de Nederlandse Orde van Belastingadviseurs
The Dutch Association of Tax Advisers

Mandatory disclosure: proposal for a directive on notification of international arrangements

Opinion of the Dutch Association of Tax Advisers / de Nederlandse Orde van Belastingadviseurs (NOB)[1]
July 13, 2017

Content

1 Introduction

1.1 The European Commission launched a proposal on 21 June 2017 on the automatic exchange of information in the field of taxation in relation to reporting on reportable cross-border arrangements.

1.2 The NOB respects and supports the objective of the European Commission, combating unwanted tax evasion. Transparency with regards to facts vis-à-vis the tax administration is a firm principle for NOB and its members when giving advice or assisting in compliance. The NOB therefore has no objection to "mandatory reporting" of concrete information.

1.3 The NOB notes that the term tax intermediary represent every person who assists a taxpayer in setting up a 'cross-border arrangement'. This includes service providers that are not considered tax advisors in the usual sense, i.ee an independent service provider that advises taxpayers on their tax obligations and assists them in complying with them. In particular, "intermediaries" may also be persons who sell standard solutions for the purpose of making profits on that product rather than advising a client. In the following we evaluate the proposal primarily from the viewpoint of the NOB member, the independent tax adviser, and his client, the taxpayer.

[1] The Dutch Association of Tax Advisers (de Nederlandse Orde van Belastingadviseurs or NOB), established in 1954, is the professional association of the university educated tax advisers in the Netherlands. It has over 5000 members, who must meet high standards in terms of expertise, professional skills and ethics.

2 Evaluation of the proposal

2.1 The proposal aims at rapidly informing the national tax authorities and tax authorities of other Member States of arrangements that may be related to international aggressive tax evasion.

2.2 The proposed directive is a result of the OECD/G20 BEPS Project, Action 12, Mandatory Disclosure Rules, hereafter BEPS 12. The European Commission has chosen to implement BEPS 12 in the EU through a directive because BEPS 12 is not a so-called minimum standard and therefore not mandatory, which could lead to some Member States not implementing the recommendations or differences in implementation between Member States would occur. The proposal differs from BEPS 12 on a number of essential points. The main differences between the draft EU directive and BEPS 12 are:

- BEPS 12 prescribes that the hallmarks are sufficiently country specific (not one size fits all).[2]
- BEPS 12 recommends that the term "arrangement" will be defined, which the proposal has not done.[3]
- BEPS 12 recommends that a filter mechanism is provided (or that the hallmarks are sufficiently specific), so that no useless reports are made which would lead to an unnecessary administrative burden for both the intermediary and the tax authorities in the Member States.[4]
- BEPS 12 states that the tax authorities publish a list of arrangements that are already known, in order to prevent that familiar arrangements are reported that would not offer added value for formulating new anti-abuse legislation.[5]
- BEPS 12 aims to give countries insight into the development of new tax planning ideas as soon as possible to enable prompt and adequate policies to be introduced that prevent the use of these new ideas. The proposed EU directive goes a long way further, as it stipulates that arrangements (sometimes existing for decades and sometimes created by the government) must be reported. This is contrary to BEPS 12's conclusions and recommendations.

2.3 No explanation is given why is deviated from BEPS 12. The proposal therefore goes far beyond what is necessary to achieve its goal. The proposed directive thus may lead to excessive and unnecessary reports that:

– In no way have to do with aggressive tax planning and often also regard the prevention of economic double taxation;

[2] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 22
[3] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 243
[4] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 237
[5] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 240

- Would regard arrangements for which (mandatory) exchange of information is already provided for;

- Would regard arrangements whose existence and use are already known to the tax authorities in different Member States (such as the use of a Patent Box).

2.4 There are several examples of situations that have been established in accordance with the tax authorities and nevertheless would lead to notification.[6] If BEPS 12 were to be followed, this problem does not occur. This is also important because reporting such situations may be in violation of EU free movement of capital or of establishment or may be distorting competition within the EU.

