EU proposes mandatory disclosure of tax information for reportable cross-border arrangements

31 August 2017

In brief

The European Commission (EC) published a draft Directive on 21 June 2017 entitled *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*. This would amend further (and for the fifth time) the EU's Directive on administrative cooperation in the field of taxation. The draft Directive would impose mandatory reporting by taxpayers and intermediaries to the tax administrations of EU Member States for various cross-border transactions and arrangements. It also addresses the consequent automatic exchange of information on those transactions and arrangements across the EU.

This follows a prior consultation, to which a wide range of stakeholders (including PwC) responded, addressing aspects of what is perceived as aggressive tax planning, often facilitated, many believe, by intermediaries. The EC's actions respond to pressure from the European Parliament to disincentivise use of what it regards as aggressive tax planning schemes and the intermediaries that advise taxpayers on such schemes. On 25 May 2016, the Council (Member States) also invited the EC "to consider legislative initiatives on mandatory disclosure rules inspired by Action 12 of the OECD BEPS project."

The quarterly automatic exchange of information between tax authorities envisaged to take effect from 1 January 2019 would be based on domestic disclosure regimes gathering details of transactions involving one or more taxpayers in the EU, or at least one intermediary in the EU. These mandatory disclosure regimes (MDRs) would be similar to domestic MDRs currently operating within the EU in the United Kingdom, Ireland and Portugal. The proposed model borrows especially from the UK disclosure of tax avoidance schemes (DOTAS) regime for structure, but with general and specific 'hallmarks' for identifying disclosable tax planning arrangements that go much wider.

A Member State may argue that some current elements of the EC's proposals may potentially contravene EU law and therefore might need amending. Elements of the hallmarks could create a restriction on the free movement of capital or be deemed to disproportionately burden intermediaries/taxpayers in relation to the objective. Other elements might need to be restricted to wholly artificial arrangements in order to comply with EU law. Further clarity also is needed regarding alignment with the EU's general principle of legal certainty.

We recognise the need for tax transparency with and between tax administrations in the EU, as well as on a broader basis. Thus, we welcome the EC's attempts to put forward specific proposals. However, if this or an amended version of the draft Directive is to be unanimously adopted and successfully implemented, the legislation will need to: provide a longer time frame for reporting in the context of international arrangements; be more specific to reduce tax uncertainty; and provide some filters to prevent over-reporting (in other words, reporting of arrangements that are not 'aggressive' and therefore not the target of the proposal). Furthermore, the EC should consider the impact on tax administrations, as well as on taxpayers and a wide range of intermediaries, in relation to this risk of over-reporting.

This bulletin addresses the package as a whole, the cross-border arrangements and hallmarks that trigger a disclosure, the person that needs to disclose and the consequences for business, what information must be disclosed/exchanged and when, the potential penalties, the legislative process/timeline and the EU law issues to consider.

In detail

1. A package of documents and communications

The EC's proposal is in the form of a draft Directive that would require Member States to adopt domestic rules that at least satisfy those requirements (individual States could go further).

In outline, Member States would have to automatically exchange information, via a central database that the EC would set up and host. The exchange would cover various cross-border tax arrangements and occur on a quarterly basis effective 1 January 2019. In addition, there would be a catch-up for arrangements prior to that date, but after the Directive's formal adoption by Member States in Council.

Each Member State would first require relevant taxpayers and intermediaries to disclose those reportable transactions, identified by designated hallmarks, to the tax administration in that State, within a five-day turnaround. The stated intention is to provide an early warning on new risks of avoidance and enable Member States to take measures to block harmful arrangements.

The EC had previously launched a public consultation on tax intermediaries on 10 November 2016, primarily to assess the need for legislation aimed at tax advisors and other intermediaries who facilitate tax avoidance and evasion, and how to design such rules. That public consultation referenced the non-consensus recommendations on MDRs put forward under Action 12 of the base erosion and profit shifting (BEPS) project, originally run by the OECD for the G20 and now by the Inclusive Framework of 102 countries. PwC's comment letter in response was one of many published by the EC.

