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**COMMISSION STAFF WORKING DOCUMENT**

**Technical analysis of focus and scope of the legal proposal**

*Accompanying the document*

**Proposal for a Council Directive**

**amending Directive 2011/16/EU  
as regards exchange of information in the field of taxation**

{COM(2015) 135 final}

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## 1. INTRODUCTION

### 1.1. Political context

One of the continuing main priorities of the European Commission is to fight tax fraud, tax evasion and aggressive tax planning, and tackling base erosion and profit shifting. Tackling corporate tax avoidance and increasing administrative cooperation between tax authorities are tightly tied to this agenda.

Unlike tax evasion and tax fraud, which are illegal, tax optimization by avoiding tax liabilities usually falls within the limits of the law. Businesses around the world have traditionally treated tax optimization by reducing tax liabilities through legal arrangements as a legitimate practice, even though these practices may in certain cases contradict the intent of the law. Over time, tax planning structures have become more elaborate, developing across jurisdictions and shifting taxable profits towards states with beneficial tax regimes.

Such tax optimization includes aggressive tax planning, which can take a multitude of forms. In general, it consists in tax arbitrage, i.e. taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing or avoiding tax liabilities. Its consequences include double deductions (e.g. the same expense is deducted in both the state of source and the state of residence) and double non-taxation (e.g. income which is not taxed in either its state of source or in the recipient's state of residence).<sup>1</sup> Despite unilateral measures currently used by countries to protect their tax base<sup>2</sup>, Member States find it increasingly difficult to protect their national tax bases from erosion through aggressive tax planning. Due to the cross-border dimension of many tax planning structures and the use of arrangements which artificially relocate the tax base to another jurisdiction within or outside the Union, national provisions in this area cannot be fully effective.

On one hand, national authorities are struggling to prevent the erosion of their tax bases from such aggressive tax planning, largely due to insufficient information on the impact of other countries' tax regimes on their own. On the other hand, many Member States have designed themselves complex and opaque corporate tax systems, which at times, have been designed to incentivise businesses to shift profits to their jurisdictions. In that way Member States have actually contributed to and encouraged aggressive tax planning. Member States have not consistently taken a common general approach towards aggressive tax planning, causing the continuation of existing distortions.

The recent economic crisis has amplified the need of Member States to collect due revenues in order to ensure fiscal consolidation and to rebuild their economies.<sup>3</sup> In the

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<sup>1</sup> [Commission Recommendation of 6.12.2012](#) on aggressive tax planning.

<sup>2</sup> Unilateral measure could include rules on controlled foreign corporations, thin-capitalization rules, restrictions on participation exemptions, reporting of international transactions and transfer pricing, or access to banking information.

<sup>3</sup> See also the Annual Growth Survey 2015 ([COM\(2014\) 902 final](#)), where the Commission recommends within the context of fiscal responsibility that "Addressing tax fraud and tax evasion is essential to ensure fairness and allows Member States to collect the tax revenues due to them."

context of tight fiscal policy, reduced tax revenues from companies due to aggressive tax planning will induce governments to raise taxes predominantly on the least mobile tax bases which are subject to less erosion, such as labour income and profits of individual entrepreneurs or Small and Medium-Sized Enterprises (SMEs). Double non-taxation of companies on one side and raising taxes on labour income and SMEs on the other side runs counter to the recommendations by the Commission for more growth-friendly tax policy at national level<sup>4</sup>, such as shifting tax away from labour and reviewing unwarranted favourable tax treatments.

While many citizens must carry the burden of austerity and face an inescapable increase in taxes, the public perception is that other taxpayers, particularly multinational enterprises, can avoid contributing their fair share by artificially lowering their taxable income. Aggressive tax planning of large multinationals carries a significant risk of a negative impact on overall tax compliance by reducing the morale and sense of fair play of European tax payers.

In the very recent time, the political standpoints of Member States have changed radically with respect to tax practices and in particular concerning tax rulings. Where in the past unilateral tax rulings appear to have been accepted as a characteristic of tax competition, not least the LuxLeaks have made public that the lack of transparency in this area foster aggressive tax planning on a grand scale, leading to massive base erosion. The public discussion of LuxLeaks provided for a considerable public pressure on all Member States to intensify the battle against tax evasion and avoidance.<sup>5</sup>

At the same time, the EU has consistently shown leadership in tax good governance matters. It was the first region in the world to legislate on the automatic exchange of information for tax purposes, and the first to set out concrete actions to combat corporate tax avoidance and aggressive tax planning. The EU has contributed actively to the OECD/G20 work to revise transparency standards and tackle abusive tax practices worldwide. The BEPS project, due to be completed in 2015, should lead to a fundamental reform of the global tax environment, making it far more hostile to evaders and aggressive tax planners in the future.

Despite this progress, however, further measures are needed to enable Member States to protect their tax bases and businesses to compete fairly in the Internal Market. In particular, there is clearly scope for more openness in national corporate tax policies, and in the regimes used to attract companies and investment. In this context, the EU has an opportunity to show leadership and set the agenda for greater corporate tax transparency. Tax rulings, in particular, require urgent attention in this regard.

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<sup>4</sup> e.g. through the [country specific recommendations](#) in the "European Semester"

<sup>5</sup> See for instance the explicit support for the policy initiative on exchange of information on tax rulings as expressed in the letter by the Finance Ministers of France, Germany and Italy to Commissioner Moscovici, of November 2014.

## 1.2. Tax rulings

In most EU Member States<sup>6</sup> taxpayers can submit a request to tax authorities to grant a tax ruling concerning the application of existing national tax provisions to a particular structure, transaction or series of transactions. They are therefore not intrinsically problematic – granting tax rulings is neither illegal nor against the Treaties. Tax rulings are primarily issued to provide legal certainty as they determine whether, and in some cases how, particular law and administrative practice will be applicable to usually large or complex commercial structures or transactions. In the ruling, the administration confirms the particular tax treatment of the structure or transaction. Not all advance tax rulings concern aggressive tax planning structures, and legitimate tax competition between Member States is not questioned.

However, some rulings do offer legal certainty for tax-driven structures which rely on tax planning tools typically used by multinational enterprises in order to reduce their tax burden. Tax rulings which result in a low level of taxation in one Member State entice companies to artificially shift profits to that jurisdiction. Not only does this lead to serious tax base erosion for the other Member States, but it can further incentivise aggressive tax planning and corporate tax avoidance.

In general, when submitting the request, the taxpayer can decide whether to submit this request to only one specific tax authority or to two or more concerned tax authorities. A tax ruling may thus be unilateral, i.e. involving one tax administration and a taxpayer in its country. If the arrangement is unilateral, the tax authority issuing the ruling would not consult other tax authorities in the preparation of the ruling, irrespective of whether or not the ruling concerns transactions that might have an impact on other tax authorities. Or, tax rulings may be bi- or multilateral, i.e. based on the agreement of two or more tax administrations and a taxpayer, resident in one of these countries.

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<sup>6</sup> In a limited number of Member States (Croatia, Greece and Latvia), it appears to be the case that requests by taxpayers will result in responses that are non-binding on tax authorities. For an indicative list of Legal aspects of practice of tax rulings for companies across Member States see Annex 3, which is based on publicly available information.

Rulings are normally issued either before the transaction has been undertaken, or before a tax return has been submitted for the period covering the transaction (pre-return).<sup>7</sup> In these cases, they are then also referred to as advance tax rulings.

Tax rulings range from a couple of pages up to hundreds of pages. The distribution of topics of tax rulings can differ considerably across Member States and can cover, among others, topics like extra-statutory agreements, advance agreements offering a favourable tax treatment based on statutory or case law, agreements on taxable income in cases of uncertainty, formal and informal agreements and interpretations<sup>8</sup>. A tax ruling can cover a domestic or cross-border structure, and can cover only one company or multiple companies. Furthermore, a distinction can be made between specific (i.e. individual) and general tax rulings. Topics on which rulings have been issued include the determination of whether a permanent establishment exists, clarification on finance and other types of holding companies, clarifications on specific regimes (e.g. shipping regimes, R&D) and the valuation of inbound transferred assets (e.g. intellectual property, knowhow).

Currently, there is only little information exchange between national authorities on individual tax rulings, if at all. Member States whose tax base is adversely affected by the tax rulings of others cannot react, given that they will not even know of the existence of the respective tax ruling that might be the cause of the base erosion. In line with the joint effort to combat corporate tax avoidance, there is clearly an urgent need for greater transparency and information sharing on cross-border tax rulings including transfer pricing arrangements.

#### Transfer pricing and Advance Pricing Arrangements

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<sup>7</sup> Some rulings might be issued only after tax returns have been submitted (post-return), for instance concerning tax deferrals or in tax audits. In those cases, the rulings can be backward or forward looking.

<sup>8</sup> The broad categories of administrative practices follow the study European Commission (1999), Administrative Practices in Taxation, prepared by Simmons & Simmons.



A specific type of tax rulings concerns transfer pricing<sup>9</sup>. Transfer pricing is a major concern for tax authorities due to the potential to be used for profit shifting and base erosion. Tax authorities therefore rely on the arm's length principle and transfer pricing rules, based on internationally agreed standards, to prevent this.

Advance pricing arrangements (APAs) determine in advance of controlled transaction an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time<sup>10</sup>. An advance pricing arrangement is thus a specific type of advance tax ruling, but one which is based on the internationally agreed principles underlying transfer pricing.

According to the information provided to the Commission during the inquiry under EU state aid rules, advance pricing arrangements have in general a limited validity of between 2 and 5 years.

### **1.3. Related EU policy initiatives**

Aggressive tax planning, harmful tax regimes and tax avoidance and evasion<sup>11</sup> all rely on an environment of secrecy, complexity and non-cooperation to thrive. For years, the Commission has been working to address the various dimensions of these problems with a number of political initiatives, providing for an overall coherent political approach. Below we outline the most relevant past and current political initiatives<sup>12</sup> that relate to information exchange between tax authorities and the aspect of rulings in the area of taxation, demonstrating the complementarity of the individual initiatives and their overall coherence with the general political approach of the EU.

#### *1.3.1. Code of Conduct, Model Instruction*

In 1997, Member States agreed on a Code of Conduct for Business Taxation to address harmful tax competition within the EU.<sup>13</sup> In 1998, Member States established the Code of

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<sup>9</sup>- For a definition of transfer pricing and the "arm's length principle" please see the Annex 1: Glossary.

<sup>10</sup> OECD (2010), "[Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations](#)"

<sup>11</sup> For a definition of the concepts for the purpose of this document, please see Annex 1: Glossary.

<sup>12</sup> The political initiatives are presented, as far as possible, in chronological order.

<sup>13</sup> Resolution of the Council [98/C 2/01](#).

Conduct Group to assess business tax measures that may fall within the scope of the Code of Conduct for Business Taxation. The Code of Conduct is not a legally binding instrument. Instead, it reflects a political commitment by Member States to work together to eliminate the harmful effects of tax competition such as distortions in the Internal Market and significant losses of tax revenue. By adopting the Code, the Member States committed not to introduce new harmful tax measures ("stand-still") and to abolish the harmful tax practices already existing ("roll-back").<sup>14</sup>

One of the criteria that the Code of Conduct uses to identify harmful measures is a lack of transparency, including where legal provisions are made less stringent at administrative level in a non-transparent way. Transparency has therefore featured in other aspects of the Group's business. It has worked for many years to improve the exchange of information in the area of transfer pricing and cross-border rulings.

In 2012, the Code of Conduct Group reviewed developments in Member States' procedures regarding tax rulings.<sup>15</sup> With a view to stimulating the exchange of information in relation to cross-border tax rulings, the Code of Conduct Group looked at the Member States' internal frameworks for such exchanges and recommended the development of a "Model Instruction" that Member States could use as a reference for internal application.<sup>16</sup>

The Model Instruction covers advance cross-border rulings and unilateral advance pricing arrangements. It was developed with the assistance of tax specialists from the Member States in the Committee on Administrative Co-operation for Taxation (CACT) and the Joint Transfer Pricing Forum (JTPF). The Code of Conduct Group agreed on the Model Instructions in its report of June 2014 which the Council then accepted.<sup>17</sup>

### *1.3.2. Directive 2011/16/EU on administrative cooperation in the field of taxation*

The ECOFIN Council of 15th February 2011 formally adopted the new Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (DAC). The DAC has entered into force on 1 January 2013. Its objective is to ensure that the EU standards for transparency and exchange of information on request are aligned to international standards. The Directive provides for the exchange of information that is of "foreseeable relevance" to the administration and the enforcement of Member States' tax laws.

The scope of the Directive includes all taxes of any kind with the exception of VAT, customs duties, excise duties, and compulsory social contributions, all of which already covered by other Union legislation on administrative cooperation. The exchanges can relate to natural and legal persons, to associations of persons and any other legal arrangement.

