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The new transparency rules for intermediaries and companies lead to a complete tax chaos

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Intermediaries (such as: tax advisors, accountants, banks, and lawyers) who design tax structures are now on the Commission's radar. She recently proposed extensive transparency rules on the basis of which information about cross-border tax structures – bearing certain 'hallmarks' – will now have to be reported by the intermediary to the national tax authority ('reporting obligation'). In turn, the tax authority must automatically exchange the information that they receive to the tax authorities of all the other EU-Member States ('exchange obligation'), providing them with insights in potential tax avoidance practices. Sometimes, however, the obligation to report a tax structure shifts to the company itself. This is the case, for example: when the intermediary is not located within the EU; the intermediary is bound by professional privilege or secrecy rules; or when the tax structure has been developed 'in-house' by tax specialists of the company itself.

Given that international tax avoidance has come to broad public attention and under unprecedented public scrutiny in recent years, the Commission's plan makes sense. Transparency towards tax authorities is an important instrument to tackle alleged undesirable tax avoidance practices. Targeted transparency rules could provide tax authorities with proper information to take action against undesired tax avoidance, for example in the form of tax audits or change of legislation to close any tax loopholes. Even though, the Commission's plan will have to go back to the drawing board in Brussels. We expect that the reporting obligation will result in a high degree of tax uncertainty for business. This at a time when the EU – following the example of the OECD and the G20 – has embraced tax certainty as an important new policy objective for stimulating economic growth in Europe.

Why the current focus on tax certainty? It is not surprising that tax certainty has suddenly shifted upwards on the international political agenda of policy makers. Europe is on the eve of the implementation of a comprehensive package of measures that should address unwelcome tax policy competition (by Member States) and undesirable tax structures (used by multinationals). The recent agreement on ATAD1 and ATAD2, which are examples of such measures, can be considered as a milestone, given that Member States agreed on such a far-reaching corporate income tax harmonisation within the EU for the first time. The implementation of these measures already creates a lot of uncertainty for business. In these uncertain times, companies cannot afford any further increase of tax uncertainty caused by the proposed reporting obligation.

The new reporting obligation leads to tax uncertainty because the to-be reported tax structures have

not been defined in concrete terms. On top of that, even advised structures that a company does not want to proceed with, must be reported by the intermediary. In practice, this will result in a tsunami of unnecessary notifications, which, in turn, will give rise to unnecessary alertness of tax authorities. With the current plan, there is a risk that eager tax authorities in Europe will investigate these unnecessary reports in the context of ‘there is no smoke without fire’. At worst, this could lead to fishing expedition kind of behaviour. A company can be easily confronted with a questionnaire, a tax audit, or a denial of a tax break. The result is that the number of tax disputes between tax authorities and companies will increase rather than decrease.

The first issue is that an intermediary or a company will have to report any tax structure that they design, if it bears any of the hallmarks of the Commission’s plan. These hallmarks are so broadly described that even structures that are not at all aggressive, are subject to the reporting obligation. For example, a tax solution which prevents that companies’ losses evaporate, and therefore no longer can being deducted against future company profits, has to be reported. The reporting obligation even covers bona fide cross-border tax arrangements which are designed to prevent double taxation. That, of course, cannot be the intention,

In order to avoid the bycatch of unnecessary notifications, the list of ‘harmful’ hallmarks should be revisited. In doing so, lessons could be learned from the OECD BEPS Action 12-conclusions which provide for a framework to identify reportable arrangements. Unlike the general EU approach, which foresees in a ‘one size fits all’ harmonization by means of generic and specific EU hallmarks, the OECD approach might be more effective given that it works with specific hallmarks that take account of country specific needs and risks. If the Commission, however, prefers to stick to the general approach, we suggest that the proposed main benefit test should apply to all EU hallmarks. This could mitigate the issue that tax structures, which are not at all aggressive, need to be reported. This risk could be further mitigated, by drawing-up an additional list of tax structures which are already in the mind of tax authorities.

The second issue is that an intermediary that has designed a tax structure for a company, must make a report on this to the national tax authorities after it has been “made available for implementation” by the intermediary to its client. The exact definition of this, is very unclear. The risk that results from this is that intermediaries will need to report a multitude of tax advices, memorandums, telephone calls, etc., regardless of whether these have been acted upon by the company. Even though a company explicitly chooses not to implement an advised tax structure, sensitive tax information will become readily available to all European tax authorities. It seems to be more effective that an intermediate has to report on a tax structure only when it is actually implemented by a company.

So, what’s next? To avoid a total tax chaos, the Commission’s plan should be revisited. There must be a solution that would not spoil tax certainty for companies within Europe. Brussels cannot fail to take action on this matter.

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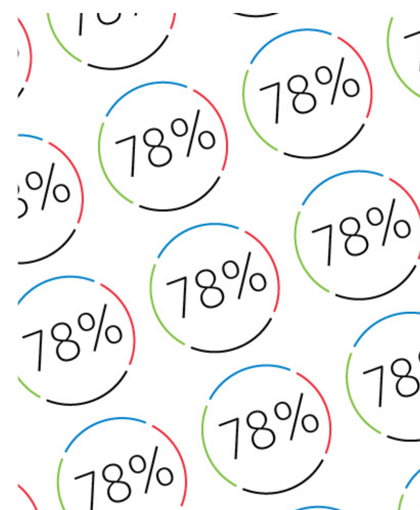

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