The EC's proposal would amend the existing Directive 2011/16/EU on administrative cooperation in the field of taxation for the fifth time, making this 'DAC6.' In the past few years this Directive has been updated to address the automatic exchange of information on financial accounts (DAC2), tax rulings/advance pricing arrangements (DAC3) and country-by-country reporting (DAC4). Furthermore, pending amendments address the ability of tax authorities to access anti-money-laundering information (DAC5).

The EC has published a number of other items underpinning its proposal linked via the DG TAXUD webpage: Transparency for intermediaries.

The draft Directive is, at this stage, still a proposal. In order to become law, the Member States in Council would need to formally adopt measures by unanimous vote, after European Parliament consultation.

PwC comment: We understand the concerns underlying the proposal and agree with the fundamental principle of transparency with and between tax administrations. However, we think further work is needed to clarify the text and make it workable both for taxpayers/intermediaries and tax administrations. In particular, at an overview level:

a) The proposal needs more certainty regarding the complex rules whereby the taxpayer would, in some circumstances, be responsible for reporting and whereby intermediaries will need to determine, if there is more than one, which of them has the reporting obligation, including where the main adviser is not in the EU.
b) Clarifying the hallmarks for reportable transactions and introducing appropriate filters or exceptions for existing, repeat and known structures could considerably reduce the burden of those making disclosures and tax administrations. This also could apply to the exchange of information through other channels (e.g. tax rulings) or using a known/approved incentive (e.g. patent box).
c) The Member States will want to ensure that the final proposals do not contravene EU freedoms, so that ultimately actions are proportionate and do not go beyond what is necessary to achieve their goal.
d) There is tension between 1) the needs of individual Member States per OECD BEPS Action 12 prescribing that the hallmarks for

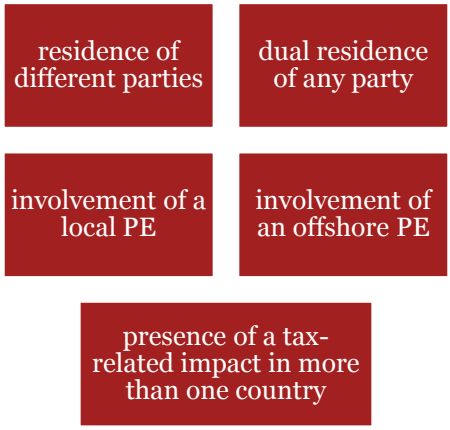
reportable transactions should be sufficiently country-specific and 2) the EC's approach prescribing a common 'one-size-fits-all' system across the EU. Additionally, that 'one-size-fits-all' approach could in itself lead to variations in interpretation unless terms are more comprehensively defined.

e) The hallmarks are an essential element of the text and should be included in the main body of the legislation, with any future changes requiring the unanimity of all Member States.

2. *What triggers a disclosure?*

Scope

Under the proposal, a cross-border arrangement is reportable if it satisfies at least one of the specified hallmarks below. There is no definition of the term 'arrangement,' but the geographical requirement is that an arrangement, or series of arrangements, involves at least two countries by virtue of one of the following (note that only one of the countries needs to be an EU Member State):



PwC comment: In order to prevent over-reporting and reduce complexity or uncertainty, the EC could clarify the proposal by referring to the BEPS Action 12 recommendations and, specifically:

a) defining the term 'arrangement' (e.g. so as to exclude the conversion of a loan into equity and vice versa, or the bona fide receipt of a preferential withholding tax rate under a double tax treaty),
b) limiting this level of reporting by reference to tax in more than one territory, rather than also targeting perceived tax avoidance in a single territory, e.g. through use of residence rules or the presence of a permanent establishment (PE) carrying out a business, either in the location of the PE or in another country,
c) narrowing the range of hallmarks to match more precisely the policy intent.

