Significant developments in the global automatic exchange of information

Executive summary

Two recent events illustrate significant development in the global automatic exchange of taxpayer information arena. On 29 October 2014, 98 countries committed to the automatic exchange of information at the recent meeting of the Organisation for Economic Co-operation and Development’s (OECD) Global Forum on Transparency and Exchange of Information for Tax Purposes. Many of these jurisdictions committed to commencing such automatic exchange in 2017.

On 16 October 2014, the European Union Economic and Financial Affairs Council (ECOFIN) published a revised Directive on Administrative Cooperation in the field of taxation between EU Member States, intending to extend the scope for mandatory automatic exchange of information between tax administrations.

Detailed discussion

Global Forum on Transparency and Exchange of Information

The 7th Meeting of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes was held in Berlin on 28 and 29 October 2014. Representatives from more than 50 countries attended the meeting to discuss the global exchange of information, a key aspect of Germany’s agenda during its current G7 presidency.

On 29 October, the OECD announced that 98 jurisdictions have made a commitment to the automatic exchange of information under the OECD’s Common Reporting Standard (CRS) model. Of those 98 jurisdictions, more than half have committed to the exchange of information as of 2017, announcing their intent in a press conference and statement¹ in Berlin.

In addition, 51 countries have signed a Multilateral Competent Authority Agreement committing to exchange of information either in 2017 or 2018.
The OECD also announced an "African Initiative," aimed at increasing the uptake of automatic exchange of information among African nations.

Details of the signing nations and commitments made, along with a copy of the Multilateral agreement signed are available on the OECD website. EY Global Tax Alert of 13 August 2014 sets out the basis of the Competent Authority Agreements and the Common Reporting Standard.

Revised Directive of Administrative Co-operation in the field of taxation (DAC)


The directive is intended to extend the scope for mandatory automatic exchange of information between tax administrations, enabling them to better combat against cross-border tax fraud and tax evasion and to increase the efficiency and effectiveness of tax collection.

The Directive effectively implements the CRS, the global standard for automatic information exchange issued by the OECD. Member States have already committed to adopting the CRS but the Directive is intended to ensure a common adoption approach across the EU.

All Member States, with the exception of Austria, have committed to the exchange of information in 2017, which requires financial institutions to implement reporting and due diligence rules from 1 January 2016. It is anticipated that Austria will commit to information exchange from 2018.

The DAC sets out a common basis for exchange of information between all Member States, and will remove the need for States to agree to Competent Authority Agreements with one another in order to implement the enhanced exchange of information. The approach substantially reflects the decisions made at an OECD level, and explicitly allows Member States to refer to the CRS Commentary as a source of illustration or interpretation in implementing the revised DAC. However, some differences between the revised DAC and CRS do exist and are highlighted in this Alert.

Background

According to the EU Council, unreported and untaxed income is considerably reducing national tax revenues and the mandatory automatic exchange of information constitutes an important tool to combat tax fraud and tax evasion.

The Council acknowledges in achieving this objective it is also crucial to ensure the expanded scope of automatic exchange of information within the EU is in line with global developments, in particular the reporting and due diligence rules included within the CRS developed by the OECD.

The revised DAC

The newly revised DAC contains rules setting out the information to be exchanged, timeline, and data security as well as reporting and due diligence rules for financial account information.

The DAC draws heavily on the CRS rules albeit with a few differences to accommodate the information exchange to the aim of the Directive.

In 2017 the EU Commission will review the efficiency and functioning of the DAC and potentially extend the list of reportable income to cover other categories and items including royalties.

Similarities between the DAC and CRS

As with the CRS, financial institutions (FIs) within the scope of the DAC include depository institutions, custodial institutions, investment entities and specified insurance companies.

In the previous version of the Directive, the information to be exchanged was limited to certain categories of income including income from employment, director’s fees, life insurance products not covered by other EU Directives, pensions and ownership of and income from immovable property.

The revised DAC brings into scope information on reportable accounts as well as the account balance or value, the total gross amount of interest, dividends and other income generated with respect to the assets held in the account and the total gross proceeds from sale or redemption of financial assets.
As with the CRS, the DAC provides the same detailed due diligence procedures for the purposes of identifying Reportable Accounts among pre-existing individual and entity accounts and new individual and entity accounts. The due diligence requirements are similar to those required under the CRS with the same thresholds for determining individual higher value accounts (US$1,000,000) and the de minimis exemption for pre-existing entity accounts (US$250,000).

