EUROPE MOVES TOWARDS A MORE TRANSPARENT REGIME

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Introduction

The recent LuxLeaks scandal has once again focused political attention on tax planning practices of multinationals (“MNEs”). It comes in the wake of the European Commission investigation of tax ruling practices across the EU and in particular their investigations into tax rulings given by Ireland, the Netherlands and Luxembourg to Apple, Starbucks and Fiat Finance, respectively, and has acted as further impetus for the European political establishment to clamp down on profit shifting through aggressive tax planning, with particular focus on the use of tax rulings.

The European Parliament has established a special parliamentary committee to examine “tax rulings and other measures similar in nature or effect” given by Member States which will examine tax ruling practices in the Member States since 1991.

In March 2015 the Commission announced a package of measures aimed at increasing tax transparency between Member States (the “Transparency Package”). The central focus of the Transparency Package is the introduction of the automatic exchange of cross-border tax rulings given by tax authorities. This marks a significant progression from the existing provisions which gives total discretion to the Member States in deciding whether to provide information on tax rulings to another Member State. As a result of the high level of discretion given to Member States in whether it is necessary to disclose a tax ruling, little information has been exchanged under the existing system. The Commission believes that failure to exchange information allows aggressive tax planning and tax fraud to flourish and it hopes that with the exchange of such information Member States can identify whether another Member State’s tax rulings are impacting on their tax base enabling Member States to react accordingly. Addressing the Parliament about the Transparency Package last March, Pierre Moscovici1 stated that the US is leading the way on transparency in tax compliance and it was his aim that the EU lead the way on transparency in tax rulings.

In June 2015, the Commission further addressed the issue of tax transparency within the internal market with the publication of its Action Plan for Fair and Efficient Corporate Taxation in the EU (the “Action Plan”). This sets out a number of measures to modernise and fundamentally reform the EU’s corporate tax systems to

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1 The European Commissioner for Economic and Financial Affairs, Taxation and Customs
mitigate the problems arising from aggressive tax planning by MNEs within the internal market as a result of exploitation of divergences in tax rules.

The Transparency Package
The Transparency Package focuses on improving cooperation between Member States in terms of their cross-border tax rulings. It removes any element of discretion and implements a quarterly automatic exchange of information between Member States to exchange information on their advanced cross-border tax rulings and their advanced pricing arrangements in the area of transfer pricing.

Legal implementation
The implementation of the proposals contained in the Transparency Package will occur through modification to the Directive on Administrative Cooperation in the field of Taxation\(^2\) (the “DAC”). It is worth noting that the new legislation will not only encompass all future tax rulings issued from the date of implementation of the legislation but also all rulings issued in the previous ten years.

Practical implementation
Information will be exchanged in a standard format on a quarterly basis. It is envisaged that a centralised directory will be created from which the information can be uploaded and accessed by the Member States. Member States will be able to rely on the existing provisions of the DAC to request additional information including the full text of the advance cross-border rulings or advance pricing arrangements from the issuing Member State.

In order to curtail any possibility of Member States circumventing the new rules, no exceptions have been included in the proposed legislation; therefore, neither commercial secrecy nor public policy will constitute grounds to refuse to exchange information. Whilst this appears draconian, the Commission seeks to justify the position on the basis that the limited nature of the information that must be exchanged should ensure sufficient protection of commercial interests.

Definitions
In order to increase effectiveness, the term “tax ruling” has been given a very broad meaning. It is defined as “any agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit” given by a Member State in advance of a cross-border transaction concerning the interpretation or application of its tax laws.

A cross-border transaction in the context of tax rulings is also broadly defined and includes, but is not restricted to, the making of investment, the provision of goods, services, finance or the use of tangible or intangible assets. The transaction does not have to directly involve the person receiving the advance cross-border ruling.

Therefore, purely domestic tax rulings are not subject to the provisions nor are rulings provided to private individuals.

An advance pricing arrangement is defined as “any agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit, which is given by the government or tax authority of a Member State to any person that determines in advance of cross-border transaction concerning the interpretation or application of its tax laws.”

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transaction between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishments”.

The European Commission’s Action Plan for Fair and Efficient Corporate Taxation

The Public Consultation on Tax Transparency

The Action Plan seeks to build on the proposals put forward in the Transparency Package by launching a public consultation assessing whether subjecting companies to increased disclosure requirements regarding the tax they pay would effectively combat tax avoidance and aggressive tax practices within the EU (the “Consultation Document”). It is clear that the underlying rationale of the proposals is that increased public awareness of large MNE’s tax affairs will act as a deterrent for such companies engaging in aggressive tax planning. The Consultation Document targets larger MNEs which the Commission believes distorts competition in the internal market through aggressive tax planning placing small and medium size enterprises at a competitive disadvantage.