Main benefit test

An additional test is potentially relevant for the generic hallmarks (A), and the first category of specific hallmarks (B), which covers use of losses, income conversion, and circular transactions. This 'main benefit test' does not currently apply to specific hallmarks focusing on the cross-border element of transactions (C), on exchange of information within the EU (D) or on transfer pricing (E).

The criterion is relatively short:

> *"The test will be satisfied where the main benefit of an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured."*

PwC comment: Note that the reference is to '*the*' main benefit rather than '*a*' main benefit or '*one of the*' main benefits. This is helpful in its intent to rule out complex situations in which there are a number of significant benefits. However, there are a number of other issues:

a) Use of the words "*if it can be established that the advantage*" makes the test itself circular in nature, rather than one which includes a description of 'obtaining a tax advantage' as is presumably intended.
b) It also refers to the advantage "one may expect", arguably and perhaps unintentionally making the test one of subjectivity as to the views of a third party or parties (with consequential questions as to how knowledgeable they should be) rather than more obviously addressing the taxpayer's motive.
c) There are potential links and possible interactions (for which guidance might be useful) with the general anti-avoidance rules (GAARs), which some Member States already have in place, and the minimum standard which the EU's anti-tax avoidance directive (ATAD) will require. That standard is expressed by reference to the taxpayer's purpose(s) and the lack of valid commercial reasons reflecting economic reality.
d) It is not clear why the main benefit test does not apply to all hallmarks; given the proposal's objectives, this might be a reasonable extension.

Generic hallmarks (A)

The nature of the 'contract' between an intermediary and the taxpayer is relevant to these first three hallmarks:

Confidentiality
- from a tax authority or other promoters

Contingent fee
- by reference to whether a tax advantage is obtained (or its size)

Standardised documentation
- including forms

PwC comment: These generic hallmarks all appear in similar form to the UK's DOTAS rules. This suggests that such criteria can work effectively if framed appropriately, broadly in line with the proposed wording. However there is much more detail in the UK rules regarding definitions.

Specific hallmarks linked to main benefit test (B)

There are three specific hallmarks proposed in this section. They broadly relate to:

Losses	• offset to reduce taxable profits
Conversion	• lower taxed revenue streams (e.g. capital, gifts)
Circularity	• transactions resulting in round-tripping of funds

PwC comment: These hallmarks risk being overly restrictive in relation to EU law and the draft Directive's purpose:

a) The proposed description of the use of losses seems to make any loss relief introduced for valid policy reasons by a Member State untenable. The transfer of final losses from a subsidiary in one Member State to the head office in another Member State has, in particular, been accepted by the Court of Justice for the EU (CJEU) (provided that certain conditions are met) in the landmark Case C-446/03 *Marks and Spencer*. This has been reiterated in subsequent case law.

b) The proposed rule could also have more clarity as to whether one category of revenue is taxed at a lower level than another. The effective tax rate of a particular transaction may be affected by a relief, exemption or deduction, while another is subject to the standard tax rate.

c) The EC also could provide guidance for other common cases, such as, for example, whether an equity growth fund would be considered as converting dividends into capital.

Specific hallmarks related to cross-border transactions (C)

There are four different sets of cross-border tax planning characteristics proposed as hallmarks:

Certain deductible cross-border payments
- hybrids or recipient stateless, low/preferentially taxed or exempt

Assets subject to depreciation in more than one country
- double dip

Claiming double taxation relief more than once
- in respect of the same item in different jurisdictions

Transfers of assets
- where material difference in amounts are treated as payable

Whether a low rate is applied to the income for the payment's recipient, as also required, would be determined by reference to its residence country as follows:

- having a statutory corporate tax rate that is lower than half of the average statutory corporate tax rate in the EU at the end of the previous calendar year, or
- being included in the EU's forthcoming list of uncooperative tax jurisdictions.