The Directive also ensures that the existing mechanisms for exchange of information are improved. Deadlines are introduced to accelerate procedures both for the exchange of

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<sup>14</sup> [ECOFIN Council conclusions of 9 March 1998.](#)

<sup>15</sup> There is unfortunately no public document summarizing the results of this monitoring exercise.

<sup>16</sup> Document [10903/12 FISC 77.](#)

<sup>17</sup> Document 10608/14 FISC 95.

information on request (reply within six months following receipt of request) and for spontaneous exchange of information (transmission of information no later than one month after it becomes available).

The Directive introduces a mechanism to encourage feedback by the Member States that have received the information. Such feedback should be given, at the latest, three months after the outcome of the use of the information is known. The Directive provides for the introduction of standard forms for exchange of information on request and spontaneous exchanges, computerised formats for the automatic exchange of information and channels for exchanging information.

### *1.3.3. Common Consolidated Corporate Tax Base*

In 2011, the Commission proposed a Directive on a Common Consolidated Corporate Tax Base (CCCTB). The CCCTB is a single set of rules that companies operating within the EU could use to calculate their taxable profits. In other words, a company or qualifying group of companies would have to comply with just one EU system for computing its taxable income, rather than different rules in each Member State in which they operate. The consolidated taxable profits of the group would be shared between the individual companies by a simple formula. The respective share of taxable profits would then be taxed in the jurisdiction of the individual company at the tax rate that continues to be set by each Member State individually. Where the CCCTB would establish how the consolidated taxable profits are shared between the individual companies, this would provide the companies already with the legal certainty on a wide range of transactions – there would thus be no need any more for these companies to apply for a tax ruling on these aspects.

### *1.3.4. Action Plan to strengthen the fight against tax fraud and tax evasion*

Tax avoidance, as well as tax fraud and tax evasion,<sup>18</sup> all have an important cross-border dimension. Member States can only address this problem effectively if they agree to take common action in this field. Improving administrative cooperation between Member States' tax administrations is therefore a key objective of the Commission's strategy in this area and a number of important steps have already been taken.

In December 2012, the Commission adopted an Action Plan<sup>19</sup> to strengthen the fight against tax fraud and tax evasion. This Action Plan noted the Council's agreement on a new framework for administrative cooperation, including among others the Council Directive 2011/16/EU on Administrative Cooperation in the field of direct taxation and repealing Directive 77/799/EEC (DAC). In this context, the Commission urged Member States to ensure a full and effective implementation and application of the instruments they had agreed, in particular by engaging in enhanced information exchange.

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<sup>18</sup> See "Annex 1: Glossary" for clarifications of concepts.

<sup>19</sup> European Commission (2012), Communication from the Commission to the European Parliament and the Council – An action plan to strengthen the fight against tax fraud and tax evasion [COM\(2012\) 722 final](#).

On 21 May 2013 the European Parliament adopted a resolution<sup>20</sup> welcoming the Commission Action Plan, urging Member States to follow up their commitments and emphasising that the EU should take a leading international role in the discussion on the fight against tax fraud, tax avoidance and tax havens, in particular through the promotion of exchange of information.

Responding to widespread public concern about tax rulings, the President of the Commission confirmed in the European Parliament in November 2014 the Commission's intention to curb tax evasion and avoidance and committed to a proposal on the exchange of information on tax rulings between Member States. On 16 December 2014, the Commission committed to making a proposal for the compulsory exchange of information on cross-border rulings as reflected in the Commission's 2015 Work Programme.

### *1.3.5. Base Erosion and Profit Shifting*

In 2013, the G20 and OECD (which includes 21 EU Member States) launched a Base Erosion and Profit Shifting Project ("BEPS Project")<sup>21</sup>. The BEPS Action Plan includes as action point 5 further work on harmful tax practices. Enhancing transparency has been identified as one of the priorities, which should be promoted by compulsory spontaneous exchange on rulings related to preferential regimes among tax authorities.<sup>22</sup>

### *1.3.6. Country-by-country reporting*

The OECD works, in the context of the BEPS project, on a "country-by-country reporting" that would require multinational enterprises to report annually to their tax administrations, and for each tax jurisdiction in which they do business, the amount of revenue, profit before income tax and income tax paid and accrued. It also would require multinational enterprises to report their total employment, capital, retained earnings and tangible assets in each tax jurisdiction. Finally, it would require multinational enterprises to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in.

The main goals of such disclosure is to enhance transparency towards tax authorities about capital flows which would help, for instance, to better enforce tax rules. The information should make it easier for tax administrations to identify whether enterprises have engaged in transfer pricing and other practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments.

In the EU, country-by-country reporting disclosed to the public is a legal obligation for selected industries, however with different objectives. The Capital Requirement Directive 2013/36/EU (CRD IV) requires credit institutions and investment firms to publicly disclose by institutions, on a country-by-country basis, key specified information relating to their businesses. This disclosure requirement is seen as an essential step for regaining

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<sup>20</sup> [European Parliament Resolution of 21 May 2013](#) on fight against tax fraud, tax evasion and tax havens (Kleva Report) – [2013/2025 \(INI\)](#).

<sup>21</sup> OECD (2013), Action Plan on Base Erosion and Profit Shifting.

<sup>22</sup> OECD (2014), [BEPS Action 5](#); "Countering harmful tax practices more effectively, taking into account transparency and substance".

the trust of citizens of the Union in the financial sector. The information to be disclosed includes the name(s), nature of activities and geographical location, turnover, number of employees, profit on loss before tax, tax on profit or loss, and public subsidies received. The new Accounting Directive 2013/34/EU also applies country-by-country reporting requirement to the listed and large non-listed companies with activities in the extractive industry and the logging of primary forests. This disclosure requirement will provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources. The information to be disclosed includes the name(s), nature of activities and geographical location, turnover, number of employees, profit on loss before tax, tax on profit or loss, and public subsidies received. Both provisions, in the Capital Requirement Directive and in the Accounting Directive, provide that Member States will have to require each institution to disclose the information referred to above on an annual basis, by Member State and by third country in which it has an establishment, on a consolidated basis for the financial year.

### 1.3.7. *State Aid Rules*

According to the rules applicable to state aid<sup>23</sup>, the concept of aid embraces not only positive benefits, but also measures which in various forms mitigate the charges which are normally included in the budget of an undertaking.

The Commission is assessing the compliance of tax practices in some Member States with EU state aid rules under Article 107 of the Treaty on the Functioning of the European Union (TFEU), in particular where certain tax practices might give rise to aggressive tax planning, for instance by multinational enterprises<sup>24</sup>. Some Member States appear to attract multinational enterprises by granting them tax rulings enabling the multinationals to take advantage of specific features in the Member States' tax systems so as to reduce significantly their tax burdens, thereby providing an economic advantage to the enterprises that have been granted a tax ruling in comparison to other enterprises that do not benefit from such tax advantages.

In December 2014, the Commission announced an inquiry under EU state aid rules into tax ruling practices, covering all Member States.<sup>25</sup> Member States have been asked to provide information about their tax ruling practices, in particular to confirm whether they issue tax rulings, and, if they do, to provide a list of all companies that have received tax rulings in the period 2010 to 2013.

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<sup>23</sup> European Commission (2014), "[Rules applicable to state aid](#)"

<sup>24</sup> See the Commission Notice on the application of the State aid rules to measures relating to direct business taxation ([Official Journal C 384, 10/12/1998](#), p. 3-9) stating in point 2 that "The Commission's undertaking regarding State aid in the form of tax measures forms part of the wider objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition in the single market. The principle of incompatibility with the common market and the derogations from that principle apply to aid 'in any form whatsoever', including certain tax measures."

<sup>25</sup> See the related press release [IP/14/2742](#).

## 1.4. Position of Member States

Over the last years, the Commission has been in regular exchange with the main stakeholder with respect to transparency in tax rulings, namely Member State authorities. Positions and contributions have been collected throughout the years via numerous standing Groups. Member States have worked in the Code of Conduct Group to improve the exchange of information regarding cross-border rulings and in the area of transfer pricing. Conclusions of this Code of Conduct Group have been communicated on a regular basis as reports to the Council<sup>26</sup>. In 1999, the Commission carried out a comparative study on transparency of administrative practices in taxation<sup>27</sup>. This study was followed up on by the Code of Conduct Group in 2009<sup>28</sup>, updating the study of 1999 and complementing it with information from the 10 Member States that had joined the EU in 2004 and 2007. However, while these studies and surveys provided a general description of the administrative practices in taxation, Member States have been reluctant in sharing actual statistics on the number of tax rulings issued, or on the number tax rulings exchanged with other Member States.<sup>29</sup> Due to the lack of detailed data, it is not possible to provide a full analysis of the current landscape, nor is it possible to provide more than just a qualitative assessment of the costs and benefits of the clarifications and amendments to the current DAC, in particular with respect to the related additional administrative burden and compliance costs.

## 2. THE NEED FOR ENHANCED TRANSPARENCY ON TAX RULINGS

### 2.1. Rational

The Commission is addressing aggressive tax planning, tax avoidance and tax evasion with a number of individual political initiatives that complement each other (see also section 1.3 above). Individually, none of the political initiatives would be able to solve by itself already all problems related to tax planning, tax avoidance and tax evasion. However, each of these proposals will have its own specific focus on certain problems identified. While the impact of each individual proposal is limited to the concrete problems addressed, the combination of all proposals provide for a coordinated policy response.

A Tax Transparency Package will be the first step in the Commission's ambitious agenda for 2015 to fight tax evasion and avoidance. It will be followed in the summer by a detailed Action Plan on corporate taxation, which will set out the Commission's views on fair and efficient corporate taxation in the EU and propose a number of ideas to achieve this objective, including ways to re-launch the proposal for a Common Consolidated Corporate Tax Base (CCCTB).

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<sup>26</sup> Public Reports by the Code of Conduct Group (Business Taxation) are accessible [here](#).

<sup>27</sup> European Commission (1999), Administrative Practices in Taxation, prepared by Simmons & Simmons.

<sup>28</sup> The results of the survey were summarized in a room document for the Code of Conduct Group. This document is not public.

<sup>29</sup> The only available information are the statistics on advance pricing arrangements at the end of 2013, collected by the Joint Tax Pricing Forum (see Annex 4: Statistics on advance pricing agreements), and the confidential information collected through the inquiry under EU state aid (see section 1.3.7).

Within the Tax Transparency Package, one specific proposal will focus on the aspect of mutual assistance by the exchange of information to increase transparency in the area of tax ruling practices. The preparation of this policy initiative, discussed in this Staff Working Document, follows the 2012 Action Plan<sup>30</sup>, in which improving administrative cooperation between Member States' tax administrations is considered to be a key objective of the Commission's strategy. The Action Plan includes a commitment for EU action to be undertaken in the short term when indicating that "the Commission will continue to strongly promote the automatic exchange of information as the future European and international standard of transparency and exchange of information in tax matters."

The Member States' need for mutual cooperation in the field of taxation has grown rapidly in the face of globalisation. There has been a tremendous development in the mobility of taxpayers and capital, of the number of cross-border transactions and of the internationalization of financial structures, which has made it more difficult for Member States to properly assess taxes due. Therefore, a single Member State cannot enforce its rights to tax revenues under its internal taxation system, especially as regards direct taxation, without receiving information from other Member States.

Because of the increased mobility of certain taxpayers and capital, tax competition between Member States has further intensified. This has led to "misaligned incentives", further driving the lack of transparency. Not only do corporations seek to maximize their profits using aggressive tax planning structures, but some Member States also design their corporate tax systems in such a way to incentivise businesses to shift profits away from other Member States to their jurisdictions in order to attract or keep big corporations. Tax rulings are one tool used to that extent.

## **2.2. Current state of play**

Automatic and spontaneous exchanges of information and exchanges on request serve different purposes and have different scopes, but all can be effective ways of tackling base erosion and profit shifting since they can promptly provide Member States with information regarding avoidance about which they were previously unaware. This information enables the Member States to react appropriately, either at an operational or at policy level. The Directive on administrative cooperation (DAC) provides Member States with a framework for administrative cooperation in the field of taxation, including in the area of tax rulings. Moreover, with the Model Instruction, Member States have agreed on a way forward to stimulating the exchange of information in relation to cross border tax rulings.

The DAC has entered into force only on 1 January 2013; a formal evaluation would under normal circumstance have been foreseen only by 2018. However, there is a political consensus, not least reflected in the public discussion of the LuxLeak files, that the existing rules are not effective. Discussions in the Code of Conduct Group for business taxation seem to confirm that only a limited number of tax rulings is spontaneously exchanged, if at all.

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<sup>30</sup> See section 1.3.4.

The ineffectiveness of the existing rules of the DAC and the limits of the Model Instructions are one of the problem drivers causing the lack of transparency, and there is a clear political commitment that a political initiative is urgently needed to address the already identified shortcomings of the DAC and the Model Instruction.