2.5 The NOB is of the opinion that regulations aimed at preventing abuse or undesirable behavior should not be unnecessarily at the expense of taxpayers and tax advisers who are aiming to comply with their tax obligations in accordance with the applicable rules. This is in line with the case-law of the European Union Court of Justice which requires that anti-abuse rules be proportionate and do not go beyond what is necessary to achieve their goal.

2.6 The BEPS Action 12 Final Report also explicitly points to the prevention of 'undue burden'.[7] The fear of the NOB for implementation of this proposal is therefore uncertainty it may cause, namely ambiguity what has to reported, when and by whom should be reported and the administrative burden that it may cause. The NOB therefore believes that the proposal for a directive should be amended to keep in line with the recommendations of BEPS 12. The above-mentioned drawbacks which would also affect the tax administration, would be prevented. Therefore in the following recommendations are made to improve the proposed directive.

[6] Referral is made to "5. Examples of accepted 'arrangements' that would have to be reported" in the following
[7] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 236

3 Proposals for improvement

1. Use specific hallmarks and specific exceptions

3.1 The European Commission's proposal is based on general terms applicable to all Member States. This results in the risk of general hallmarks which will cause ambiguity, will be implemented differently by each member state, and will lead to exchange of arrangements which should not be regarded as aggressive. BEPS 12 proposes to identify specific hallmarks per state[8], enabling the exchange of the information gathered on that basis. The NOB endorses this approach. The hallmarks in the Directive should be limited to those hallmarks that are sufficiently relevant to all Member States.

2. Include the Annex in the directive

3.2 The hallmarks should be included in the directive itself rather than in an Annex attached to the Directive, so that change of the hallmarks is subject to democratic control as provided for by the European Commission.

3. Enable the use of an exception list

3.3 BEPS 12 proposes that each country should draw up a list of exceptions.[9] The NOB endorses this approach.

4. Change the definition of cross-border arrangement

3.4 The definition of a "cross-border arrangement" does not define what an arrangement is, but defines only the cross-border element. BEPS 12 Final Report recommends to define the term 'arrangement'.[10] Furthermore, it is not a standard requirement in the EU proposal that an arrangement has a tax impact on at least two jurisdictions. It is just one of the non-cumulative conditions for an arrangement. The NOB therefore advocates that the definition of the arrangement states that an arrangement has a tax impact on at least two jurisdictions. This means that only cross-border tax arrangements would have to be reported.

---

[8] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 22: "However the hallmarks will need to reflect specific country needs or risks."

[9] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 240. The hallmarks for international schemes must be both specific, in that they should identify particular cross-border tax outcomes that raise concerns for the reporting jurisdiction, and generic, in that they should be defined by reference to their overall tax effects and be capable of capturing any arrangement designed to produce those effects regardless of how the arrangement is actually structured. This combination of specific and generic elements will allow tax administrations to target those international tax planning arrangements that raise the most significant tax policy or revenue concerns while still capturing novel or innovative schemes. In addition to setting out general descriptions of cross-border outcomes, the tax administration should provide a specific list of tax regimes and outcomes that are not required to be disclosed under the international hallmarks in order to avoid disclosure of arrangements that are known to the tax administration and are not thought to raise any particular tax policy issues.

[10] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 243

5. Apply the main benefit test to all hallmarks

3.5 The so-called 'main benefit test', which in short means that the tax benefit was decisive for the 'arrangements' does not apply in all respects to the proposal. The NOB advocates the inclusion of this main benefit test in the definition of the cross-border arrangement in order to ensure that the reporting obligation remains limited to relevant arrangements.

6. Exclude reporting for matters that already need to be reported

3.6 For the same reason, the NOB pleads to exclude cases already reported under another international reporting obligation, such as rulings, from notification.

3.7 The exchange of existing structures could be arranged by means of a database similar to the OECD's ATP database. A Member State could indicate whether it would be informed when a taxpayer in another Member State uses one of the numbered structures included therein. Member States could include questions in the tax return in which the taxable person must indicate which structures are used as appropriate and which states are involved. The database could then exchange this information automatically.

