European Commission presents a package of tax transparency measures

On 18 March 2015, the European Commission (The Commission) presented a package of tax transparency measures (the Transparency Package) as part of its ambitious agenda to tackle perceived corporate tax avoidance and harmful tax competition in the European Union (EU). A key element of the transparency Package is a proposal to introduce quarterly, automatic exchange of information between Member States regarding their cross-border tax rulings, including Advance Pricing Arrangements (APAs).

The proposal takes the form of new requirements to be included in the existing legislative framework for information exchange, via amendments to the Directive on Administrative Cooperation (the Directive). The Commission notes that this will enable automatic information exchange on tax rulings to be rapidly implemented, as the procedures, processes and framework to do so are already in place.

Alongside the proposal to automatically exchange information regarding rulings, the Transparency Package also contains a communication outlining a number of other initiatives designed to advance the tax transparency agenda in the EU, including assessing possible new transparency requirements for multinational companies, reviewing the Code of Conduct on Business Taxation, quantifying the scale of tax evasion and avoidance and repealing the Savings Tax Directive.

Background

In December 2014, the Commission in its 2015 Work Programme stated that it will clamp down on tax evasion and tax avoidance and ensure that taxes are paid in the country where the profits are generated. On 18 February 2015, the College of Commissioners (the grouping of 28 Commissioners) commenced this work with a first orientation debate, discussing action points where possible.
The transparency package is one of the key deliverables within the work programme. A second package of measures (referred to in the Commission’s 2015 Work Programme as a New Action Plan to combat tax fraud and evasion), which will take into consideration the current initiatives against tax avoidance by the OECD and G20, is expected to be presented by the Commission in Summer 2015.

On the issue of rulings, the Commission states in its press release accompanying the Transparency Package that it believes EU Member States currently share very little information with one another about their tax rulings, further noting that it is at the discretion of the Member State to decide whether a tax ruling may be relevant to another EU country. As a result, Member States are often unaware of cross-border tax rulings issued elsewhere in the EU which may impact their own tax bases. The Commission further notes that it is its belief that a lack of transparency on tax rulings is being exploited by certain companies in order to artificially reduce their tax contribution.

The Transparency Package

The central component of the Transparency Package is a legislative proposal designed to improve cooperation between Member States in terms of their cross-border tax rulings and aims to mark what the Commission refers to as “the start of a new era of transparency.” This “new era” would seem to refer to the Commission taking concrete steps on the exchange of tax rulings between countries, while work under Action 13 of the Organisation for Economic Cooperation and Development’s (OECD) Base Erosion and Profit Shifting (BEPS) project will result in the enhanced transparency around the taxes that companies pay, as well as their transfer pricing approach.

Under the Transparency Package proposal, Member States will be required to automatically exchange information on their tax rulings, with the Commission proposing a strict timeline whereby, every three months, all Member States would be obliged to report to all other Member States and the Commission on the cross-border tax rulings they have issued in that period. This report, sent via a secure email system, would contain a pre-defined, standard set of information. The recipient Member States would also have the right to request more detailed information on any of the rulings documented, where the information is relevant to the administration of the tax laws of the Member State. Each year, Member States would have to provide statistics to the Commission on the volume of information exchange on tax rulings.

In addition to this quarterly exchange of information, the proposal also refers to a retroactive application of ten years, whereby the above obligation is extended to rulings issued in the ten years before the date on which the proposed Directive takes effect, where such rulings are still valid on the date of entry into force of the Directive. Importantly, the conditions in relation to periodic exchange of rulings laid down in the proposed Article 8a of the Directive state that “This obligation is extended to rulings issued in the ten years before the date on which the proposed Directive takes effect.” A more likely outcome, however, is that these retroactive rulings will be exchanged on a “one-off” basis, and not automatically, on a periodic basis.

Article 1(6) of the proposed Directive also enables the possible creation by the Commission of a secure central directory concerning information communicated in the framework of this proposal. This central directory would both facilitate the exchange of information and support Member States in studying and reacting to rulings exchanged between Member States.

The Directive also considers confidentiality issues such as safeguarding the protection of taxpayers’ personal data as well as the protection of commercial interests.

The obligations stated above in relation to the exchange of information does not cover advance cross-border tax rulings which exclusively concern the tax affairs of one or more natural persons.
Other elements of the Transparency Package

The Transparency Package also contains a communication outlining a number of other initiatives to advance the tax transparency agenda in the EU. These are:

- **Assessing possible new transparency requirements for multinationals:** The Commission will examine the feasibility of new transparency requirements for companies, such as the public disclosure of certain tax information by multinationals. The objectives, benefits and risks of any such initiative need to be carefully considered. Therefore, the Commission will assess the impact of possible additional transparency requirements to help inform a decision at a later stage.