The main reasons for the ineffectiveness of the existing provisions for the exchange of information in the tax area are all related to the "push" aspect of information exchange, in particular with the application of Article 9 in conjunction with the interpretation of Article 5 of the DAC. The problems identified include the following.

- The exchange of information pertaining to tax rulings currently falls within the scope of Articles 5 and Article 9(1)(a) of Directive

2011/16/EU. Both articles apply to information that is foreseeably relevant to the administration and enforcement of the domestic laws of the other Member State. However, this can result in insufficient exchange of information:

- (1) Discretionary element: According to Article 9(1)(a) of the DAC, it remains at the sole discretion of the Member State issuing the ruling to decide whether or not rulings might be of foreseeable relevance for other Member States or not. However, the conclusion of the issuing Member State does not necessarily have to match the assessment of other Member States, who might consider the ruling to be very well of relevance – but these possibly impacted Member States will be in no position to make a request for more detailed information ("pull") unless they are made aware that the ruling exists.
- (2) Lack of information: Member States' authorities may not always have the necessary information to decide whether the information is foreseeably relevant to other Member States. They might conclude on the basis of incomplete information against the relevance for other Member States and do not, therefore, consider it necessary to share information on these rulings.

- Secondly, despite political agreement by all Member States on the Model Instruction, this Model Instruction remains legally non-binding. The experience of the past years shows that non-binding agreements on the exchange of tax information are not being followed up in practice, at least partly because of the existing misaligned incentives.

#### ***Features of the Directive on administrative cooperation (DAC)***

The DAC establishes the rules for information exchange. Article 5 sets out the procedure for the exchange of information on request. Article 9 defines the scope and conditions for the spontaneous exchange of information.

The exchange of information is based on "push and pull" approaches. This means that according to the current DAC the issuing Member State has to "push" (Article 9) information on tax rulings to those other Member States for which it considers that the tax rulings are foreseeably relevant. Article 9(1)(a) establishes that the decision on whether or not to send information is subject to the assessment of the circumstances by the Member States issuing a tax ruling.

In turn, the other Member States receiving this information can then, for their part, decide whether they want to "pull" (Article 5, Exchange of information on request) more information on the specific tax ruling.



- Thirdly, some Member States could regard Article 9 as not applicable to their administrative practices, i.e. that the definition of tax ruling as outlined in the DAC or in the Model Instruction does not apply to their practice or parts of it. More specifically, some Member States point out that their administrative practices are limited to a strict interpretation of legal provisions without any discretionary powers for the tax administrations or tax inspectors and without approving any level of taxation. They do not, therefore, consider these practices as meeting the definition of a tax ruling as set out in the Model Instruction, which is "any practice, agreement with tax offices or exercise of discretion by a tax authority, which provides some degree of agreement as to the level of taxation on a particular company, activity or business, whether or not this is called a ruling". Consequently, where Member States consider their administrative practice as not falling under the definition of a tax ruling, they may believe that they are not obliged to inform other Member States about such practices.
- Fourthly, the current system is limited to the exchange of information with those Member State that may suffer a tax loss whereas the principles of the tax rulings granted by one Member State may be of relevance to all Member States.

Furthermore, the Commission has no access to the information exchanged and is, therefore, not in any position to effectively monitor tax practices in order to ensure that rulings do not have a negative impact on the internal market. Moreover, the Commission is not in a position to ensure compliance with the launch of infringement procedures: Firstly, as the Commission is not party of the information exchange foreseen by the DAC, it cannot even discover situations where information on tax rulings has not been exchanged even though it should have. Furthermore, the current discretionary elements in the DAC leave Member State authorities so much leeway in their decision whether or not to exchange information, so that challenging a possible decision against information sharing would have been hardly promising.

### **2.3. Problems addressed**

The main problem addressed with the policy proposal is the lack of transparency which facilitates the application other harmful tax practices – but in itself can also be the consequence of such harmful tax practices. Lack of transparency is also an incentive for enterprises to apply aggressive tax planning. Indirectly, this leads to tax base erosion, the lack of a level playing field and social dissatisfaction.<sup>31</sup>

Lack of transparency: Few advance tax rulings appear to be the subject of information exchange under the existing legal framework, if at all. This leads to a lack of transparency on the applied administrative practice. Without transparent information on, for instance, the level of taxation agreed for a particular multinational enterprise, activity or business, the other Member States most likely will not be aware of the impact of such an agreement and cannot react to this.

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<sup>31</sup> For an graphical illustration of the issues identified, see Annex 2: Problem tree.

Harmful tax practices applied by Member States: Harmful tax practices<sup>32</sup> unduly affect the location of business activity in the European Union, in particular when they are set up with the intention of attracting – or keeping – big multinational enterprises. This is the case for instance when tax rulings target non-residents only, or when tax rulings provide for a more favourable tax treatment than that which is generally available in the Member State concerned. The Code of Conduct Group established several criteria for identifying potentially harmful tax measures – lack of transparency is one of them. In addition to being characterized as being harmful in itself, lack of transparency can be seen as a typical facilitator for the implementation of other harmful practices.

Unfortunately, there is no information available on the size of this problem. Firstly, there is currently no information exchanged on tax rulings which could be the basis of an assessment (beyond the information presented above on advance pricing arrangements and the inquiry under EU state aid rules). Secondly, in the past Member States have been reluctant in sharing any information on their tax practice in that respect, it is therefore not possible to quantify for instance the share of tax rulings that prove problematic for other countries.

Aggressive tax planning by enterprises: Aggressive tax planning is a major concern for the EU and internationally given that it leads to losses of tax revenues for countries, for example through double deductions and double non-taxation. Aggressive tax planning is facilitated by a lack of transparency, as are fraud and evasion. Lack of transparency and harmful tax competition create incentives in particular for multi-national taxpayers to set up structures which channel taxable profits from high tax countries where profits are originally generated to low tax countries.

Anecdotal evidence provides for a general understanding of the relevance of this problem: While the statutory corporate tax rate in the EU Member States lies between 10 and 35%, the analysis of LuxLeaks documents showed that the effective tax rates paid by some multinationals in the EU were below 1 or 2%. Constructions for enterprises to minimize their tax liability include exempting income diverted to foreign branches, intercompany loans which can be deducted from profits, and royalties and dividends which are taxed at a very low or zero rate. Examples discussed in media all across Europe include the McDonald's branch in Luxembourg which paid an effective tax rate of only 1.4% in 2014 – compared to the statutory rate of 29.22% which competitors of McDonald's in the same country are faced with. McDonald's effective tax rate of 1.4% is also far lower than even the preferential rate on royalties and intellectual property income in Luxembourg of 5.8%. Another example discussed within the context of LuxLeaks concerns Shire, a large drug firm, which paid an effective tax rate of only 1.7% in Ireland in 2014, while the statutory rate is 12.5%. Also in Ireland, Apple achieved to reduce its tax liability in a similar way to an effective rate of only 2%. With the view of reduced tax rates in certain countries, companies have an incentive to move profits to these jurisdictions. Profits are thus and not taxed anymore where they have been generated in the first place, thus leading to tax base erosion in these countries.

Lack of a level playing field for businesses: While some businesses engage in aggressive tax planning, others do not. This is the case in particular for small and medium-sized enterprises (SMEs) which often have neither the means nor the possibilities to develop a

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<sup>32</sup> For a definition of harmful tax practices as set out by the Code of Conduct Group, please see Annex 1: Glossary.

tax optimization strategy at international level. The consequence is the distortion of competition. Where one company can benefit from a limited effective tax rate of only 1 or 2%, then it is obviously in a much more favourable position concerning for instance any investment decision compared to the competitors faced with tax rates that are ten times as high or more. The comparable disadvantage of competitors is further worsened when Member States impacted by aggressive tax planning are forced to shift to less mobile tax bases which affect national businesses, including SMEs, most. A lack of transparency exacerbates this problem as it increases Member States' difficulties in re-establishing a level playing field.

Tax base erosion: The result of aggressive tax planning of companies and harmful tax practices by other Member States is that the other countries will lose part of their tax bases. From an EU point of view this jeopardizes the functioning of the Internal Market as well as the application of more growth-friendly tax policies at national level. To sustain a sufficient level of tax revenues, Member States might be forced to shift to less mobile taxes. This also reinforces the social dissatisfaction by citizens.

The agreements reached in individual tax rulings differ from one case to another, so that even if the number and content of tax rulings were known an assessment of the size of this problem would prove impossible. However, even if the evidence outlined above is only anecdotal, it shows that the effective tax rates paid by some multinationals following tax rulings are far below the average level of effective tax rates of their competitors. Since the revenues of these multinational companies run into billions of Euros, it is safe to conclude that the magnitude of base erosion is substantial.

Social dissatisfaction: Recent press reports on the LuxLeaks, but also on the past and present use of aggressive tax planning structures by big multinational enterprises, have led to public criticism and social dissatisfaction. Both NGOs and Member States have urged the European Institutions to take reforms regarding corporate tax avoidance.<sup>33</sup>

There is a wide perception of observed unfairness, that companies, in particular multinational enterprises, avoid contributing their fair share to the funding of public goods by artificially lowering their taxable income. The negative public perception has been further reinforced in the context of the current austerity measures being imposed in those countries that need to achieve fiscal consolidation. Many citizens feel that companies avoid taxes while they see themselves faced with increasing tax burdens.

The comparison of the anecdotal evidence outlined above with tax rates citizens face serves well as an illustration for the driver of social dissatisfaction. For instance, the implicit tax rate on labour has increased between 2009 and 2012 from around 35 to 36%, or the average standard VAT rate increased between 2000 and 2012 from 19.3 to 21.5%<sup>34</sup>. Citizens compare these increases in taxes they cannot avoid with reports on big multinationals which manage to evade taxes by reducing their effective tax rate to 1%.

## **2.4. Affected stakeholders**

Member States/Tax administrations: The national tax administrations of Member States are trying to prevent the erosion of their tax bases from aggressive tax planning, which

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<sup>33</sup> See for example the [letter by European non-governmental organisations](#) written in December 2014 to the members of the European Parliament, or the letter drafted by the Finance Ministers of France, Germany and Italy of November 2014.

<sup>34</sup> See European Commission (2014): "[Taxation trends in the European Union](#)"

is exacerbated by insufficient information on the impact of other countries' tax regimes and tax rulings on their own. This puts them in a position where they cannot respond effectively either at the compliance or policy level to the challenges of globalisation; Member States are thus less able to defend their tax base. Attempts by tax administrations to improve tax collection result in increasing administrative cost and in the design of complex counter-measures. (e.g. introduction of complex anti-abuse measures, or of special tax regimes to incentivise enterprises to shift profits to their jurisdictions etc.)

Businesses not applying aggressive tax planning techniques: Tax rulings disrupts the functioning of the Internal Market as the prevailing lack of transparency allows Member States to provide tailor-made tax rulings for certain companies or provide legal certainty for specific tax avoidance structures. This results in a competitive advantage for those companies compared to companies not engaged in aggressive tax planning. This is the case most notably for SMEs, which may not have the means to explore international tax planning techniques.

Citizens: Individual taxpayers are indirectly affected. Multinational enterprises that use aggressive tax planning structures do not pay their fair share of taxes in the Member States where they are based, affecting the tax base of these Member States. In the context of tight fiscal policy, reduced taxes on companies due to aggressive tax planning will force governments to raise taxes predominantly on the least mobile tax bases, which are subject to less erosion, such as labour income.

Third countries: Third countries are affected in a similar way as Member States. According to the International Monetary Fund (IMF)<sup>35</sup>, there is evidence that tax base spill-overs are particularly marked, when it comes to developing countries. Developing countries derive a greater proportion of their revenue from corporate tax than OECD countries (in extreme cases, up to 90%). Consequently, the sums these countries lose due to corporate tax avoidance are proportionately larger relative to their overall revenues than in developed countries. According to the IMF, base erosion due to multinational profit shifting is 2-3 times larger for developing countries than for OECD countries.

### **3. APPROACH CHOSEN TO ENHANCE TAX TRANSPARENCY ON TAX RULINGS**

#### **3.1. The Objective of this initiative**

The general objective of this policy initiative is to ensure the smooth functioning of the Internal Market and thereby contribute to the Internal Market's potential to create sustainable growth and employment.

This initiative aims directly at increasing transparency on tax rulings between Member States. Improved information exchange should provide Member States with better information on which to base policy and compliance decisions.

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<sup>35</sup> IMF (2014), Policy Paper, "[Spillovers in International Corporate Taxation](#)".

Indirectly, the initiative addresses aggressive tax planning, in particular tax avoidance. By exchanging information Member States will have the necessary information to decide if they have the right to tax the beneficiary of another Member States' tax ruling, for example in double non-taxation cases. An increase in transparency between Member States will draw attention to existing loopholes that some taxpayers use to shift profits between Member States.