7. Extend the notification period to 20 working days

3.8 The NOB believes that the proposal places too much emphasis on the rate of reporting. This presupposes that direct action by the tax authorities is useful, necessary and possible. This is not the case. The relevant taxes are almost always imposed retroactively. Also, the 5-day notification period seems not to be in balance with the obligation for international exchange on a quarterly basis. Therefore NOB proposes a notification period of at least 20 working days.

8. Improve definition of 'made available'

3.9 The reporting obligation of intermediaries is aimed primarily at intermediaries who offer ready-to-use arrangements. The tax authorities would thus be informed in a timely manner and be able to take action if necessary. The NOB supports this approach, but considers it important to work out the definition of 'made available for implementation' so that it becomes clear that such an arrangement must be developed to the extent that it may be implemented immediately. To this end, the UK requirements could be applied:

- the scheme is fully designed,
- is capable of implementation in practice,
- a promoter communicates information about the scheme to potential clients suggesting that they consider entering into transactions forming part of the scheme.[11]

[11] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, Annex A

9. Allow intermediaries to report in case of ready-made constructions and taxpayers in the other cases

3.10 The NOB believes that in all situations, in which no off the shelf arrangements are offered as defined under 3.7, but advice is given within an existing relationship with a client, the taxpayer must be primarily responsible for reporting. The taxpayer is ultimately responsible for his own affairs and has access to all relevant information.

3.11 This would simplify the proposal[12] and make it sounder from a principled point of view. The notification period would then begin after the first steps of implementation. This also prevents that advice which is not followed up, will have to be reported. NOB points out that, if there is an intermediary, due to his duty of care, legal liability and knowledge, he will advise on and assist the taxpayer in the reporting obligation.

[12] No problem if there is no intermediary subject to the EU Directive, not necessary to identify which intermediary has to report in complex situations, no issue with legal privilege.

4 Explanation

In General

4.1 The proposal is apparently written primarily for the situation in which intermediaries sell ready-to-use cross-border tax-saving arrangements. The United Kingdom DOTAS regime has served as an inspiration (possibly in addition to the reporting regimes of Ireland and Portugal). The UK has had a flourishing industry for many years, where boutique firms offered off-the-shelf tax arrangements to potential clients. The UK did not have a general anti-abuse rule until a couple of years ago. That was probably the reason for the emergence of this industry. In the Panama Papers, tax advisors from the UK were mentioned most apart from Switzerland, and in the Lux Leaks it appeared that the UK was very often involved. It is important to note that in the United Kingdom the number of notifications is nowadays limited. The EU recently adopted a General Anti-Abuse Rule and on 7 June 2017, 67 countries signed the Multilateral Instrument ("MLI"). As a result, in more than 1100 treaties anti-abuse provisions will come into force. In many countries and in any case in the Netherlands for decades, such a rule was already applicable.

4.2 The above is especially relevant, as the EU has recently taken a number of measures, such as the ATAD 1 & 2, country-by-country reporting, the EU implementation of the OECD Common Reporting Standard (CRS), mandatory automatic exchange of rulings, Directive on Double Taxation Dispute Resolution Mechanisms (DTDRM) in the EU, the fourth anti-money laundering directive including UBO registers, blacklist of non-cooperative countries, and the already memorized MLI. The added value of the present proposal is therefore quite limited.[13]

4.3 Hereafter some of the NOB-proposals for improvement will be explained.

Re 1. Use specific hallmarks

4.4 BEPS 12 is based on country-specific characteristics[14]. The European Commission maintains a generic approach. In doing so, the approach becomes much less effective and is furthermore contrary to EU jurisprudence that regulation should be proportionate and no other less comprehensive measures to achieving the objective are available. In addition, in the view of the NOB, the Commission proposal is in conflict with the subsidiarity principle, which means that the EU only deals with those matters which it can handle more effectively than Member States at national level. Indeed, the BEPS 12 Final Report clearly indicates that the hallmarks must be sufficiently country-specific. This leads to the conclusion that the directive requires the Member States to determine and include country specific hallmarks in national legislation. The hallmarks in the

[13] Mr Van de Klasthorst a member of the Tax Coordination Group Combating Tax Constructions of the Tax Administration, expressed his concern over the counter effect that may come from this proposal in a recent parliamentary hearing. Thus requested he also indicated that he thought the package of measures of OECD and the EU was comprehensive.
[14] OECD/G20 BEPS Project, Action 12 - 2015 Final Report, paragraph 22

Directive should be limited to those hallmarks that are sufficiently relevant to all Member States.

