SVENSKT NÄRINGSLIV

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The European Commission 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 KOM(2017) 335 final

Opinion

The Confederation of Swedish Enterprise supports the overarching EU objective to tackle tax avoidance and evasion. However, it is important that new rules are clear, concise and proportionate.

We find that the Commission's proposal on Mandatory Disclosure Rules (MDR), as it stands, does not strike a proper balance between the additional compliance costs to taxpayers with the benefits obtained by tax administrations. The hallmarks governing the obligation to report are so widely drawn that they exceed by far what is required to meet the stated objective of dissuading intermediaries from designing and marketing tax avoidance schemes. We believe there to be an obvious risk that also a huge number of ordinary tax advice concerning transactions with little or no interest to tax authorities, will have to be reported. This will not only place a disproportionate compliance burden on businesses and advisors, but may also have a negative impact on tax administrations' ability to process the information.

In addition, we question the Commission's authority to amend and update the hallmarks listed in Annex IV. This Annex could purportedly be amended by the European Commission under Article 290 TFEU. Article 290 concerns amendment or supplementation of ***non-essential*** **elements** of legislative acts. Considering the fact that the hallmarks define what constitute reportable cross-border arrangements, they are in our view clearly an ***essential*** **element** of the Directive, and should in accordance with the procedure laid down under Article 115 TFEU therefore only be amended through unanimous agreement of the European Council.

Svenskt Näringsliv Confederation of Swedish Enterprise
Postadress/Address: SE-114 82 Stockholm Besök/Visitors: Storgatan 19 Telefon/Phone: +46 (0)8 553 430 00
www.svensktnaringsliv.se Org. Nr: 802000-1858

Furthermore, when balancing the additional compliance cost to taxpayers with the benefit obtained by the Tax Administration, we question the justifiability of introducing MDR in a country like Sweden where taxpayers already have extensive obligations to disclose relevant information to the Tax Administration.

Background

On 21 June the Commission proposed new transparency rules for intermediaries that design or sell potentially harmful tax schemes. According to the proposal, cross-border tax planning schemes bearing certain characteristics or 'hallmarks' which can result in losses for governments have to be automatically reported to the tax authorities before they are used. The Commission has identified key hallmarks, including the use of losses to reduce tax liability, the use of special beneficial tax regimes, or arrangements through countries that do not meet international good governance standards.

The obligation to report a cross-border scheme bearing one or more of these hallmarks will be borne by:

- the intermediary who supplied the cross-border scheme for implementation and use by a company or an individual;
- the individual or company receiving the advice, when the intermediary providing the cross-border scheme is not based in the EU, or where the intermediary is bound by professional privilege or secrecy rules;
- the individual or company implementing the cross-border scheme when it is developed by in-house tax consultants or lawyers.

Member States shall automatically exchange the information that they receive on the tax planning schemes through a centralized database, giving them early warning on new risks of avoidance and enabling them to take measures to block harmful arrangements. The requirement to report a scheme does not necessarily imply that it is harmful, only that it merits scrutiny by the tax authorities. In order to create a powerful deterrent, Member States are obliged to implement effective and dissuasive penalties for those companies that do not comply with the transparency measures.

The new rules are very comprehensive, covering all intermediaries, all potentially harmful schemes and all Member States. Details of every tax scheme containing one or more hallmarks will have to be reported to the intermediary's home tax authority within five days of providing such an arrangement to a client.

General comments

The Confederation of Swedish Enterprise supports the overarching EU objective to tackle tax avoidance and evasion. However, the introduction of MDR will

significantly increase the compliance burden for taxpayers. It is therefore of utmost importance that new rules are clear, concise and proportionate. When drafting the proposal on MDR, the Commission was instructed by ECOFIN to draw inspiration from BEPS action 12. According to the final OECD report on action 12, a key design principle when developing MDR is to strike a balance between compliance cost to taxpayers and the benefits obtained by tax administrations.