Another aim of this initiative is to indirectly tackle harmful tax practices. The exchange of information promotes peer pressure among the Member States and facilitates alignment of the national laws and administrative practices regarding the treatment of profits. Such alignment would trigger a further combat against aggressive tax planning.

Achieving these specific objectives would enhance the level playing field between corporations and consequently aim at the general objective.

In operational terms, the policy proposal aims at improving the framework under which Member States exchange information and increase the number of tax rulings exchanged between Member States.

### **3.2. Features of the policy proposal**

The proposal to enhance transparency on tax ruling follows in central aspects the DAC and builds further on the Model instructions. In particular, the policy initiative would have the following features:

- The exchange of information would cover tax rulings concerning all taxes excluding VAT, customs and excise duties, and compulsory social security contributions. To that extent, the preferred option would follow the DAC and build further upon the Model Instruction.
- The discretionary element to decide for or against a "push" of information on tax rulings is taken away from the issuing Member State, by making it obligatory to exchange information with all other Member States and the Commission.
- Only advance cross-border rulings should be covered, including unilateral, bi- and multilateral tax rulings.
- Tax rulings concerning and involving the tax affairs of natural persons are excluded. In case of a tax ruling concerning both a company and a natural person, only those parts of tax rulings concerning and involving the tax affairs of natural persons are excluded.
- Member States should exchange all valid and future rulings, with a limitation to tax rulings issued as of 1 January 2005.
- The exchange should take the form of a mandatory automatic exchange on a quarterly basis directly to the other 27 Member States and the Commission.
- The information exchange would be a direct exchange, where the issuing Member State informs other Member States and the Commission directly on every tax ruling issued.

The proposed initiative would constitute the most effective approach to information exchange, while taking into account the potential administrative burden on Member

States and minimizing the potential negative consequences on fundamental right to the protection of personal data, the right to conduct a business, and the right to property.<sup>36</sup>

### 3.3. Impacts

The implementation of the preferred policy package with its various elements would directly result in a much improved and widened information exchange within a clear framework. This information exchange will lead to direct and indirect, positive and negative impacts. Direct impacts are those which can be directly linked to and unequivocally attributed to the information exchange. Indirect impacts are possible impacts which may arise following the underlying policy intervention, but which cannot be attributed to this underlying policy intervention through a strict causal relationship and/or are less certain to occur, because they depend on other factors not under direct control.

#### 3.3.1. *Direct impacts*

- ... on Member States receiving information:  
The direct positive impact (benefit) of the information exchange is the increase in transparency between Member States on tax practice, tax rulings of which Member States had not even been aware of. This will provide Member States receiving the information with the possibility to obtain a synopsis of tax practices in other countries, and a more complete overview over the tax liabilities of their resident companies. This will put them in an informed position to react (see section 3.3.2 Indirect impacts).
- ... on Member States issuing tax rulings:  
Direct negative impacts of the information exchange are administrative burden and compliance costs that are directly related to information exchange on tax rulings. It is important to note that administrative burden and compliance costs will concern Member State authorities only, there are no costs involved for companies at all. Furthermore, the policy initiative does not curtail in any way the right for any economic operator, legal or natural person to request a tax ruling. Consequently, there is no need to limit the coverage of information exchange by excluding certain groups (SMEs, micro-enterprises).  
The costs of information exchange are directly linked with the number of rulings issued by each Member State. Given that the proposal suggests the exchange of a limited summary of the ruling, costs per ruling are considered limited. On top of variable costs for the continuous exchange of information we have to consider one-off costs to cover the information exchange for tax rulings issued during the last 10 years. Given that the current DAC already requires information exchange where tax practice might have a foreseeable impact on other Member States, one could argue that the current proposal does not even add costs in a significant way: Information on relevant rulings should have been exchanged in the past already<sup>37</sup>. However, given that in reality information had not been exchanged, the policy proposal that now further clarifies the obligations will factually lead to compliance costs in particular for Member States that in the past did not exchange

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<sup>36</sup> Alternatives considered in the design phase of this initiative are discussed Annex 5.

<sup>37</sup> The proposal extends the coverage to a some extent, though.

information. Costs are directly related to the number of tax rulings issued and will thus differ considerably from one country to the other. Given the low number of tax rulings in most Member States (see Annex 4: Statistics on advance pricing agreements), costs are limited. Even for those Member States with the most active tax rulings practice, the number of information exchanges triggered by this proposal is very limited compared to information exchanges in other areas: Luxembourg states a total of some 120 advance pricing agreements in force, while for instance, the VAT information exchange system covers some 60 million customs documents *annually* (across the EU). Thus, while costs are limited – but possibly concentrated mainly on a small number of Member States – they are clearly outweighed by the benefit of increased transparency.

- ... on Society:

As a direct positive social impact, the increase in transparency would be taken by the general public as an active approach to tackle the observed unfairness. This proposal gives a clear signal to the EU citizen that aggressive tax planning and harmful tax practices are not desirable and not sustainable. The proposal would in that way address the problem of social dissatisfaction and positively impact the perceived fairness of tax systems.

### 3.3.2. *Indirect impacts*

Indirect economic impacts are expected for Member States issuing tax rulings as well as Member States affected by said tax rulings. Some Member States might find themselves more likely in one role than another, either more likely to issue tax rulings, or more likely to be affected by tax rulings of other Member States. On the other side, some Member States might well be in both roles, impacting with their tax rulings other Member States, while being at the same time affected by tax rulings of others. The magnitude of these effects remains uncertain.

- ... on Member States issuing tax rulings:

An indirect positive impact of an increase in transparency is the expected change of national tax practice of issuing Member States into a more prudent one: The information exchange on rulings is expected to exert peer pressure among Member States. Member States affected by tax rulings can react based on this information, for instance by bringing certain tax practices to the attention of the Code of Conduct Group. Furthermore, it is expected that over time Member States issuing tax rulings will adapt their tax practice to limit the risk of falling under peer pressure and to apply a more prudent approach to tax rulings.

- ... on Member States receiving information:

Another indirect positive impact is that apart from the application of peer pressure, tax transparency will enable Member States receiving the information to refine their risk analysis in order to close potential loopholes that may be used for aggressive tax planning. This would limit the chance that enterprises can avoid their fair share of tax payments.

The information received through the exchange can also be used by Member States as a control mechanism to check if companies act in line with their legal obligations. Having full information about the tax liability of companies, Member States will be in the position to further examine cases in which the effective tax rate is significantly lower than the statutory rate. The tax authority of a Member State may decide to reassess the tax liability of the beneficiary of the ruling,

resulting in a corrected or even additional tax levy – this is the intended impact of ensuring that these companies will not continue to avoid taxes but contribute their fair share.

- ... on companies applying aggressive tax planning:  
A clearly intended, albeit indirect impact of the proposal is that companies using tax rulings to implement their aggressive tax planning structures are likely to see their tax liability in the EU increase. While this implies an increase in effective tax rates for those companies applying aggressive tax planning – this increase in effective tax rate does not imply an unfair burdening of enterprises, but is in fact very well the intention of the proposal and a mere correction of a market failure, due to which these enterprises managed so far to circumvent paying their fair tax share.
- ... on the economy of Member States:  
Where tax practices were used in the past to attract or keep big businesses, some of these big businesses might decide to leave again, possibly resulting in a loss of for example foreign direct investment and economic activity. On the other side, Member States that had been so far negatively impacted by such tax ruling practices could expect a flow back of some of the economic activity and a recovery of their tax base.
- ... on the tax base of affected Member States:  
While the expected indirect impact would indeed be a fairer distribution of profits by enterprises between Member States, thus redistributing the tax revenues in the EU, it is impossible to predict the extent or even the likelihood of a possible increase of tax revenues as an indirect positive impact of this proposal. This depends on the way Member States possibly affected by rulings will use the available information.
- ... on the tax shift in affected Member States:  
Assuming that increased transparency will lead to a change in tax practice of Member States and consequently to a limitation of aggressive tax planning of companies, this might in turn reduce pressure for a continued tax shift to less mobile tax bases.
- ... on the perceived fairness of the tax system:  
Transparency on tax practice will put Member States in a better position to hold each other accountable for not applying a reasonable effective tax rate. Such peer pressure could limit the use of harmful tax practices by Member States and restrict existing advantages of tax planning enterprises. Companies will consequently face a more transparent tax liability, which will be perceived as more fair by the public. As Member States are aware of other Member States' practice, the number of disputable tax rulings is expected to reduce. Reactions by Member States impacted by tax rulings would be seen as an active approach to tackle the observed unfairness, thus reducing the perceived social dissatisfaction.

### **3.4. Sensitivity analysis – risk analysis**

- Race to the bottom:  
The transparency on tax practices in Member States issuing tax rulings could be seen as creating a risk that Member States will copy similar approaches and engage in a race to the bottom. However, transparency on tax rulings is not expected to lead to a shift to or the development of new potentially harmful tax measures, as this would be in clear contradiction with the "stand still" as agreed



upon in the Code of Conduct. Mechanisms within the Code of Conduct Group are in place that would allow following up on new developments. The transparency created by the policy proposal would in fact make it very difficult for any authority to design harmful tax measures that would go unnoticed.

- **Move of capital to tax havens outside Europe:**  
The increase in transparency between Member State authorities might tempt certain multinational companies to hide profits in tax havens outside the EU. However, the public pressure following the LuxLeaks is not only on Member States but also providing for headwind of multinational companies. In fact, big multinational companies react by deliberately deciding for foreign direct investments in European Member States to be able to convincingly make a case for their commitment to and engagement in European economies.
- **Implications for international commitments:**  
The obligation to exchange information on tax rulings within the EU would not affect the current international commitments, such as the exchange of information in the BEPS project, which includes third countries as well. Instead, the current proposal is expected create peer pressure between the OECD members to broaden the exchange of information to all OECD countries, limiting the possibilities for tax avoidance and aggressive tax planning even further.
- **Transposition issues, position of Member States:**  
No transposition issues are expected. Most Member States already keep track of the rulings they issue so the exchange of information from a cut-off date should not create a disproportional administrative burden. Given that the proposal suggests the amendment of an existing directive (see the following section), there are no implementation issues.  
While Member States have been reluctant to exchange information on their national tax practice in the past, the economic crisis and the LuxLeaks discussions have prepared the ground for a fundamental change in positions of Member States. Given the social dissatisfaction with certain tax practices and the perception that multinational companies can evade taxes while the average citizen is faced with increased tax burden, Member States are faced by considerable public pressure to act now. This provides for a window of opportunity to address tax evasion and harmful tax practices with effective measures.

## **4. CHOICE OF INSTRUMENT**

### **4.1. Revision of the DAC**

A legislative proposal could either be a stand-alone measure, or it could amend Council Directive 2011/16/EU<sup>38</sup> on administrative cooperation between Member States in the field of taxation. An advantage of linking the proposal to the 2011 Directive would be that it would imply the use of the IT tools already in place under that Directive for cooperation between tax administrations (e-forms, effective feedback system, etc.). Such a link would also allow the proposal to come within the scope of the wider rules in the 2011 Directive relating to the organization of information exchange, the use of standard forms

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<sup>38</sup> Directive 2011/16 was already amended, in late 2014, to encompass the international standard for automatic exchange of financial account information endorsed by the G20.

and other technical elements. An amendment to the existing DAC would also fit into the Commission initiative of better regulation and simplification, by limiting the number of legislative documents.

With the preferred choice of instrument, the proposal would be set to become EU law. All EU Member States have to comply with EU law and the Commission could open an infringement procedure against a Member State which would not be compliant with the EU law.

#### **4.2. Legal Base**

Article 115 TFEU provides for the approximation of such laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the internal market. In this context, Article 115 TFEU has always served as the legal base of legislative initiatives in the direct tax field provided that the tax matters in question impact on the internal market and make the approximation of laws necessary.

#### **4.3. Subsidiarity, EU Added Value, and proportionality**

Given the cross-border dimension of many tax planning structures and the increased mobility of capital and persons, national provisions in this area cannot be fully effective, as experience shows. The resulting need for action at EU level has already been implicitly acknowledged by the existing initiatives in this area, in particular within the context of the DAC and the recent development of the Model Instruction. However, individual Member States continue to depend on other Member States to get a full picture on the impact of cross-border transactions on their tax base.

The EU is in a better position than each Member State individually to ensure the effectiveness and completeness of the system of exchange of information on tax rulings and in doing so, ensuring the smooth functioning of the internal market. Furthermore, by being member of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, the EU has committed itself to implement transparency and effective exchange of information for tax purposes.

Lack of transparency on tax rulings has negative effects notably on the smooth functioning of the internal market and has been identified as the specific problem in need of a policy response. The suggested clarifications and amendments to the current DAC represent a proportionate answer to the identified problem and therefore, do not exceed what is necessary at the Union level to achieve the objectives of the Treaties.