PwC comment: Some of the terms are not extensively defined, or are determined in a manner that may lead to uncertainty (and see further below in relation to EU law more generally).

a) The determination of low-tax treatment would lead to uncertainty if, on the first day of each year, the EC is not able to publish and widely publicise the average statutory tax rate across the EU for the previous year.

b) It could also bring in all payments to residents of low-tax countries (even, say, for a purchase of goods) including Member States with relatively low tax rates compared to other Member States at the present time.

c) In relation to preferential taxation, it is unclear whether this would refer to any form of tax policy decision to apply specific rates, irrespective of its nature.

d) This specific hallmark carries the risk of restricting the free movement of capital (Article 63 Treaty on the Functioning of the EU (TFEU)) in relation to third countries. Therefore, one could argue that it is less likely that EU residents will invest in third countries (and vice versa). Such a restriction is unlikely to be successfully justified by the need to prevent tax avoidance as it is not limited to wholly artificial arrangements.

Specific hallmarks concerning automatic exchange of information (D)

This is essentially one hallmark about arrangements that circumvent the

reporting of income (and automatic exchange under DAC), with a number of listed examples.

PwC comment: While the hallmark itself is relatively clear, there may be other points to consider:

a) There are interesting contrasts here with the approach adopted by the OECD and the BEPS Inclusive Framework for a disclosure facility for arrangements that avoid the common reporting standard (CRS) on financial account information. Under the OECD approach, anyone has the opportunity to report perceived avoidance.
b) The effect of not reporting income to the taxpayer's resident State is specifically in point. However, there should be protection for an intermediary or taxpayer that is not able to determine whether this has happened.

Specific hallmarks concerning transfer pricing (E)

Targeted specifically at transfer pricing (TP) and the apparent view of what constitutes the arm's length principle (ALP) in the context of the EU, this hallmark has two limbs:

PwC comment: This may seem relatively straightforward in principle, but in practice it raises additional thoughts:

a) There is currently a lack of clarity about the ALP within the EU, particularly following a series of State aid cases in which conformity with the ALP has been investigated. The lack of clarity makes this hallmark particularly difficult to judge (albeit State aid is being argued on equality principles under Article 107 TFEU, while the hallmarks would be determinable under Article 115 TFEU).
b) The reference to the OECD's TP Guidelines is welcome. Additional helpful guidance would include whether this is intended as an either /or determination or whether both must be tested (particularly since those Guidelines do not form part of many States' rule of law).
c) The lack of reporting under DAC3 for tax rulings/advance pricing arrangements may be aimed at regimes that deliberately use pricing as a means of obtaining a tax benefit. But, without a motive test, this hallmark may call into question the interpretation by a tax administration as to the nature of its ordinary dealings in relation to a taxpayer. Further, a taxpayer or an intermediary will not be aware of whether a tax administration has made an exchange.

3. Who needs to disclose?

The burden of reporting may fall on either:

- a qualifying intermediary (including any person involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or those who provide aid, assistance or advice), or
- the taxpayer, in cases where the intermediary that would otherwise report is entitled to legal professional privilege or a qualifying intermediary is absent (including wholly 'in-house' schemes).

While we refer to qualifying intermediary, the draft Directive just defines an intermediary by reference to such person as mentioned above if they are:

- incorporated in, and/or governed by, the laws of a Member State
- resident for tax purposes in a Member State
- registered with a professional association related to legal, taxation or consultancy services in at least one Member State, or
- based in at least one Member State from where the person exercises their profession or provides legal, taxation or consultancy services.

The proposal provides brief rules for cases where there is more than one potential reporter:

- Where there is more than one intermediary, the reporter would be the one that has responsibility vis-à-vis the taxpayer for designing and implementing the arrangement.
- Where there are associated taxpayers that use the same

arrangement, the reporter should be the one that is in charge of agreeing the arrangement with the intermediary. In this context, association is widely defined by reference to common management or common participation at a 20% level in control/capital. Indirect holdings are calculated as if a holding of more than 50% is deemed to be 100%. An individual and their lineal ascendants/descendants are deemed to be a single person.

