

It is questionable if the proposal is truly suitable for reaching its explicitly mentioned goal to be a deterrent for tax intermediaries. According to a study by The Greens / EFA Group in the European Parliament, more than half of the intermediaries from EU-member states involved in the ICIJ Offshore Leaks database operate from the UK – a country that already has such a reporting obligation in place. We suggest having a deeper look at the effects of reporting obligations in countries which already work with such a mechanism in order to better understand and assess its cost-benefit-relation.

However, it should be noted that more than 99.9% of tax consultants and taxpayers are not involved in potentially critical models. The circle of promoters of aggressive tax arrangements is just negligibly low in Belgium, France, Germany and Italy, but also in other Member States.

We therefore emphasize the need to continue the deliberations about a reporting requirement for cross-border tax arrangements with the appropriate amount of proportionality. The reporting obligation may in no way become a red tape for tax consultants, auditors or lawyers. The importance of these occupations for the uniformity of taxation and tax control must also be taken into account in the discussions: Their financial, administrative, auditing and legal advice activities make the fiscal administration considerably easier. They also offer a major contribution to ensuring continuous tax revenues.

In this context, ETAF states:

1. The subject matter of the reporting requirement for cross-border models and the notifying parties must be determined in a precise manner in order to uncover the truly relevant cases. A requirement leading to over-reporting is to be rejected.

2. Different reporting systems in the Member States would lead to legal uncertainty and counteract the increase in transparency. It would therefore be as well necessary to specify the subject matter of the reporting requirements for cross-border issues and the notifying parties as precisely as possible in the Directive.

III. Comments on selected items of the proposal

1. Definition of the term 'intermediary' – Amendment of Article 3 point 21

ETAF welcomes the inclusion of the characteristic that only the intermediary who is **responsible** for designing, marketing, organization or management of the tax model shall be required to report. Moreover, Article 3 point 21, 2nd sentence provides that only the persons responsible for material assistance, assistance or advice with regard to the design, etc. shall be regarded as intermediaries.

This is a necessary clarification. It prevents, for example, course instructors or speakers from becoming notifiable when presenting loopholes in seminars. Similarly, employees of the intermediary or of the taxpayer engaged in the above activities would not be regarded as intermediaries. These persons are generally not responsible to the taxpayer.

It should be clarified whether the term "person" refers to a natural person and/or to a legal person. In case only natural persons would be seen as intermediaries, it is questionable how the company of the intermediary would be responsible for individual actions. This concerns the notification as such, but also the failure to observe it. Clarifications are necessary in the interests of a uniform legal situation in the Member States.

2. Notification period – Article 8aaa (1)

According to the proposal, the Member States are required to implement a very short reporting period. The information would have to be submitted to the tax authority within five working days, for example after the intermediary would have made the model available to the taxpayer for use.

We believe that a reporting period of five days is inadequately short, even though the necessary information is available to the notifiable persons at the time when the tax arrangement is provided or implemented. There must be room for preparing the transmission to the financial authorities. This may include, for example, the anonymization of information on involved third parties in order to protect professional secrecy. The reporting period should therefore be extended to one month.

3. Exemption from reporting obligation - Art. 8aaa (2) first paragraph

Member States shall grant the right of exemption from compulsory reporting to the intermediaries if they are entitled to a legal professional privilege under national law. The reporting obligation shall then shift back to the taxpayer. In these cases, the intermediary would have to inform the taxpayer of the duty to notify.

ETAF welcomes the exemption from the reporting requirement in the above mentioned cases. This requirement adequately takes into account the high value of the trustful relationship between the tax advisor and the taxpayer.

However, we would like to point out that the wording "where they are entitled to a legal professional privilege under the national law of that Member State" is a concept which is not commonly used in one of the ETAF Member States. It is unclear whether the rule refers to contractual or professional confidentiality obligations, or whether it refers to the criminal term of betrayal of secrets. In our opinion, the possibility of exemption from reporting obligation should be linked to the **legally guaranteed right** of the intermediary to refuse (as is the case with, for example, a tax advisor or a lawyer). A mere contractual arrangement should not be sufficient. The wording needs to be clarified in this point.

4. **Value of the transaction – Article 8aaa para. 6 lit f)**

The notification shall include the value of the transaction or the series of transactions within a cross-border model or a series of such models.

From our point of view, it is not clear which value such information generates with regard to the objectives of the proposal. We therefore advocate the need to reconsider this informational obligation.

If this requirement is deemed necessary, the term "transaction" should be defined separately in Article 3 of Directive 2011/16/EU. The determination of such transactional value should also be specified. Otherwise the content of this information would differ from Member State to Member State. This would counter the objective of transparency.

5. **Identification of any person likely to be affected by the reportable cross-border arrangement – Article 8aaa para. 6 lit h)**

The notification should include all other persons likely to be affected by the model.