## ANNEX

### ANNEX 1: GLOSSARY

Advance cross-border tax ruling: For the purpose of the Directive on administrative cooperation, an Advance Cross-Border Ruling is defined as any communication, or any other instrument or action with similar effects, including those issued in the context of a tax audit that has effect for the future

- a) made by, or on behalf of, the government or the fiscal authority of one or more Member States, or Member States' territorial or administrative subdivisions, to any person;
- b) regarding interpretation or application of a legal or administrative provision concerning the administration or enforcement of domestic laws relating to taxes (as defined in Article 2) of these Member States, or their territorial or administrative subdivisions;
- c) in relation to a cross-border transaction or series of transactions;
- d) in advance of the filing of a tax return covering the period in which the transaction or series of transactions covered take or took place.

The transaction in question does not have to be either a single, isolated transaction nor does it have to directly involve the person receiving the Advance Cross-Border Ruling.

Advance Pricing Arrangement (APA): For the purpose of the Directive on administrative cooperation, Advance Pricing Arrangements (or agreements) are understood as any agreement, or any other instrument or action with similar effects, including those issued in the context of a tax audit that has effect for the future

- a) between the government or the fiscal authority of *one or more* Member States, or Member States' territorial or administrative subdivisions, concerning the tax affairs of any person;
- b) determining an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing or the transfer price itself;
- c) in relation to a transaction or series of transactions with a cross-border dimension where either one of the parties to the transaction or series of transactions controls the other party or parties to the transaction or series of transactions or the parties to the transaction or series of transactions are under common control;
- d) or regarding the attribution of profits to a permanent establishment.

Advance pricing arrangements determine in advance of controlled transaction an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time. An advance pricing arrangement may be unilateral, i.e. involving one tax administration and a taxpayer. If the arrangement is unilateral, the tax authority issuing the ruling would not consult other tax authorities, irrespective of whether or not the ruling concerns transactions that might have an impact on other tax authorities. Or, the advance pricing arrangement may be bilateral or multilateral, i.e. based on the agreement of two or more tax administrations and a taxpayer. An advance pricing arrangement is thus a specific type of advance tax ruling,

but one which is based on the internationally agreed principles underlying transfer pricing.

Aggressive tax planning (see also: Tax planning): In the Commission Recommendation on aggressive tax planning (C(2012) 8806 final), aggressive tax is delineated as consisting in "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)".

Automatic vs. spontaneous exchange of information: For the purpose of the Directive on Administrative Cooperation automatic exchange of information means the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals.

Following article 3 (10) of the Directive on Administrative Cooperation spontaneous exchange means the non-systematic communication, at any moment and without prior request, of information to another Member State, but within a given timeframe after the information becomes available. In the DAC, the deadline for spontaneous exchange of information was set at one month after the information becomes available, i.e. one month after the issuing of the tax ruling.

Base Erosion and Profit Shifting (BEPS Project): Tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. The OECD has developed specific actions to give countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time give enterprises greater certainty by reducing disputes over the application of international tax rules, and standardising requirements.

Code of Conduct Group (CoC Group): Set up by the EU's Finance Ministers at a Council meeting on 9 March 1998 to assess the tax measures that may fall within the scope of the Code of Conduct for business taxation and to monitor standstill and the implementation of rollback (as set out by the Code of Conduct on Business Taxation) and report regularly to the Council on this.

Code of Conduct on Business Taxation: A legally non-binding instrument requiring Member States to refrain from introducing any new harmful tax measures ("standstill") and amend any laws or practices that are deemed to be harmful in respect of the principles of the Code ("rollback"). The code covers tax measures (legislative, regulatory and administrative) which have, or may have, a significant impact on the location of business in the Union. The Code of Conduct on Business Taxation was set out in the conclusions of the ECOFIN Council meeting on 1 December 1997.

Cross-border transaction: Transactions are cross-border transactions where not all the parties to them are tax resident in the territory of the Member State giving the Ruling, including the situation where one of the parties to the transactions is a dual resident. Transactions are also cross-border where one of the parties to them carries on business

through a permanent establishment and the transactions form part of the permanent establishment's business.

Harmful tax practice: The Code of Conduct Group (Business Taxation) defined in 1999 in its report to the ECOFIN Council (SN 4901/99) harmful tax competition and harmful tax measures as follows:

"(...) tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.

Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

When assessing whether such measures are harmful, account should be taken of, inter alia:

1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or
4. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or
5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way."

Joint Transfer Pricing Forum (JTTF): The Joint Transfer Pricing Forum consists of an expert group, created by the European Commission in 2002 in order to reduce the high compliance costs and to avoid (or facilitate the elimination of) double taxation that easily arises in the case of cross-border inter-group transactions. The Joint Transfer Pricing Forum works within the framework of the OECD Transfer Pricing Guidelines and operates on the basis of consensus to propose to the Commission pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the EU. The work of the Joint Transfer Pricing Forum is divided into 2 main areas:

- the Arbitration Convention (AC) - a specific dispute resolution mechanism for transfer pricing cases
- other transfer pricing issues identified by the Joint Transfer Pricing Forum and included in its work programme.

Mixed rulings: A distinction can be made between tax rulings concerning and involving the tax affairs of legal persons and those concerning and involving the tax affairs of natural persons. Mixed rulings are tax rulings that concern and involve, at the same time, natural and legal persons (e.g. enterprises).

Model Instruction: A document, developed by the Committee on Administrative Cooperation for Taxation and agreed upon by the Code of Conduct Group (Business

Taxation) in 2014, providing practical guidance with a view to improving the effectiveness of the arrangements for spontaneous exchanges of information.

OECD Model Tax Convention: A uniform non-binding legislative model, developed by the OECD, to clarify and standardise the fiscal situation of taxpayers who are engaged in activities in other countries and to settle the most common problems that arise in the field of international juridical double taxation.

Small and Medium-Sized Enterprises (SMEs): SMEs are defined by the European Commission as having less than 250 persons employed. They should also have an annual turnover of up to EUR 50 million, or a balance sheet total of no more than EUR 43 million (Commission Recommendation of 6 May 2003).

Tax arbitrage: Taking advantage of the technicalities of a tax system, of mismatches between two or more tax systems, or simply of tax rate differentials between two or more tax systems, for the purpose of reducing or avoiding tax liabilities.

Tax avoidance: According to the OECD glossary of tax terms, tax avoidance is defined as the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow.

Tax evasion: According to the OECD glossary of tax terms, tax evasion is defined as illegal arrangements where the liability to tax is hidden or ignored. This implies that the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities.

Tax fraud: According to the OECD glossary of tax terms, tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted, fake documents are produced, etc.

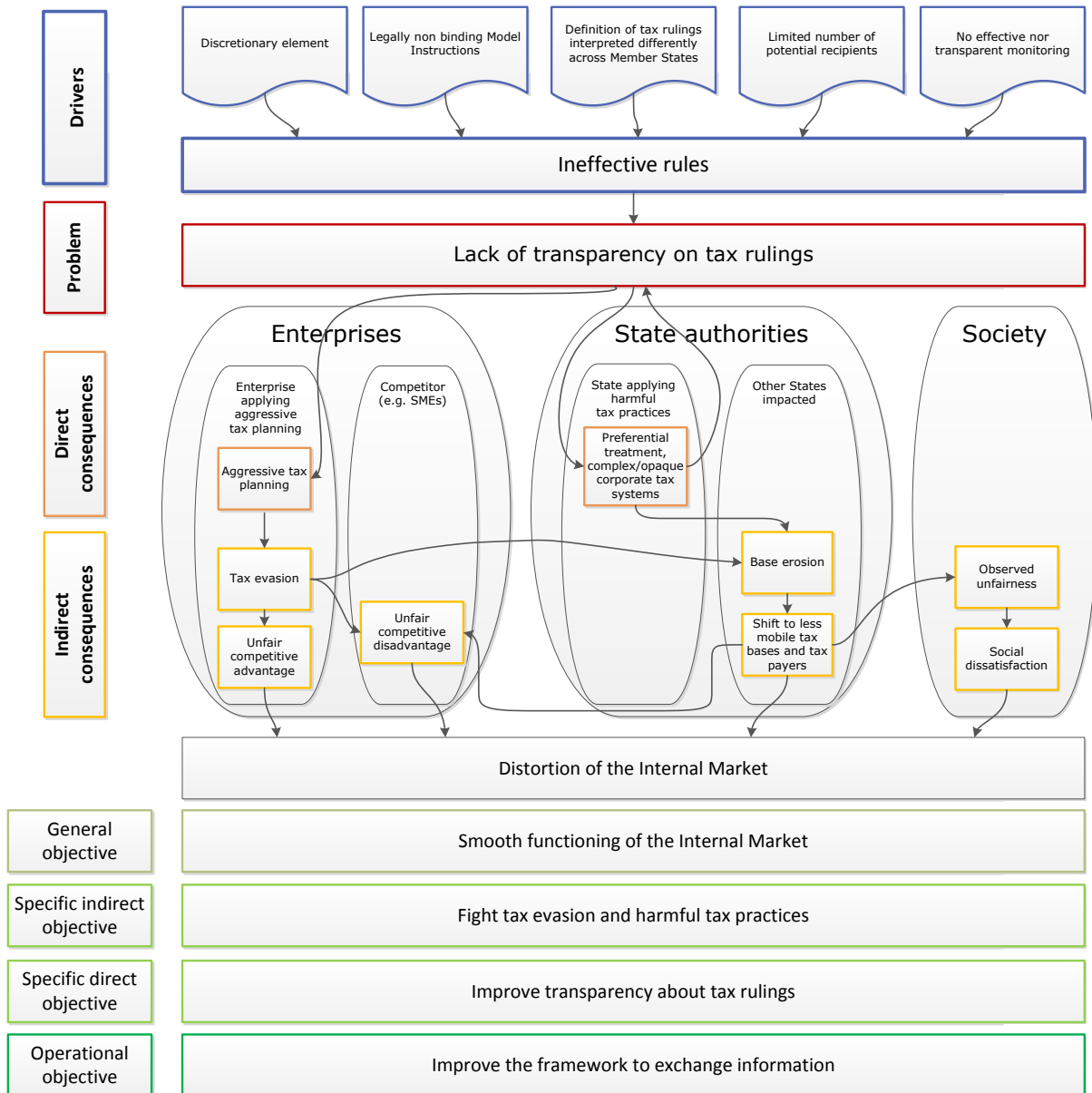
Tax planning (see also: Aggressive tax planning): According to the OECD glossary of tax terms, tax planning is an arrangement of a person's business and/or private affairs in order to minimize tax liability.

Tax ruling: For the purpose of the Directive on administrative cooperation, a wider definition of Tax Ruling is used than in the Model Instruction of the Code of Conduct Group. It entails any communication or any other instrument or action with similar effects, by or on behalf of the Member State regarding the interpretation or application of tax laws: Under this definition, all sorts of rulings are covered irrespective of its qualification within a Member State. So the definition is not limited to those communications in which there is exercise of discretion by a tax authority.

Transfer pricing: In EU context, Transfer Pricing is understood as the terms and conditions surrounding transactions within a multinational enterprise. It concerns the prices charged between associated enterprises established in different countries for their inter-company transactions, i.e. transfer of goods and services. Since the prices are set by non-independent associates within the multinational enterprise, it may be the prices do not reflect an independent market price. The "arm's length principle" stipulates that a transfer price should be the same as if the two companies involved were indeed two

independents, not part of the same corporate structure. The arm's length principle is spelled out in Article 9 of the OECD Model Tax Convention and sets the framework for bilateral treaties between OECD countries and many non-OECD governments.