Re 3. Enable the use of an exception list

4.5 Following the BEPS 12 Final Report, each Member State should be able to use an exception list to conclude known and / or non-aggressive "arrangements" of reporting. This limits the administrative burden and compliance costs for taxpayers, tax advisors and the Tax Office.

4.6 The NOB is therefore of the opinion that Annex IV should be removed from the Directive and that the Member States themselves have to draw up these characteristics. The NOB refers to the APV legislation introduced in the Netherlands which must combat the abuse of foreign trust. Every resident of the Netherlands who makes a declaration of income tax must answer the question whether he or she is involved in foreign trust. This is thus a hallmark that is an indication of abuse for the Netherlands. In Anglo-Saxon countries, however, the use of a trust is a common phenomenon.

Re 5. Apply the main benefit test to all hallmarks

4.7 The characteristics under C, D and E are not linked to the main benefit test. In short, Hallmark C is regards the situation that a deductible payment in another jurisdiction is actually charged with less than half of the European average corporate rate. This results in 2016 in a rate of just over 11%. According to this rule some 'tax havens' seem to be reportable[15]. This calculus, however, creates uncertainty, as it can at one moment be unclear what results from the calculus.

4.8 In addition, the internal market is distorted and also the subsidiarity principle is indirectly affected in case of payments to Member States where the corporation tax rate is less than 11% (for example, Hungary and Bulgaria).

[15] https://taxfoundation.org/corporate-income-tax-rates-around-world-2016/

5 Examples of accepted 'arrangements' that would have to be reported

5.1 Hallmark B1 concerns the situation in which the taxpayer uses losses to reduce his tax liabilities by transferring losses to other jurisdictions or accelerating them. It is obvious that the main benefit of this is the tax benefit, but it is questionable whether this is aggressive tax avoidance in case real losses are suffered

5.2 If a company uses the innovation box (patent box) as recently adapted and approved by the Code of Conduct and the OECD, this will in many cases have to be reported based on Hallmark C 1 d. In practice, EBIT agreements are regularly made and all cross-border income is covered by the application of the innovation box. These payments, however, arise from normal operations and generally do not play any part in tax avoidance. In the Netherlands, the agreements with regard to the innovation box are always established in consultation with the tax administration. The tax administration is therefore fully informed. These agreements are made in the form of a ruling. On the basis of current European regulations and agreements within OECD, rulings about the innovation box are exchanged so that the foreign tax authorities are also aware. It is not clear why application of the innovation box should have to be reported again on the basis of this proposal. This would lead to an unnecessary increase in administrative burden on the taxpayer and tax authorities, especially if the main benefit test is not met.

5.3 Under hallmark B1, the transfer of losses must be reported that are completely legitimate and derive from primary EU law. An example of this are the so-called "Marks & Spencer" losses (referred to as the EUJ judgment of 13 December 2006, Case C-446/03). These are losses of a foreign subsidiary, with the potential for loss settlement for that foreign subsidiary exhausted. The judgment of the Court of Justice of the European Union states that the Member State in which the parent company is established allows the transfer of these losses as a deduction from the parent's profits. It is not clear why this should constitute a cross-border reportable arrangement, now that there is a completely legitimate situation. There is no aggressive tax planning in this case, on the contrary, there is a question of preventing economic double taxation.

5.4 Hallmark E2 will also cover arrangements that should be exchanged but have not been exchanged. However, an intermediary or a taxpayer is not aware whether this is the case.