PwC comment: The ways in which large commercial projects are typically handled may suggest that certain areas need more clarity:

a) The position for large networks of advisers, and where there are large numbers of different advisers, particularly advising multinational groups, may require substantial collaboration and cooperation to determine the relevant reporter and whether there are several individual arrangements or a series of arrangements that need to be reported. This may be complicated further where the lead adviser is outside the EU but there are a number of other advisers in the EU, perhaps all with relatively minor roles.
b) It seems from the proposed wording that where there are multiple intermediaries and the lead qualifying intermediary is entitled to legal professional privilege, responsibility would not pass to another intermediary before it falls on the taxpayer (with the lead intermediary informing the taxpayer).
c) It would be unusual but not impossible for a taxpayer to plan its tax affairs without involving a single 'local' adviser – the choice of reporter between associated taxpayers is not dealt with in such instance, but should be relatively straightforward.
d) The situation is also a little unclear where taxpayers repeat planning using their own resources but based on previous advice.

4. Consequences for business

Businesses will need to consider the extent to which their in-house activities would be reportable directly and where intermediaries' status would mean the onus for reporting arrangements discussed with those intermediaries would lie with the business. A business would need systems to identify, capture and report transactions, as well as the knowledge of people in both operations and functions to take the rules into account in carrying out daily business, as well as larger project planning.

PwC comment: The consequences of the measures as set out in the proposal would be far-reaching. Currently, the proposal's wording lacks the clarity that a regulation with such impact on taxpayers and their intermediaries reasonably requires. This leads to uncertainties in many areas.

More specifically, businesses may wish to consider the extent to which these proposals could affect their attitude to risk, tax planning strategy and operations. Businesses should consider these impacts in the following areas:

a) How much a business is prepared to be involved in notifiable arrangements, possibly recognising the reporting and exchange of this information as part of its overall tax transparency. Alternatively, does it prefer to not be associated with any notifiable arrangements?
b) Any additional risks that may be generated or increased as a result of implementing a disclosable arrangement, depending on any domestic laws that would reference them.
c) For inbound investors into the EU (e.g. from the United States), to what extent would not having any arrangements reported be considered important across the EU as a whole or in relation to particular Member States? Could the behavioural impact of this be that inbound investors take advice only from advisers based outside the EU, thus creating its own impact on the EU economy as well as other consequences?
d) A number of international tax transactions and financing arrangements may potentially be affected by the deductible cross-border payment hallmarks (C), e.g. interest or royalty payments, where the receipt attracts a low level of tax.
e) It is unclear at this stage how the regime would apply in practice to non-corporate planning, for example in relation to employee mobility, because of the nature and scope of the hallmarks.

5. What needs to be disclosed and exchanged?

Each Member State will have to determine the scope and format of the information that taxpayers or intermediaries must report to their tax administration under the Directive. However, as proposed, this will be partly shaped by the information that would have to be transferred in the prescribed format to the EU's central database, broadly relating to:

- the identification of intermediaries and taxpayers, implicitly in the reporting State (and, where appropriate, the persons who are associated enterprises to the intermediary or taxpayer)
- the hallmark(s) that give rise to the reporting obligation
- a summary of the arrangement(s) including start dates, applicable

domestic tax rules (if any), and values
- an abstract description of the relevant business activities involved (with some protection for specific information), and
- the identification of the other Member States that are involved, or likely to be concerned, and the person or persons within the State that may be affected.

PwC comment: In order to provide consistency, we would welcome additional clarification in the following areas:

a) The reporting, where appropriate, of the identification of the "persons who are associated enterprises to an intermediary" seems redundant. The proposals include two references to other requirements that relate to associated enterprises of taxpayers, but none to associated enterprises of intermediaries. The definition of 'associated enterprises' also relates solely to taxpayers.
b) The exception from disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy, is welcome yet remains subject to interpretation.