## ANNEX 2: PROBLEM TREE





### ANNEX 3: LEGAL ASPECTS OF PRACTICE OF TAX RULINGS FOR COMPANIES ACROSS MEMBER STATES

EU Member State	Tax rulings for companies
<b>Austria</b>	<p><b>binding</b> advance rulings:</p> <ul style="list-style-type: none"> <li>- available relating to reorganization, group taxation and transfer pricing</li> <li>- fee applicable</li> </ul> <p>non-binding advance ruling:</p> <ul style="list-style-type: none"> <li>- on prospective transactions</li> <li>- fee applicable</li> </ul>
<b>Belgium</b>	<p>Advance ruling:</p> <ul style="list-style-type: none"> <li>- for all forms of taxes</li> <li>- open to all taxpayers</li> <li>- decisions published anonymously</li> <li>- <b>binding</b> upon tax administration, only re specific situation at hand</li> <li>- valid for 5 years; renewal possible</li> </ul>
<b>Bulgaria</b>	<p>rulings issued by National Revenue Agency – not binding</p> <p>letter of interpretation or ruling issued by Minister of Finance or Executive Director of National Revenue Agency – <b>binding</b></p> <p>no interest or penalties if taxpayer acts accordingly</p>
<b>Croatia</b>	<p>no binding advance ruling</p> <p>non-binding guidance from tax authorities possible</p>
<b>Cyprus</b>	<p>unofficial advance ruling:</p> <ul style="list-style-type: none"> <li>- on interpretation of specific laws</li> <li>- no fees</li> <li>- no appeal possible</li> <li>- <b>binding</b> on tax authorities</li> <li>- not binding on taxpayer or the court</li> </ul>
<b>Czech Republic</b>	<p><b>binding</b> advance rulings concerning specified matters (e.g. transfer prices)</p> <p>non-binding opinion on specific issues possible</p>
<b>Denmark</b>	<p>advance ruling on tax assessment (not valuation)</p> <p><b>binding</b> on tax administration but not on taxpayer</p> <p>fee applicable</p> <p>appeal possible</p>
<b>Estonia</b>	<p>advance ruling:</p> <ul style="list-style-type: none"> <li>- on prospective transactions</li> <li>- <b>binding</b> on the tax authority, but not on taxpayer</li> <li>- appeal not possible</li> <li>- fee of EUR 766.9</li> </ul>
<b>Finland</b>	<p>advance rulings of Central Tax Board:</p> <ul style="list-style-type: none"> <li>- issues involving income tax, value added tax, taxation of non-residents, withholding tax on interest or insurance tax</li> <li>- <b>binding</b> on the tax administration, but not on the taxpayer</li> <li>- appeal possible</li> </ul> <p>advance rulings of tax offices:</p> <ul style="list-style-type: none"> <li>- only difference from Central Tax Board: tax office permitted to rule on valuation matters</li> </ul>

EU Member State	Tax rulings for companies
<b>France</b>	<p>general private ruling:</p> <ul style="list-style-type: none"> <li>- position of tax authorities regarding a specific set of facts</li> <li>- no tacit approval procedure</li> <li>- only protects the requesting party and taxpayers in a comparable situation</li> <li>- formal procedure</li> <li>- may concern any provision of the tax law codified in the CGI</li> <li>- <b>binding</b> for the tax authorities, but not binding for the taxpayer</li> </ul> <p>specific private ruling:</p> <ul style="list-style-type: none"> <li>- tacit approval procedure</li> <li>- limited to specific issues (e.g. abuse of law, election for R&amp;D credits, PE threshold)</li> <li>- tacitly binding for the tax authorities in respect of specific requests</li> </ul> <p>audit ruling:</p> <ul style="list-style-type: none"> <li>- request, under a tax audit, of inspector's position over specific and precise matters in respect of which adjustment is not proposed</li> </ul>
<b>Germany</b>	<p>advance ruling:</p> <ul style="list-style-type: none"> <li>- on prospective transactions</li> <li>- <b>binding</b> on the taxpayer and the competent tax authorities</li> <li>- fee applicable</li> </ul>
<b>Greece</b>	<p>written answers from Ministry of Finance:</p> <ul style="list-style-type: none"> <li>- on taxpayer's written question</li> <li>- <b>not binding</b> on tax authorities, although tax authorities generally follow written answers</li> </ul> <p>from 1 January 2014, advance pricing agreements can be entered into</p>
<b>Hungary</b>	<p>advance ruling:</p> <ul style="list-style-type: none"> <li>- issued by the Ministry for National Economy</li> <li>- in respect of tax liabilities or the absence of tax liabilities of a taxpayer regarding future transactions</li> <li>- <b>binding</b> for tax authorities (unless facts of case change or the legislation changes)</li> <li>- with respect to corporate income tax, certain taxpayers may request a tax ruling that is valid for 3 years regardless of the changes in legislation</li> <li>- rulings may also be requested in relation to past transactions regarding corporate income tax, individual income tax, small company tax and local business tax until tax return is due</li> <li>- fee applicable</li> <li>- Ministry may be consulted before the procedure</li> <li>- extension of temporal effect of ruling possible</li> <li>- fee for extension applicable</li> </ul>
<b>Ireland</b>	<p>advance ruling:</p> <p>in relation to industrial development projects and complex or unusual transactions in accordance with published guidelines</p>
<b>Italy</b>	<p>Advance ruling</p> <ul style="list-style-type: none"> <li>- <b>binding</b></li> <li>- formal procedure</li> <li>- specific matters: anti-avoidance; fictitious interposition; advertising and entertainment expenses; anti-tax haven legislation; minimum tax on dormant companies</li> </ul>
<b>Latvia</b>	<p><b>no binding</b> advance rulings available</p> <p>general regime for requesting tax authorities' statement in specific situations</p>
<b>Lithuania</b>	<p>taxpayers might request for a private free of charge binding ruling regarding the approval of transfer pricing principles and the assent of the foreseen transaction</p> <p>ruling is <b>binding</b> on tax authorities, not binding on taxpayer</p>
<b>Luxembourg</b>	<p>no formal ruling procedure</p> <p>tax confirmation from tax authorities, applicable to practical cases</p>

EU Member State	Tax rulings for companies
<b>Malta</b>	<p>rulings can be given on:</p> <ul style="list-style-type: none"> <li>- definition of participating holding</li> <li>- tax treatment of any transaction which concerns any financial instrument or other security</li> <li>- tax treatment of any transaction that involves international business</li> </ul> <p><b>binding</b> for 5 years from the time of such ruling and for 2 years from the time of any relevant change in statutory provisions subsequent to such ruling</p> <p>a tax ruling by the DG may at the option of the applicant be renewed for a further period of 5 years</p>
<b>Netherlands</b>	<p>open system:</p> <ul style="list-style-type: none"> <li>- any matter</li> <li>- no formal procedure</li> </ul> <p>advance:</p> <ul style="list-style-type: none"> <li>- participation exemption, hybrids, PE, classification of activities</li> <li>- good faith requirement</li> <li>- <b>binding</b></li> <li>- formal procedure</li> </ul>
<b>Poland</b>	<p>general rulings by the Ministry of Finance / individual rulings by delegated tax authorities:</p> <ul style="list-style-type: none"> <li>- written request filed by taxpayer: actual or proposed transactions</li> <li>- fee payable</li> <li>- no tax proceedings or penalties for period during which ruling is effective, if taxpayer strictly follows ruling</li> </ul>
<b>Portugal</b>	<p>the system of advance rulings, <b>binding</b> to the tax administration only to the extent of the particular issue, can be used by the taxpayer to determine a specific matter of its tax situation (e.g. tax benefits, legal framework of operations)</p>
<b>Romania</b>	<p>advance ruling:</p> <ul style="list-style-type: none"> <li>- concerns the regulation of future tax state of facts</li> <li>- formal procedure, fee applicable</li> <li>- <b>binding</b></li> <li>- appeal possible</li> </ul> <p>non-binding recommendation</p>
<b>Slovak Republic</b>	<p>no general advance ruling system</p> <p>individual advance rulings, upon request, on:</p> <ul style="list-style-type: none"> <li>- determination of taxable income of Slovak permanent establishment of a non-resident;</li> <li>- transfer pricing methods (from 1 September 2014 advance pricing agreement subject to a fee between EUR 4,000 – 30,000);</li> <li>- amount of advance payments required in certain circumstances; or</li> <li>- on specific tax issues (from 1 September 2014 binding rulings subject to a fee between EUR 4,000 – 30,000)</li> </ul>
<b>Slovenia</b>	<p>advance ruling system available</p>
<b>Spain</b>	<p>tax authorities' replies to written queries (national / regional / local levels):</p> <ul style="list-style-type: none"> <li>-- all taxes covered</li> <li>- background information and specific circumstances required</li> <li>- no fees</li> <li>- <b>binding</b> for tax authorities; taxpayer may choose whether or not to follow the opinion<sup>39</sup></li> <li>- appeal not possible</li> </ul>

<sup>39</sup> Clarification by authors: A tax specific ruling is binding for both tax payer and tax authorities. What is not necessarily binding is the general interpretation that is public and open to all companies. These general interpretations are published on the internet pages of the Spanish tax authorities while deleting the names of the taxpayer requesting this clarification.

EU Member State	Tax rulings for companies
<b>Sweden</b>	advance ruling: <ul style="list-style-type: none"> <li>- on tax matters in respect of national income tax, municipal income tax, national real estate tax and certain indirect taxes</li> <li>- binding on tax administration but not on taxpayer</li> <li>- fee applicable (except for indirect taxes), compensation possible</li> <li>- appeal possible</li> </ul> advance ruling upon application issued by Council for Advance Tax Rulings
<b>United Kingdom</b>	<ul style="list-style-type: none"> <li>- clearance procedures connected to specific anti-avoidance provisions</li> <li>- advance pricing agreements</li> <li>- advance thin capitalization agreements</li> </ul>

Source: *International Bureau of Fiscal Documentation (IBFD)*

Annotation: *The given information is indicative and not to be understood as exhaustive.*