It is not clear what additional value this information entails with regard to the objectives of the proposal. From our point of view, such notifiable information should therefore be reconsidered.

If this requirement is deemed necessary, it would have to be clarified as a matter of urgency in order to achieve broadly uniform reporting obligations in Member States and get a practicable transposition into national legislation. It should be clarified, for example, whether "persons" can only be natural persons or even legal persons. It would also be necessary to clarify when a person is affected. It is, for example, questionable whether employees of the intermediary or the taxpayer must be included in the report.

Legal uncertainty arises, in particular, in cases where not all parties concerned are aware of the person liable to report. In addition, the concept of "likeliness" leads to legal uncertainty. "Likely" implies an assessment of the person who is subject to the disclosure, which can be

examined by the competent authority and assessed differently. Given these high uncertainties, Member States must be given the option to introduce an "escape clause" in favor of the person subject to disclosure. The scheme should provide that a liable person does not breach its reporting obligation and thus cannot be subject to a sanction simply because it has not identified a "likely affected" person and therefore has not indicated it.

IV. Comments on selected hallmarks of Annex IV

The considerations of the EU Commission to determine tax arrangements with a final catalog of hallmarks are considered very useful by ETAF. In contrast to a wide, indefinite legal concept, which is intended to encompass all tax reductions, such a catalogue can be a practicable approach. Depending on the extent of concreteness, it can provide a sufficient degree of legal certainty.

1. Main Benefit Test

ETAF supports the proposal of the European Commission to introduce a "main benefit" test for the general characteristics of "A." and the specific characteristics of "B.". In general, objectives and objectively verifiable criteria should be defined carefully, preferably without any discretionary powers. This increases the legal certainty for all users.

ETAF suggests that the wording of the "main benefit" test itself should be more concrete. It should clearly state that the tax advantage is, on the one hand, the main advantage (more than half of the total tax advantage of the measure), but on the other hand it must also be the **main reason** for the arrangement. A mere accidental tax advantage by, for example, a relocation of production should not trigger a reporting obligation. It should also be thought about a threshold from which tax benefit a reporting obligation should start. Only material tax planning schemes will entail a reaction by the member states and thus be reportable.

For the reasons to be presented in detail below, we believe that the "main benefit" test should provide the taxpayer with a codified countervailing opportunity. The counter-evidence should be as such that the taxpayer can present economically justified motives for the design.

2. General hallmark: Remuneration according to A. 2. Annex IV-E

The general hallmark "A. 2." refers to the remuneration of the intermediary. In the description of the remuneration as " fee (or interest, remuneration for finance costs and other charges) for the arrangement or the series of arrangements" it is not clear whether the listing in the parenthesis is used alternatively or cumulatively.

So, the wording in the English original text would need to be adjusted slightly:

„2. An arrangement or series of arrangements where the intermediary is entitled to receive a ***fee, interest, remuneration for finance costs or other charges*** *for the arrangement or series of arrangements and* ***those fees are*** *fixed by reference to:" […]*

3. General hallmark: Standard documentation according to A. 3. Annex IV-E

An arrangement or a series of arrangements should be reported if they contain the "use of standard documentation and standard form sheets". The mark is concretized as follows: "*The documentation is commonly available to more than one taxpayer and does not need to be tailor-made to enable a taxpayer to implement the arrangement or series of arrangements."*

This very broad wording can already trigger a reporting requirement if commonly accessible standard form sheets, such as articles of association, are used. This seems not to be constructive, since only the use of common sample contracts is not a strong indicator for tax avoidance. We recommend to change the wording as follows:

"An arrangement or series of arrangements that involves the use of standardised documentation including standard forms. The documentation is ~~commonly available to~~ ***ready-made for*** *more than one taxpayer and does not need to be ~~tailor-made~~* ***customized*** *to enable a taxpayer to implement the arrangement or series of arrangements."*

V. Comments on selected points of the justification of the proposal

Use of the collected data: Compliance with the principle of legal cetainty

It is not foreseeable how and to what extent the information of the taxpayer will be used by the relevant States. This concerns the possibility that the data will not be used at all, as well as the possibility of legislative measures against the design model, the arrangement of a special audit, the use of the information in the assessment procedure or even the initiation of tax investigation measures.

The draft directive aims at providing Member States with early knowledge to take actions against certain tax planning models. Whether and what action will actually be taken by the Member States as a result of the information is completely ignored by the draft directive. For the acceptance of the directive it is essential that the findings are actually used. As indicated in our contribution to the public consultation of the EU Commission, additional administrative cost without actual effect and without the use of the collected data can lead to an erosion of the tax moral. There is also a risk that States which actively use the tax gaps described above will not take action against the notified tax arrangements. The proposal should therefore not be silent in this regard.