ACCOUNTANCY EUROPE.

Pierre Moscovici
Commissioner for Taxation
European Commission
Belgium

Sent by email: cab-moscovici-webpage@ec.europa.eu

Brussels, 19 July 2017

Subject: Disclosure of reportable cross-border arrangements for tax intermediaries

Dear Commissioner,

Accountancy Europe is pleased to provide you with our comments on the Commission's proposal for changes to the Directive on mandatory automatic exchange of information in the field of direct taxation in respect of reportable cross-border tax arrangements.

Our position on the provision of tax advice was set out in our 2015 paper *The accountancy profession and taxation: doing the right thing,* a follow up to which will be published shortly. The 2017 paper states that accountants must not devise and promote tax planning structures that are designed to achieve a different result than that clearly intended by the legislator and that they should consider the public perception of the advice – including the possibility of reputational harm.

We support transparency in cross-border tax arrangements bearing certain characteristics or 'hallmarks' which can result in erosion of the tax base of individual countries.

ACHIEVING EFFECTIVE EU-WIDE DISCLOSURE FOR CROSS-BORDER TAX ARRANGEMENTS

We support the disclosure of standardised and pre-packaged tax avoidance schemes by the promoter to the tax authority once the schemes are made available for implementation. Some EU countries have already legislated for mandatory disclosure of tax avoidance schemes, including specific mention of pre-packaged schemes. All of the existing disclosure schemes in the EU also include disclosure of schemes that have specific characteristics or hallmarks, designed to ensure the disclosure of schemes that have been identified as posing a potential risk to the tax base of the country in question.

The legal framework in which tax advice is given varies considerably across Member States. This has been recognised in the Commission's proposal by requiring the taxpayer to disclose arrangements directly when the advisor is entitled to legal professional privilege under national law. This also deals with situations where the tax advisor is situated outside the EU, maintaining a consistent approach.

There are other circumstances, where it may be more effective that the taxpayer has the responsibility to disclose the arrangements.

For instance, disclosure by the taxpayer may be more effective in cases where more than one advisor is engaged as potentially only the taxpayer would have a full overview of the tax planning and commercial

structure. This is especially the case with cross-border arrangements, where different advisors may be consulted by the client in various countries.

Also, the advisor may not be aware of all relevant facts of an arrangement. This can be the case, for example, if the advisor is advising on specific transactions rather than the whole arrangement.

This is not to say that the advisor would not have a role – the advisor provides the taxpayer with a realistic assessment of the consequences (legal and reputational) of the arrangement, sufficient to allow the taxpayer to make an informed decision on whether to proceed.

The advisor would also be responsible for ensuring that the taxpayer is aware of a potential obligation to report – indeed, the taxpayer's obligation to report may be, in practice, discharged by the advisor at the client's request.

EXERCISE CAUTION WHEN GOING BEYOND BEPS ACTION 12

Accountancy Europe applauds the use of objective criteria ('hallmarks') in Annex IV to trigger a reporting obligation, and the alignment of 'generic hallmarks' with BEPS Action 12. Such measures should be coordinated at an international level to ensure consistency in approach and effectiveness.

We do not agree, however, that the list of 'specific hallmarks' should apply uniformly across the EU. BEPS Action 12 states that the design and selection of the 'specific hallmarks' must be left for national legislators to decide, as they should "identify particular cross-border tax outcomes that raise concern for the reporting jurisdiction". The proposed Directive draws on the specific hallmarks of the mandatory disclosure regimes of three Member States – they are not consistent amongst all three, representing specific national concerns.

Therefore, we recommend that a further analysis of the specific hallmarks is undertaken.

PRACTICAL ASPECTS OF REPORTING

The five-day deadline for reporting new arrangements is appropriate in the case of reporting by intermediaries of pre-packaged schemes, as envisaged by BEPS Action 12 and legislation such as the UK's Disclosure of Tax Avoidance Schemes (DOTAS).

However, if the taxpayer has the responsibility for other reportable cross-border arrangements, the proposed five-day deadline for reporting a new arrangement may be too short. As highlighted in BEPS Action 12, some national advanced disclosure schemes allow longer reporting.

There should also be defined criteria to enable the taxpayer to determine when they have 'implemented' an arrangement. Currently, the Commission does not clarify what it understands as 'implementation'.

Finally, to further facilitate the disclosure by taxpayers, Accountancy Europe recommends that governments introduce national e-portals through which the reporting of arrangements can be made directly. This will work for the benefit of tax administrations as well, who would have easy and standardised access to all reported arrangements in their respective Member State.

Sincerely,

Edelfried Schneider
President

Olivier Boutellis-Taft
Chief Executive