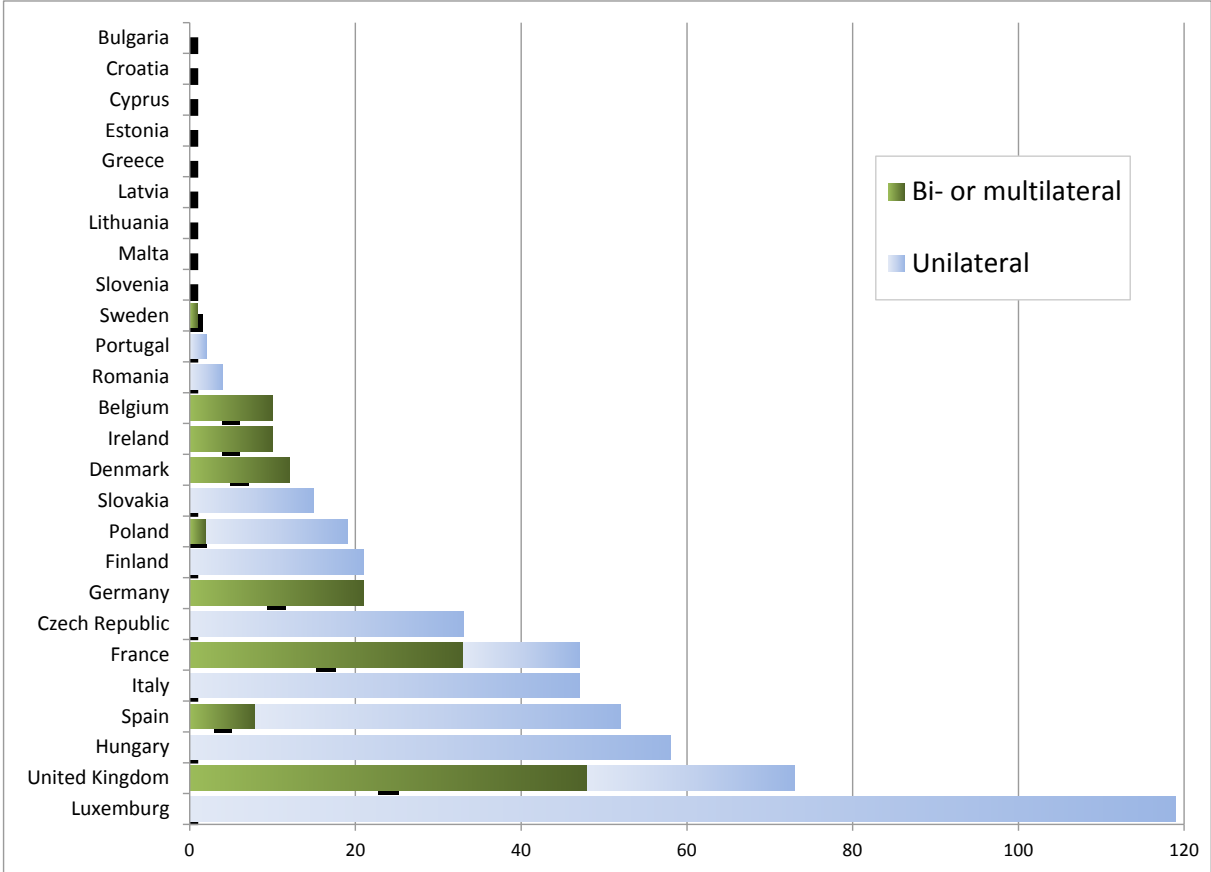
## ANNEX 4: STATISTICS ON ADVANCE PRICING AGREEMENTS

Table 14: Advance pricing agreements at the end of 2013

Member State	What types of Advance Pricing Agreements (APAs) are currently available?			Total number of APAs in force end of 2013			Of which			Bi- or multilateral		
	Unilateral	Bilateral	Multilateral	EU	Non-EU	Total	EU	Non-EU	Total	EU	Non-EU	Total
Austria	Yes	Yes	Yes	.	.	.	.	.	.	2	1	3
Belgium	Yes	Yes	Yes	7	3	10	0	0	0	7	3	10
Bulgaria	No	No	No	0	0	0	0	0	0	0	0	0
Croatia	No	No	No	0	0	0	0	0	0	0	0	0
Cyprus	No	No	No	0	0	0	0	0	0	0	0	0
Czech Republic	Yes	Yes	Yes	29	5	34	29	4	33	0	0	0
Denmark	No	Yes	Yes	2	10	12	0	0	0	2	10	12
Estonia	No	No	No	0	0	0	0	0	0	0	0	0
Finland	Yes	Yes	Yes	14	7	21	14	7	21	0	0	0
France	Yes	Yes	Yes	20	27	47	8	6	14	12	21	33
Germany (Yes)	Yes	Yes	Yes	9	12	21	0	0	0	9	12	21
Greece	Yes	Yes	Yes	0	0	0	0	0	0	0	0	0
Hungary	Yes	Yes	Yes	47	11	58	47	11	58	0	0	0
Ireland	No	Yes	Yes	5	5	10	0	0	0	5	5	10
Italy	Yes	Yes	Yes	22	25	47	22	25	47	0	0	0
Latvia	Yes	No	No	0	0	0	0	0	0	0	0	0
Lithuania	Yes	Yes	Yes	0	0	0	0	0	0	0	0	0
Luxembourg	Yes	Yes	Yes	119	0	119	119	0	119	0	0	0
Malta	No	No	No	0	0	0	0	0	0	0	0	0
Netherlands	Yes	Yes	Yes	.	.	.	.	.	.	.	.	.
Poland	Yes	Yes	Yes	13	6	19	12	5	17	1	1	2
Portugal	Yes	Yes	Yes	1	1	2	1	1	2	0	0	0
Romania	Yes	Yes	Yes	4	.	4	4	.	4	0	.	0
Slovakia	Yes	Yes	Yes	14	1	15	14	1	15	0	0	0
Slovenia	No	No	No	0	0	0	0	0	0	0	0	0
Spain	Yes	Yes	Yes	44	8	52	37	7	44	7	1	8
Sweden	No	Yes	Yes	0	1	1	0	0	0	0	1	1
United Kingdom	Yes	Yes	No	17	56	73	2	23	25	15	33	48
<b>EU (26 MS) excl. AT and NL</b>				<b>367</b>	<b>178</b>	<b>545</b>	<b>309</b>	<b>90</b>	<b>399</b>	<b>58</b>	<b>87</b>	<b>145</b>

Source: Based on European Commission 2014, EU Joint Transfer Pricing Forum, "Statistics on APAs at the end of 2013", JTPF/007/2014/EN  
 Annotation: "." indicates missing information.

**Figure 2: Advance pricing arrangements at the end of 2013**



Source: Based on European Commission 2014, EU Joint Transfer Pricing Forum, "Statistics on APAs at the end of 2013", JTPF/007/2014/EN

Annotation: Date from Austria and Netherlands inconclusive, thus omitted from this figure

**Table 15: Requests for advance pricing agreements in 2013**

Member State	Number of APAs requested in 2013		Number of APAs granted in 2013		Number of APAs rejected in 2013		Number of requests withdrawn in 2013	
	EU	Non-EU	EU	Non-EU	EU	Non-EU	EU	Non-EU
Austria	.	.	.	.	.	.	.	.
Belgium	7	3	7	1	1	.	1	.
Bulgaria	0	0	0	0	0	0	0	0
Croatia	0	0	0	0	0	0	0	0
Cyprus	0	0	0	0	0	0	0	0
Czech Republic	22	8	13	2	5	0	0	0
Denmark	2	3	1	3	0	1	0	0
Estonia	0	0	0	0	0	0	0	0
Finland	28	10	14	7	1	0	6	0
France	8	10	4	4	3	0	0	0
Germany	15	12	4	6	0	0	2	1
Greece	0	1	0	0	0	0	0	0
Hungary	12	8	10	5	0	0	0	0
Ireland	4	3	2	3	0	0	0	1
Italy	27	34	10	8	2	2	0	0
Latvia	1	0	0	0	0	0	0	0
Lithuania	0	0	0	0	0	0	0	0
Luxemburg	204	.	117	0	0	0	2	0
Malta	0	0	0	0	0	0	0	0
Netherlands	323	.	228	.	5	.	67	.
Poland	6	4	1	3	0	0	0	0
Portugal	2	2	0	0	0	0	0	0
Romania	8	.	0	.	0	.	0	.
Slovakia	13	3	9	1	2	0	4	1
Slovenia	0	0	0	0	0	0	0	0
Spain	20	3	10	2	1	0	2	1
Sweden	8	3	0	1	0	0	0	0
United Kingdom	10	32	6	21	0	0	2	2

Source: Based on European Commission 2014, EU Joint Transfer Pricing Forum, "Statistics on APAs at the end of 2013", JTPF/007/2014/EN

Annotation: "." indicates missing information.

The document "Statistics on APAs at the end of 2013" outlines the guidance given to the Member States when completing the questionnaire that was the basis for the data collection. Based on this guidance, the terms used in the tables above should be understood as follows:

**APA in force:** an advance pricing agreement is considered as "in force" when it was granted before the end of the reference year (e.g. 2013) and the agreement's term covers the reference year. Therefore, an advance pricing agreement granted during the reference year (N year) but starting in N+1 year is not counted as "in force at the end of the reference period". The figure in the column "total number of advance pricing agreements in force" should be the result of adding the following two columns: bi- and multilateral advance pricing agreements in force and unilateral advance pricing agreements in force.

**Counting of advance pricing agreements:** If an advance pricing agreement covers transactions with more than one company of the multinational enterprise in the respective Member State (e.g. Subsidiaries A and B in Member State X each having transactions with parent company P in State Y covered by the advance pricing agreement), each advance pricing agreement should be counted (here 2 advance pricing agreements in Member State X).

**Counting of multilateral advance pricing agreements:** A multilateral advance pricing agreement should be considered as several bilateral advance pricing agreements and should also be counted that way for statistical purposes, i.e. a multilateral advance pricing agreement signed by Member State A, Member State B and Member State C is counted, from the perspective of State A, as a bilateral advance pricing agreement between A and B, and a bilateral advance pricing agreement between A and C and therefore as two advance pricing agreements. Likewise, a request for such a multilateral advance pricing agreement is counted as two requests.

**Requests received:** an advance pricing agreement request should be counted as received in the year the formal written advance pricing agreement request was filed. The term "advance pricing agreement request" has a meaning in line with section 4.52 and 4.53 of the EU JTPF advance pricing agreement Guidelines, i.e. a formal application supplemented with appropriate information. Pre-filing requests are therefore not considered.

**APA granted:** an advance pricing agreement is considered as granted

- when the Competent Authority(ies) has (have) formally agreed to the advance pricing agreement, whatever form this formal agreement takes (exchange of letters, signature of the agreement, ...) and
- all the subsequent formal proceedings that may be required are fulfilled (e.g. a formal agreement by the taxpayer or an advance ruling granted to the taxpayer).

That is, if a bilateral advance pricing agreement was signed by the Competent Authorities in year N and e.g. the implementing domestic advance ruling or the taxpayer's agreement was only granted in N + 1, the advance pricing agreement is counted as granted in N + 1.

Mismatches may result both from different Member States' approaches (e.g. one Member State' reference date is that of the closing letter and for the other Member State, it is that of the taxpayer's agreement) and also from the internal implementation in a different year of the proposed approach. Although these discrepancies are considered as tolerable for the purpose of these statistics, CAs may want to avoid them by informing each other about subsequent proceedings and agree on the date they consider the advance pricing agreement as finally granted.

**APA applications rejected:** an advance pricing agreement is considered as rejected when an advance pricing agreement application is not accepted by the tax administration or negotiations to reach a bilateral or multilateral advance pricing agreement failed and therefore no advance pricing agreement was granted.



## **ANNEX 5: POSSIBLE OPTIONS CONSIDERED DURING THE PREPARATION OF THE INITIATIVE**

### **1. CURRENT SITUATION AND POSSIBLE DEVELOPMENTS/CHANGES FOR THE FUTURE**

Without proportionate EU intervention, all information exchanges between tax authorities on tax rulings will continue to rely on application of Article 9 of the DAC. In addition, the Model Instruction provides practical guidance on how an effective exchange of tax rulings can be ensured and what should be included in such an exchange.

The CCCTB as proposed by the Commission would, if adopted, limit significantly the occurrence of cross-border tax rulings, as groups of companies would have to apply a single set of tax rules across the Union and deal with only one tax administration. The CCCTB would, therefore, increase transparency and limit harmful tax practices and aggressive tax planning inside the Union.

The existing country-by-country reporting obligations could indirectly increase transparency towards tax-authorities. However, these are currently limited to only certain specific economic sectors, the financial sector and the extractive and forestry industries. Also, they do not provide for specific information obligations with respect to the existence of tax rulings.

The inquiry under State aid rules regarding tax ruling practices in all Member States, is set up to identify if and where competition in the Internal Market is being distorted through selective tax advantages. If a particular tax ruling entails the existence of State aid, it should be the subject of a Commission decision, which will be published (cleaned of any confidential information), thus leading to information of the public about specific tax practices in the past.

At national level, in the light of recent public attention on tax rulings Member States may feel more pressure to increase transparency. However, such pressure from media coverage and does not constitute a sufficient and lasting driver for effective action across the EU.

Current projects by the G20 and the OECD in the context of the Base Erosion and Profit Shifting project will also influence the exchange of information with regard to tax rulings. With regard to harmful tax practices, improving transparency has been made a priority. This might entail the compulsory spontaneous exchange of information on rulings related to preferential tax regimes with the affected country. However, agreements within the OECD will remain legally non-binding. While they provide for political commitment, countries remain reliant on effective cooperation and goodwill of the counterpart.

### **2. ALTERNATIVES**

#### General considerations

The problems identified can be related almost exclusively with the "push" phase of the current DAC, i.e. the initial phase of information exchange when the Member State issuing a tax ruling informs (or, given the experience, rather: should inform) other

Member States of the existence of the ruling. Consequently, the shape and specifications of the possible policy initiative focuses on this phase of information exchange.

For the policy proposal, we have discussed the possible scope and content of a number of features that will characterize the information exchange - features like the taxes to be covered, or taxpayers to be covered. Within each feature, we identify and compare the current situation as with alternatives. In general, within each feature, options are mutually exclusive, which implies that for each feature only one of the options can be chosen. Exceptions are the discussions on "Type of rulings" and "Means for exchanging information", where combinations are possible.

Furthermore, in general, features are independent of each other. This implies that for instance the choice for a certain feature regarding the "Type of taxes" covered does not influence the choice for the "Decision on relevance of rulings for other Member States". The choice between the options for a certain feature can thus be taken independently from the choice between the options outlined for another feature. As a practical consequence, we choose the preferred option for each feature individually. Exceptions are to some extent the options for "taxpayers", "type of information sent", and "means for exchanging information". Here, the overall impact on fundamental rights depends on the combination of the type of information sent, the taxpayer included and the means chosen for the information exchange.

## **2.1. Types of taxes**

In terms of coverage of taxes, three options have been identified.

1.1. All taxes: Exchange of information would concern rulings issued on taxes of any kind.

1.2. Taxes excluding VAT, custom duties, excise duties and compulsory social security contributions: The scope, in terms of type of taxes, is aligned to the current DAC (Article 2) that was restricted to direct and indirect taxes that are not yet covered by other Union legislation<sup>40</sup>. It therefore describes the current situation.

1.3. Option 1.2, additionally excluding wage tax. As an alternative to option 1.2, the coverage of taxes could be further narrowed down to exclude also wage taxes. There are arguments that wage taxes are not a primary vehicle for undertaking aggressive tax planning. This option follows discussions with Member States.

Screening of options: Of the three identified options, option 1.1 to cover all taxes will be discarded and not retained for the comparison of options. Coverage of all taxes would not seem justified as the exchange of information on VAT, customs duties, excise duties, as well as on social security contributions, is already covered by other legislation on administrative cooperation, specifically focusing on these types of taxes. This is also the

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<sup>40</sup> "Other Union legislation includes Council Regulation [904/2010/EU](#) of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ L 268 of 12.10.2010, P. 1); Council Regulation [389/2012/EU](#) of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) N° 2073/2004 (OJ L 121 of 8.5.2012, P. 1).

reason why the scope of the existing DAC excludes these taxes. The problems identified do not provide reasons that would require to extend the coverage beyond what the current DAC foresees.

## **2.2. Decision on foreseeable relevance of tax rulings for other Member States**

2.1. Assessment by the issuing Member State of the foreseeable relevance: The DAC currently foresees, under its Article 9, that the issuing Member State would provide information only to those Member States for which it deems a tax ruling to be of foreseeable relevance. It therefore constitutes the baseline option.

