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Mr.
Sebastian Walz
Permanent Representation of the
Federal Republic of Germany to the EU
8-14, rue Jacques de Lalaing
1040 Brussels
Belgium

October 19, 2017

**Reporting obligation for cross-border tax arrangements
Comments on the proposal for a council directive amending Directive 2011/16/EU from
21 June 2017 (COM (2017) 335 final)**

Dear Mr. Walz,

the European Commission has proposed a council directive introducing an obligation for intermediaries and taxpayers to report cross-border tax planning arrangements.

The proposal for a council directive stipulates that intermediaries have the right to a waiver from reporting obligations where they are entitled to a legal professional privilege under national law. In this case as well as in cases where there is no intermediary involved the reporting obligation shifts to the taxpayer. This could lead to a situation where mainly taxpayers and therefore companies are obliged to report cross-border arrangements. Monitoring the reporting obligation and the actual filing of the reports will result in considerable additional administrative burden for companies.

Reporting on legal arrangements is too far reaching

We welcome and support the objective of the European Commission to fight tax evasion. National tax bases need to be protected from erosion and a level playing field for companies in the European Common Market has to be created and maintained.

With the introduction of reporting obligations for cross-border tax planning arrangements and an automatic exchange of the reports between the Member States, the European Commission intends to enhance transparency. The aim is to enable Member States to respond to potentially aggressive arrangements through legislative and/or administrative actions. The current proposal focuses on cross-border arrangements and emphasizes that those in particular are potentially aggressive. Though the Member States may have a legitimate interest in gathering information on cross-border arrangements, we speak out against the introduction of such a reporting obligation.

The reporting of tax planning arrangements goes beyond the usual taxpayer's obligation to be tax compliant. The responsibilities of tax administrations are in effect shifted to intermediaries and taxpayers. Additionally, the legal uncertainty of the scope of the reporting obligations makes it difficult for taxpayers and intermediaries to comply with the new rules.

Leaving our general objections aside, a European reporting obligation should, nevertheless, distinguish between cross-border arrangements which are potentially harmful for the national tax bases on the one hand and harmless arrangements on the other hand. In our view, only potentially harmful arrangements should have to be reported. Therefore, the reporting obligation should contain criteria identifying such arrangements without excessively expanding the scope of the law. Such an identification of potentially harmful arrangements is particularly difficult against the backdrop of the objective of the proposal to cover not just illegal but also legal arrangements.

Clearly defining the “hallmarks” makes the reporting obligation manageable

With regard to legal certainty, the proposal for a council directive contains significant shortcomings. In many cases the reporting obligation is unclear and not restricted to potentially aggressive cross-border arrangements. The proposal for a council directive tries to identify reportable arrangements by means of defining cross-border arrangements and hallmarks describing potentially aggressive arrangements. Nevertheless, both criteria are too vague to define reportable cross-border arrangements in an adequate manner. Particularly, with regard to determining sanctions within the framework of national implementing regulations, legal certainty for taxpayers and intermediaries is crucial. Therefore, further clarifications of the hallmarks and the definition of cross-border arrangements in the council directive are

needed. If further clarifications are left to the national legislators, the risk that Member States will interpret the council directive differently is apparent.

The hallmarks identifying potentially aggressive arrangements are laid down in Annex IV of the proposal. They are necessary for the determination of reportable cross-border arrangements and are therefore an integral part of the legislative act. Thus, the hallmarks should be integrated in the text of the council directive itself. Due to the open and vague design of the reporting obligation and in order to provide legal certainty for taxpayers and intermediaries, a delegation of legislative power to the European Commission according to art. 290 TFEU should be avoided.

Reporting period too short and impractical

Considering the information taxpayers and intermediaries have to report, a reporting period of five working days is not appropriate – even for intermediaries with a high-tech infrastructure. In our view, it would be sufficient if taxpayers report their arrangements when filing their tax declaration.

Tax authorities should give feedback

Currently, the draft directive does not oblige tax authorities to state whether the reported arrangements are considered “aggressive”. Taxpayers and intermediaries reporting the requested information on cross-border arrangements to the tax authorities need more certainty concerning their projects. In view of the aim of the reporting obligation to strengthen transparency, tax authorities should inform taxpayers and intermediaries without unnecessary delay, whether the reported arrangements are categorized as aggressive or not. Such an obligation to inform the reporting taxpayer or intermediary about the results of the legal assessment is also supported by the 2016 report¹ of the Max-Planck-Institute for Tax Law and Public Finance in Munich: Tax transparency is not a one-way street.

Furthermore, we are sceptical towards retrospective reporting obligations for arrangements that were implemented between the date of political agreement and 31 December 2018. The reporting obligation should not come into effect before the day the council directive has been transposed into national law, i.e. at the earliest on 1 January 2020.

¹ http://www.tax.mpg.de/fileadmin/TAX/docs/TL/MA/Gutachten_Anzeigepflichten_MPI.pdf

We kindly ask to take the above-mentioned comments into consideration for the future legislative procedure. If you have any further queries, please do not hesitate to contact us.

Sincerely yours

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Dr. Rainer Kambeck



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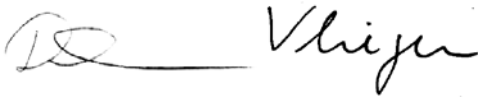
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