These similarities between the DAC and CRS should minimize costs and administrative burdens both for tax administrations and for economic operators.

**Differences between the DAC and CRS**

Competent Authorities in Member States will need to ensure that financial institutions within their jurisdiction collect enough information to meet their obligation to other Member States under the DAC as well as for exchange of information under the CRS.

The key differences between the DAC and CRS are highlighted here:

- Under the CRS, pre-existing individual accounts are not required to be reviewed, identified or reported in the case of cash value insurance contracts or annuity contracts, providing that the reporting FI is effectively prevented by law from selling such contracts. The DAC removes this exemption, which along with the removal of the de minimis limits under Foreign Account Tax Compliance Act (FATCA) is expected to bring back book insurance contracts in scope of review.
- With respect to a pre-existing entity account, the reporting FI may use any classification in the records of the account holder that was determined based on a standardized industry coding system as documentary evidence.
- The DAC provides alternative procedures for group cash value insurance contracts or group annuity contracts. In particular, FIs may treat a financial account that is a member’s interest in a group cash value insurance contract or group annuity contract as a non-reportable account until the date on which an amount is payable to the employee/certificate holder or beneficiary, upon condition that such financial account meets certain requirements.
- In order to avoid duplication in reporting, a trust that is a passive non-financial entity (NFE) and is not taxed in its home jurisdiction is not considered to be a similar legal arrangement to an entity for these purposes. In effect, a passive NFE which is not taxed will not be treated as a reportable person in its own right, and instead reporting will focus on the controlling persons.
- EU Member States will inform the EU Commission of the list of entities and accounts that should be treated, respectively, as Non-Reporting Financial Institutions and Excluded Accounts. The EU Commission will subsequently publish a single list of such Non-Reporting Financial Institutions and Excluded Accounts. The language accompanying the DAC indicates that entities and accounts should only be identified where they meet all of the conditions for being considered low risk. On the face of it, this would appear to be a narrower definition in most countries than those excepted under Annex II of the relevant agreements with the US.

**Interaction with the revised EU Savings Directive**

The revised DAC covers a wide scope of income and capital, including most of that covered by the revised EU Savings Directive. The EU Council has therefore invited the EU Commission to present a proposal to repeal the EU Savings Directive (2003/48/EC of 3 June 2003).

**Timeline**

- By 31 July 2015, EU Member States will inform the EU Commission of the list of entities and accounts that should be treated, respectively, as Non-Reporting FIs and Excluded Accounts.
- By 31 December 2015, EU Member States will adopt and publish the domestic laws, regulations and administrative provisions to comply with the new DAC which will then apply from 1 January 2016.

The timeline for the due diligence procedures will be:
• 31 December 2016: Complete review for high value individual accounts
• 31 December 2017: Complete review for low value individual accounts and entity accounts.

Before 1 July 2017, the EU Commission shall submit a report that provides an overview and an assessment of the statistics and information received.

First exchanges of information will take place by 30 September 2017. Exceptions are provided for Austria, which should be allowed to exchange information automatically by 30 September 2018.

Technology, data security and data protection
The information exchange will take place through the CCN network (a standard computerized format the EU Commission has developed in close cooperation with the EU Member States) which will ensure data protection.

Therefore, EU Member States will be responsible for development of their systems as necessary to enable information to be exchanged using the CCN network and for ensuring the security of their systems. The Reporting FI and the Competent Authorities of each Member State will be considered to be data controllers for the purposes of Directive 95/46/EC (Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

Consequently, each Member State will ensure relevant Reporting FIs inform each individual Reportable Person concerned that the information to be exchanged relating to him will be collected and transferred according to this Directive and will ensure that the Reporting FI provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC.

What next?
The revised DAC will be adopted without further discussion at the EU level. Each EU Member State will adopt and publish the domestic laws, regulations and administrative provisions to comply with the new DAC. Those provisions, containing a reference to the Directive, have to be communicated to the EU Commission.

As noted above, Member States will need to ensure that financial institutions collect enough information to meet obligations to other Member States under the DAC as well as for exchange of information under the CRS.

A key issue for the industry is ensuring the consistency of global implementation for the CRS and the DAC, aligned as far as possible to existing FATCA implementations. FIs will hope that the arrival of the DAC leads to greater consistency for the rules across the EU.

FIs should take immediate steps to understand the key differences and similarities between the DAC and CRS, and the corresponding impact on their approach to CRS compliance.

Endnotes
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