6. Timing of disclosure and automatic exchange

There generally would be a five-day turnaround period for reporting to the domestic tax authority. The deadline proposed is broadly as set out below:

- Intermediaries: within five days after an arrangement becomes available to a taxpayer for implementation or where the first step in a series has been implemented.
- Taxpayers: within five days, beginning on the day after the reportable cross-border arrangement or the first step in a series has been implemented.

Under the proposal, tax administrations would be required to gather the necessary details from each calendar quarter, and transmit it within one month of the end of each quarter.

PwC comment: The UK's DOTAS and the Irish regime seem to have worked relatively well with a five-day turnaround. However, a slightly longer period, e.g., 20 days, might be more appropriate for international cross-border arrangements. Promoters (intermediaries) under the Portuguese regime must report the required information to the tax authorities within 20 days of the end of the month in which the tax planning scheme or action was first proposed, or in which implementation began. A 20-day period would not eliminate the early warning for tax administrations, but would allow for the more complex nature of cross-border transactions and the required collaboration and cooperation potentially necessary to comply. Furthermore:

a) Taxpayers and intermediaries should have adequate time to seek and receive good advice and effective assistance, particularly if the planning needs to involve the C-suite in order to properly govern risk.
b) Transactions that never take place might be disclosed. Although this early concern with the UK's regime was managed, there is increased risk in an international context.
c) A short time frame is most relevant for straightforward planning arrangements. However, more complex and bespoke advice is more difficult to identify, assess and appropriately report. This will be particularly true where cross-border collaboration may be required to fully determine the facts and circumstances, even before ascertaining who should report.
d) It is uncertain whether the reference to 'made available for implementation' is intended to mirror the UK's 'made available' criterion. This is made more difficult by reference also to the first step in a series having been implemented. It would be helpful to clarify when the latter is thought to come before the former. The uncertainty inherent in determining when anything is available might suggest that implementation is always a better trigger.

7. Penalties

For failure to report accurately and timely, the proposal requires Member States to impose domestic penalties that are effective, proportionate and dissuasive. In other respects, each Member State can decide the form and size of these penalties.

PwC comment: Imposing penalties of different dimensions in different Member States may influence the levels or quality of reporting when considering one State against another. The likelihood of over-reporting is greater in those Member States with higher penalties.

8. Legislative process and timeline

A technical working party of the Council already is considering the draft Directive. The process to adopt a Directive in this area will require a unanimous decision by Member States in Council. The European Parliament will be involved in this piece of legislation, but only in an advisory role. The Estonian EU Presidency has indicated that it would like to achieve political agreement before the end of 2017.

Under the current proposal, the first reports to tax administrations would apply from 1 January 2019. Therefore, the first information exchanges across the EU via the central database would cover the period from 1 January 2019 to 31 March 2019. The report would be due by 30 April 2019. However, the proposal also includes a degree of retrospective reporting for arrangements implemented between the actual date of political agreement and 31 December 2018. This report would be disclosed to other tax administrations by 31 March 2019.

PwC comment: The transition between the actual and retrospective elements of the proposals is unclear. A Member State would be required to apply the Directive's provisions from 1 January 2019. However, it is uncertain whether this means help made available after that date or where a report would be due after that date. If, for example, some tax advice were provided shortly before that date, but the resulting arrangements are implemented after that date, would this fall within either element of the transition rules?

We understand that the EC, the European Parliament and also the Member States wish to deliver a workable EU-wide regime in a short time frame. If the Council is able to agree quickly, this will add pressure on intermediaries and taxpayers to have systems in place to identify reportable transactions by the date of political accord, since it will be more difficult to gather information at a date much later than the transaction and the actual provision of any advice or assistance.

9. *Matters related to EU law that need consideration*

The draft Directive's preamble includes sections addressing aspects of the legal basis for the proposals, subsidiarity (the need for collective action at the EU level) and proportionality (representing a proportionate answer to the identified problem). Some of the EU law issues on specific matters have been raised above. There are also more general concerns.