"Mandatory disclosure regimes should be clear and easy to understand, should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration, should be effective in achieving their objectives, should accurately identify the schemes to be disclosed, should be flexible and dynamic enough to allow the tax administration to adjust the system to respond to new risks (or carve-out obsolete risks), and should ensure that information collected is used effectively.[1]"

The Confederation of Swedish Enterprise is concerned that the proposal, as it stands, does not live up to the basic design principles advocated by the OECD. In our view, the proposal is not proportionate. The hallmarks governing the obligation to report are so widely drawn that they exceed by far what is required to meet the stated objective of dissuading intermediaries from designing and marketing tax avoidance schemes.

We find the rules disproportionate and potentially harmful to a broader objective of ensuring tax compliance, making it significantly more cumbersome for taxpayers to seek advice on the tax implications of transactions from third parties, or possibly even their own internal tax functions, thus adding additional complexity and uncertainty for businesses.

We believe that a clear distinction needs to be drawn between ordinary tax advice concerning transactions with little or no interest to tax authorities and marketed "schemes" that have been provided by third parties. The current proposal does not provide enough specificity around definitions and has an over-broad collection of hallmarks which do not distinguish between such cases. This will not only increase the administrative burden for taxpayers, but may also have a negative impact on tax administrations' ability to process the information.

At the very least, and as suggested by the OECD, Member States should be allowed to define country specific hallmarks which are genuinely relevant to their tax jurisdiction, together with a list of excluded tax regimes that are not required to be disclosed since there is no risk of loss of revenue.

We are also concerned about a possible overlap in EU initiatives. Recent EU anti-avoidance legislation such as e.g. ATAD 1 & 2, the Directive on administrative

[1] OECD/G20 Base Erosion and Profit Shifting Project, Mandatory Disclosure Rules, Action 12: 2015 Final Report, page 9.

cooperation on advance cross-border rulings (DAC 3) and the Directive on administrative cooperation on country-by-country reporting (DAC 4) seems to address many loopholes, effectively superseding the need for EU-wide MDR.

Another aspect which we question is the authority granted to the Commission to amend and update the hallmarks listed in Annex IV. This Annex could purportedly be amended by the European Commission under Article 290 TFEU. However, it is clearly stated that Article 290 concerns amendment or supplementation of ***non-essential* elements** of legislative acts. Considering the fact that the hallmarks themselves are decisive for the obligation to report, they are in our view clearly an ***essential* element** of the Directive, and should therefore only be changed through unanimous agreement of the European Council under Article 115 TFEU.

From a Swedish perspective, taxpayers already have extensive obligations to disclose relevant information to the Tax Administration. Introducing MDR seems to be more a question of timing. Consequently, when balancing the additional compliance cost to taxpayers with the benefit obtained by the tax administration, we question the justifiability of introducing MDR in a country like Sweden.

Specific comments

Hallmarks

The hallmarks proposed by the Commission would apply to a large volume of transactions and do not clearly distinguish between those transactions that are undertaken for tax avoidance, and those that are undertaken in the ordinary course of business.

The Confederation of Swedish Enterprise questions why the main benefits test only shall apply to some of the hallmarks and not all of them. The latter approach would at least narrow the reporting obligation towards more relevant arrangements.

Time period

The 5-day time frame for disclosure is overly restrictive. We believe it will be extremely difficult, if at all possible, to fully analyse whether a transaction falls within the scope of the regime, document it, and complete the extensive form within a five day period. The existing domestic regimes that do have a five day period typically focus only on one country's tax base. Even in such cases it is still a significant effort for trained tax professionals in that country to meet the reporting deadlines.

In dealing with a cross-border scenario there are several additional complications. For one, since the hallmarks target a number of different countries simultaneously they are much broader. Secondly, taxpayers and advisers may not have the in-

house expertise to analyse foreign tax implications and will need to rely on their networks or advisers to provide assurance on this. It will be virtually impossible to undertake such broad and international analysis within a five day period.

Penalties

According to the proposal, penalties should be “effective, proportionate and dissuasive”. Without additional guidance, there is an obvious risk of widely divergent interpretation and far-reaching measures introduced by Member States.

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Johan Fall Claes Hammarstedt