- **Reviewing the Code of Conduct on Business Taxation:** The Code of Conduct on Business Taxation is one of the EU’s main tools for ensuring fair corporate tax competition. It sets out the criteria that determine whether a tax regime is harmful or not and it requires Member States to abolish any harmful tax measures that go against the Code. Member States meet regularly to assess their compliance with the Code. The Commission argues that over the past years, the Code has become less effective in addressing harmful tax regimes as its criteria do not take into account more sophisticated corporate tax avoidance schemes. The Commission will therefore work with Member States to review the Code of Conduct as well as the mandate of the Code of Conduct Group in order to make it more effective in ensuring fair and transparent tax competition within the EU.

- **Quantifying the scale of tax evasion and avoidance:** The Commission, along with Eurostat, will work with Member States to see how a reliable estimate of the level of tax evasion and avoidance can be reached. The Commission states that there is growing evidence that evasion and avoidance are pervasive and cause significant revenue losses. However, a precise quantification of the scale and impact of these problems has not been determined up to now. Reliable statistics of the scale and impact of these problems would help to better target policy measures against them.

- **Repealing the Savings Tax Directive:** The Commission is proposing to repeal the Savings Tax Directive, as this text has since been overtaken by more ambitious EU legislation, which requires the widest scope of automatic information exchange on financial accounts, including savings related income. Repealing the Saving Tax Directive is intended to create a streamlined framework for the automatic exchange of financial information and prevent any legal uncertainty or extra administration for tax authorities and businesses.

Potential implementation timetable

The two legislative proposals of the Transparency Package (the automatic exchange of information regarding rulings and the repeal of the Savings Tax Directive) will be submitted to the European Parliament for consultation and to the Council for adoption. The Commission in its press release calls upon Member States to agree on the rulings proposal by the end of 2015, allowing it to enter into force on 1 January 2016. On the basis that the European Council in December 2014 called for the proposal, the Commission expects full political commitment on reaching a timely agreement.

Within the framework of the treaties of the European Community and the European Union (as well as under constitutional treaty approved by Heads of State and Government), all tax decisions to be taken at European level are subject to the unanimity rule. That is, all Member States must agree on any measure adopted in the taxation field.

Potential difficulties in achieving consensus

While the Commission notes that it expects Member States to exercise full political commitment, the wide scope of the Transparency Package proposal may not attract universal acceptance from all Member States. In particular, some Member States may not wish to make all bilateral or multilateral APAs available, while not all Member States might agree...
to (or even be able to) exchange all active rulings made in the last ten years. At a higher level, the access to such rulings information will effectively grant direct access to the Commission to the tax administration practices of each Member State, an issue which is not within the institutional role of the Commission. Finally, the sheer volume of actions that each Member State must now undertake in a short time frame may also pose an issue.

Nonetheless, the political pressure that is being driven via increased public interest should not be underestimated. This pressure may also be increased in the European Parliament which will likely approve the Directive, if not in fact proposing even stricter provisions, notwithstanding the Parliament's consultative role in issues such as these.

Implications

The Tax Transparency Package proposed by the Commission is one part of a wider set of connected initiatives which are designed to increased overall levels of tax transparency. In particular, the Transparency Package must be viewed in conjunction with Action 13 of the OECD's project which obligates companies to report taxes paid via the country-by-country reporting template, as well as to furnish tax authorities with increased levels of transfer pricing information via the Master File and Local File mechanism.

In addition, the interaction of the Transparency Package with the 27 January 2015 formal adoption by the European Council of a binding general anti-abuse rule (GAAR) to be included in the European Union's Parent-Subsidiary Directive (PSD) from 1 January 2016 onwards should also be considered. As noted by the Commission in its materials supporting the Transparency Package, “Member State Y would find out about the artificially high prices that the subsidiary is charging to the parent company, in order to shift profits to Member State X. As a result, it may be able to apply the anti-abuse element of the Parent-Subsidiary Directive, and deny the company the usual tax exemption for dividends.”

Application of a GAAR is typically a highly subjective issue. In that regard, an increase in disputes and a change in the taxpayer and revenue authority relationship as a result of the Transparency Package is a possibility.

As noted, a further milestone from the Commission will be an Action Plan on Corporate Taxation which will be presented before the summer. This second Action Plan will focus on “measures to make corporate taxation fairer and more efficient within the Single Market, including a re-launch of the Common Consolidated Corporate Tax Base (CCCTB) and ideas for integrating new OECD/G20 actions to combat base erosion and profit shifting (BEPS) at EU level.”

Endnotes

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