The Action Plan also seeks to address tax transparency between the EU and third countries with the introduction of a list of the “Top 30” non-cooperative jurisdictions. This list will be compiled from Member States’ national blacklists. The aim of this list is to combat the shifting of profits outside the EU to tax havens; it is hoped that a common EU approach will prove more effective than unilateral actions by individual Member States.

The proposals seek to implement reporting requirements inline with Action 13 of the OECD BEPS project (Transfer Pricing Documentation and Country-by-Country Reporting) and extend the country by country reporting requirements currently in place for financial institutions within the EU. The Consultation Document sets out a number of proposals requiring varying degrees of public disclosure of different categories of company information. The public consultation will close on 9 September 2015.

Whilst aligning itself to Action 13 of the BEPS project, the Consultation Document acknowledges the very crucial caveat that the OECD and G20 countries are not legally obliged to implement the BEPS action plan recommendations, and not all EU Member States are OECD members. An EU legislative initiative ensures that a standardised automatic exchange of information based on country-by-country reporting would bind companies operating within the internal market, regardless of the fate of the BEPS legal implementation. Although fair competition is at the heart of the Commissions’ proposals, a real concern must be that the proposals could have the opposite effect; placing EU listed/based MNEs at a serious competitive disadvantage to their U.S. and Asian counterparts which would not be obliged to disclose such information. This in turn could lead to a drain of MNEs from the E.U. It is therefore essential that in seeking to mitigate distortions of competition within the EU between MNEs and SMEs the Commission does not inadvertently create more damaging distortions of competition between EU and Non-EU MNEs which could act as an impediment to MNEs operating from within the EU.

The Proposals

The Consultation Document puts forward five options, two of which envisage disclosure to tax authorities and three more radical options proposing to disclose information to the general public.
1. **No EU action**
   This option envisages implementation occurring at domestic Member State level and therefore does not avoid the necessity to publicly disclose tax-related information, as Member States may implement such laws pursuant to BEPS regardless of EU inaction.

2. **Implementation of BEPS 13 at EU level**
   This would require the ultimate parent company to disclose tax-related information on a country-by-country basis to the relevant tax authorities.\(^3\)

3. **Publication of anonymised/aggregated data by the EU tax authorities**
   Once all enterprises have fulfilled their obligations to disclose information the various tax authorities would subsequently be obliged to disclose anonymised/aggregated data to the general public.

4. **Public disclosure of tax-related information by either enterprises or tax authorities**
   This goes a step further and envisages enterprises disclosing tax-related information on a country-by-country basis. The information would either be made available directly to the public as part of their annual reporting obligations or by the national tax authorities, by means of a public register. This option is already in place for financial institutions operating within the EU.

5. **Publicly available corporate tax policies**
   Enterprises would be compelled to report their policies and approach towards tax compliance and planning to the public, for example, in their annual return. This is the most draconian option and goes beyond anything envisaged in BEPS Action 13. The Consultation Document indicates that this option could be implemented instead of other forms of public disclosure or could be an additional requirement to the aforementioned types of public disclosure of tax-related information.

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**Conclusion**

The EU expects implementation of these tax transparency measures by the beginning of 2016. The EU actions are occurring against the international backdrop of the OECD BEPS project, the U.S. implementation of FATCA along with the G20s focus on the implementation of the automatic exchange of information. Therefore, it is inevitable that companies, particularly MNE's are facing increased disclosure requirements of their tax-related information, whether it arises at domestic, European or international level through BEPS related amendments to the OECD Model Tax Treaty.

**Notes on Authors**

Brian Duffy is a Tax Partner and Mary Dineen is a Barrister and Tax Advisor with William Fry Tax / TAXAND Ireland which is Ireland’s only independent (non-audit) multi-disciplinary global tax practice. William Fry Tax is a full service tax practice and is the Irish member of TAXAND with more that 400 partners and over 2,000 advisors represented in 50 countries. Brian Duffy has over 13 years’ experience advising clients in tax litigation and disputes, tax structuring, inward investments, mergers and acquisitions transactions, real estate transactions and personal taxation. He provides taxation advice to a broad base of clients in various business sectors including insurance, hotels and tourism, mobile telecommunications, private equity, technology and pharma.

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\(^3\) The information to be disclosed pursuant to Action 13 is as follows: name, nature of activities, location, list of subsidiaries of the parent enterprise operating in each country, revenue, revenues split between related and unrelated parties, number of employees, profit or loss before tax, income tax paid and accrued, stated capital, accumulated earnings, tangible assets. It is also proposed to include further information, for example, an explanatory narrative containing information on tax-related information.