PwC comment: The way the main benefit test in general, and the hallmarks in particular, have been drafted risks disproportionately burdening intermediaries (or taxpayers where appropriate). This may not be fully in line with established CJEU case law. It follows from the jurisprudence (e.g. Case C-196/04 *Cadbury Schweppes* but also subsequent case law) that national measures aimed at tax avoidance structures should have the specific objective of tackling wholly artificial arrangements that do not reflect economic reality and that aim to escape the tax that would have normally been due on the profits. The measures should be suitable and proportionate to achieve that objective. Member States therefore cannot enact broad measures targeted at abuse that also capture genuine arrangements (at least not without providing the taxpayer with the possibility to prove otherwise).

On a similar note, mandatory disclosure rules also act to deter tax avoidance and/or abusive situations. However, these should be tailored to their specific objective and should not be overly broad or place a disproportionate burden on the intermediary or taxpayer. A general presumption of tax avoidance thus is not allowed under EU law.

There is, prima facie, a difference in treatment based on whether 'an arrangement' is purely domestic or also involves cross-border elements. As previously noted, such a prima facie restriction may only be justified under EU law insofar as the legislation is specifically targeted and suitable to achieve its aim. To comply with EU law, the hallmarks likely would need to be limited to only wholly artificial arrangements in line with the CJEU's jurisprudence.

In its decision in Case C-271/06, *Netto Supermarkt GmbH & Co. OHG v Finanzamt Malchin,* the CJEU clearly stated that : "*Member States must respect the general principles of law that form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality and the principle of protection of legitimate expectations*". The CJEU interprets the principle of legal certainty as requiring that national measures be sufficiently clear and precise and, while the proposed mandatory disclosure rules would form part of a Directive, in our view the analysis should not be any different. Tax certainty could be improved by adding a possibility to consult or apply in advance to the tax administration on the question of whether an arrangement is reportable.

It is unclear to what extent the need to deter tax avoidance may be considered a reason of public interest from a strictly legal perspective of the CJEU, and whether by reporting various structures, intermediaries potentially may be acting contrary to the EU's Trade Secrets Directive. Following CJEU case law, a tax administration cannot ask for more data than is absolutely necessary to achieve that request's purpose and here, with a purpose of tackling aggressive tax planning, it is not clear whether the hallmarks are proportionate to attaining that objective.

Finally, the question arises whether the proposed rules are fully in line with Article 16 of the EU Charter of Fundamental Rights on the freedom to conduct a business.

Member States will need to consider all of these points in order to ensure

that the proposal effectively reaches its targeted outcome.

The takeaway

A minimum harmonised level of mandatory tax disclosure in each EU Member State likely will be adopted in the near future. Much of the reported information then will be shared with all other EU Member States' competent tax authorities via a central EU-level database.

The breadth of transactions covered is likely to be large. There will be potential reporting responsibilities for both taxpayers and a wide range of intermediaries.

Taxpayers, intermediaries and tax administrations will wish to see that any directive is practical, addresses the underlying concerns and does not overreach. Therefore, taxpayers or intermediaries could usefully discuss any specific concerns with individual Member States, since each will ultimately have to agree to the directive.

While the precise description of the reportable transactions is not yet known, intermediaries and taxpayers should assess what systems they will need, how they will spread awareness of the final requirements within their organisations and how they will handle compliance sign-offs. Tax administrations will benefit from the EU-wide sharing mechanisms already in place, but the gathering of information via a local reporting will need more detailed consideration.

The potential impact of these proposals raises fundamental tax policy issues. The complexity of tax systems and their lack of harmonization, plus a myriad of different countries' tax incentives, make business decisions on what constitutes sensible tax planning as part of the stewardship of resources versus exposure to risk from actions that are seen as 'aggressive tax avoidance' highly complex. The roles of governments, tax administrations, taxpayers and intermediaries are all an essential part of that debate, and one in which we will continue to engage, alongside other stakeholders.

Let's talk

For a deeper discussion of how these issues might affect your business, please call your usual PwC contact. If you don't have one or would otherwise prefer to speak to one of our global specialists, please contact one of the people below:

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