2.2. No assessment of the foreseeable relevance: Under this option, information on a tax ruling would be "pushed" to all Member States and to the Commission irrespective of how the issuing Member State would conclude on the foreseeable relevance of their tax ruling on other Member States.

## **2.3. Types of tax rulings**

Within the discussion on types of tax rulings to be covered by the policy initiative, we identified the following four areas. Firstly, the question whether the proposal should be limited to cross-border aspects or also include domestic rulings. Secondly, the question whether only advance rulings should be covered or also post-return rulings. Thirdly, the actual definition of a tax ruling, and fourthly, whether the proposal should include only unilateral tax rulings or also bi- and multilateral tax rulings.

### *2.3.1. Area 1: Cross-border vs. domestic tax rulings*

3.1. Cross-border tax rulings: As intended by the Model Instruction, only cross-border tax rulings (involving another Member State or a third country) would be covered as they may affect the establishment or functioning of the Internal Market. However, the proposal will specifically define what cross-border rulings are. This option is thus close to the baseline option with some modifications (labelled thus as "baseline +").

3.2. Cross-border and domestic tax rulings: Under this option, information on any tax ruling would be exchanged irrespective of whether or not they have a cross-border dimension.

Screening of options: Of the presented options, option 3.2 to include domestic rulings is discarded at this stage already. When it comes to direct taxes, Article 115 TFEU serves as the legal base of legislative initiatives provided that the tax issues impact on the internal market and make the approximation of laws necessary. However, domestic rulings do not necessarily concern the functioning of the internal market. Therefore, there is no legal basis for extending the exchange of information to domestic rulings, i.e. rulings with no cross-border dimension. This is also in view of respecting the principle of subsidiarity.

### *2.3.2. Area 2: Advance tax ruling vs. post-return tax rulings*

3.3. Advance tax rulings (pre-transaction or pre-return tax rulings): Under this option, advance rulings would be covered, as per the model instruction. Advance tax rulings would be defined more specifically than in the Model Instruction, and would cover tax rulings that are given either before the relevant transaction or series of transactions took

place or in advance of the deadline for filing of a tax return covering the period in which the transaction or series of transactions takes place or took place. They therefore include tax rulings given in the context of a tax audit when they also apply to future years for which tax returns have not yet been received. This option is very close to the baseline option with a further clarified definition of advance tax rulings ("baseline +").

3.4. Advance tax rulings and post-return tax rulings: This option would include advance tax rulings as described above as well as tax rulings granted after a return for the period in which the transaction or series of transactions took place had been received. A post-return tax ruling could possibly also apply to a number of past years for which returns had already been received.

### *2.3.3. Area 3: Definition of tax ruling*

3.5. No explicit definition of tax rulings. This is the current baseline situation, as tax rulings are not explicitly defined in the DAC.

3.6. Tax rulings defined as any communication or any other instrument or action with similar effects, by or on behalf of the Member State regarding the interpretation or application of tax laws. Under this definition, all types of tax rulings are covered irrespective of its qualification within a Member State.

3.7. Tax rulings defined as any practice, agreement with tax offices or exercise of discretion by a tax authority, which provides some degree of agreement as to the level of taxation on a particular company, activity or enterprise. This definition, which was used in the Code of Conduct Group (in a questionnaire prepared by the Commission services), defines tax rulings in a more concise way as there is a reference to the notion of discretion and agreement on a level of taxation.

### *2.3.4. Area 4: Unilateral vs. bilateral and multilateral tax rulings*

3.8. Unilateral tax ruling: Any tax ruling which is issued by a *single* Member State would be covered under this option. This option is to the baseline option, as it repeats the limit set out in the Model Instruction.

3.9. Unilateral, bilateral and multilateral tax ruling: This option would cover not only tax rulings that are issued by a single Member State, but additionally also the tax rulings that are issued in agreement between two or more tax administrations and a taxpayer resident in one of these countries.

## **2.4. Taxpayers**

4.1. All taxpayers: Exchanges would cover rulings that concern and involve the tax affairs of any legal or natural person. This would be in line with the DAC and therefore establishes the baseline option.

4.2. All taxpayers, excluding natural persons: Under this option, tax rulings that concern and involve the tax affairs of natural persons would be excluded from the scope of the initiative. This would be partly on the basis that the vast majority of natural persons are unlikely to engage in significant tax avoidance (in terms of revenues lost for the State)

but also because natural persons are already the subject of considerable information exchange (see recent agreement on Automatic Exchange of Information<sup>41</sup>).

4.3. All taxpayers, excluding natural persons and Small and Medium-Sized Enterprises (SMEs): Under this option, tax rulings that concern and involve the tax affairs of natural persons and/or of SMEs would be excluded. SMEs are like natural persons less likely to engage in aggressive tax planning in a significant manner (not only with respect to the likelihood to apply cross-border tax optimization, but also in terms of revenues lost for the State).

## **2.5. Scope of information sent**

General considerations: As indicated in the introduction to section 5.2, the design of policy response to address the problems identified focuses on the first phase of information exchange, i.e. the "push" element. Consequently, this section discusses here the relevant options of the scope of information to be exchanged during the "push" of information by the issuing Member State to other Member States. The scope of information exchanged in response to a possible subsequent "pull" request by receiving Member States remains unaffected.

5.1. Minimum information per tax ruling: In this option, the information sent from the issuing Member State to other Member States and the Commission would cover a limited number of key elements, which should enable recipient Member States to decide whether the said tax ruling might be of potential relevance to them. (If so, the recipient Member States could submit a request for more detailed information to the issuing Member State). The information sent by the issuing Member State would be limited to: (i) the identification of the taxpayer and where appropriate the group to which it belongs; (ii) the type of matters addressed with by the ruling; (iii) the criteria used for the determination of the transfer pricing in the case of an advance pricing arrangement; (iv) the identification of the other Member States likely to be affected; (v) the identification of any other taxpayer likely to be affected.

The current DAC establishes in a non-explicit way that relevant information needs to be exchanged. Option 5.1 as described above is very close to this baseline with the further improvement of detailing the elements of information exchanged ("baseline +").

5.2. Summary information per tax ruling: In this option, the limited information of key data outlined in option 5.1 would be complemented by a summary description of the matters addressed by the rulings and of the set of criteria used for the determination of the transfer pricing in case of an advance pricing arrangement.

5.3. Detailed information per tax ruling: In this option, the information sent by the issuing Member State should be extensive and detailed on the content of the tax ruling which would allow the recipient Member State to develop an informed view on the impact of the tax ruling for its domestic tax base (without excluding a subsequent request by the recipient Member State for further information).

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<sup>41</sup> Council Directive [2014/107/EU](#) of 9 December 2014 amending Directive [2011/16/EU](#) as regards mandatory automatic exchange of information in the field of taxation.

Screening of options: Option 5.3 is discarded at this stage, as it seems disproportionate in terms of administrative burden and compliance costs to require already for the "push" phase the exchange of extensive and detailed information for every tax ruling issued. Member States which can justify that a specific tax ruling is of foreseeable relevance to them will continue to have the possibility within the "pull" approach to request more detailed information on a case by case basis.

## **2.6. Timeframe**

General considerations: Tax rulings are not necessarily limited in time, meaning that a tax ruling issued several years ago may still be valid today. In general, in most Member States tax rulings remain valid until the underlying legal provisions change. Advance pricing arrangements, on the other side, have a limited validity between 2 and 5 years, depending on the Member State.

6.1. Valid tax rulings irrespective of their date of issuance: Under this option, it is proposed to take into consideration all tax rulings that are still valid, independent of the date of when the tax ruling was issued.

6.2. Valid tax rulings, issued after a cut-off date: In this option, the scope would be restricted to valid tax rulings issued as from a cut-off date. A time frame of 10 years would be in line with the limitation period within which unlawful and incompatible State aid can be recovered<sup>42</sup>. Following this argument, tax rulings issued since 1 January 2005 would be covered by the information exchange.

6.3. Tax rulings issued as of the entry into force of the new legal instrument: Under this option, the exchange of information would only concern newly issued rulings, i.e. rulings issued as from the entry into force of the legal instrument. This alternative is closest to the intentions of the Model Instruction and can thus be considered as the baseline option.

## **2.7. Trigger for exchange of information, timeframe or frequency of exchange**

7.1. Spontaneous exchange: In line with Article 9 of the current DAC, the actual sending of information would be triggered by the issuance of a tax ruling – the exchange would take place case by case. Each Member State would have to send information on the respective tax ruling within a specified timeframe – the current DAC establishes here a maximum period of 1 month after the information to be exchanged has become available. The spontaneous exchange largely reflects the baseline scenario, although the timeframe might be revisited. Instead of within a month, exchanges could take place within a quarter or a year following the date of issuance. The option is thus classified as baseline with further improvements ("baseline +").

7.2. Automatic exchange: The sending of information would take place regularly, at pre-established regular intervals, which could be set as monthly, quarterly, or annual<sup>43</sup>. At the end of each interval, Member States would be required to inform the recipients either

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<sup>42</sup> Article 15(1) of Council Regulation (EC) [659/1999](#) of 22 March 1999 lays down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83/1, 27.03.1999, p. 6).

<sup>43</sup> "Automatic" exchange as described above should not be confused with "automated".

of the tax rulings issued during this interval, or that the Member State has not issued any tax ruling during that period.

## **2.8. Means for exchanging information**

8.1. Publication by the issuing Member State on a public website: Within this option, each issuing Member State would make the information publicly available to any interested party.

8.2. Issuing Member State sends the information directly to other Member States and the Commission: Each Member State issuing a tax ruling would exchange information directly with other Member States and the Commission. This option is aligned to the current prescriptions in the DAC and the Model Instruction with the extension to include the Commission in the information exchange. The option is thus classified as baseline with further improvements ("baseline +").

8.3. Indirect exchange through a central directory accessible to Member States and the Commission: Each issuing Member State would send the information to a central directory which would be accessible to the other Member States and to the Commission.

**Table 1: Overview of options**

Policy initiative: Features	Key information on options	
<b>1</b> Types of taxes	<b>1.1</b> All taxes	
	<b>1.2</b> Taxes excluding VAT, custom duties, excise duties, compulsory social security contributions (baseline)	
	<b>1.3</b> Taxes excluding VAT, custom duties, excise duties, compulsory social security contributions and wage tax	
<b>2</b> Decision on foreseeable relevance of tax rulings for other MS	<b>2.1</b> Assessment by the issuing Member State of the foreseeable relevance (baseline)	
	<b>2.2</b> No assessment of the foreseeable relevance	
<b>3</b> Types of rulings	Cross-border vs. domestic tax rulings	<b>3.1</b> Cross-border tax rulings ("baseline +")
		<b>3.2</b> Cross-border and domestic tax rulings
	Advance tax rulings vs. post-return tax	<b>3.3</b> Advance tax rulings (pre-transaction or pre-return tax rulings) ("baseline +")
		<b>3.4</b> Advance tax rulings and post-return tax rulings
	Definition of tax ruling	<b>3.5</b> No explicit definition of tax rulings (baseline)
		<b>3.6</b> Any communication by or on behalf of the Member State regarding the interpretation or application of tax laws
		<b>3.6</b> Any practice or agreement with tax offices or exercise of discretion by a tax authority, which provides some degree of agreement as to the level of taxation
	Unilateral vs. bi- and multilateral tax rulings	<b>3.8</b> Unilateral tax rulings (baseline)
		<b>3.9</b> Unilateral, bi- and multilateral tax rulings
<b>4</b> Taxpayers	<b>4.1</b> All taxpayers (baseline)	
	<b>4.2</b> All taxpayers, excluding natural persons	
	<b>4.3</b> All taxpayers, excluding natural persons and SMEs	
<b>5</b> Scope of information sent	<b>5.1</b> Minimum information per tax ruling ("baseline +")	
	<b>5.2</b> Summary information per tax ruling	
	<b>5.3</b> Detailed information per tax ruling	
<b>6</b> Timeframe	<b>6.1</b> Valid rulings, irrespective of their date of issuance	
	<b>6.2</b> Valid rulings issued after a cut-off date: Within previous 10 years as of date of entry into force	
	<b>6.3</b> Rulings issued as of the entry into force of the new legal instrument (baseline)	
<b>7</b> Trigger for exchange of information, timeframe or frequency of exchange	<b>7.1</b> Spontaneous, i.e. non-systematic and at any moment (within one month, a quarter or a year after issue) ("baseline +")	
	<b>7.2</b> Automatic, i.e. systematic and at pre-established regular intervals (every month, quarter or year)	
<b>8</b> Means for exchanging information	<b>8.1</b> Publication by the issuing Member State on a website publicly available	
	<b>8.2</b> Direct exchange between issuing Member State and other Member States plus Commission ("baseline +")	
	<b>8.3</b> Indirect exchange through a central directory accessible to Member States and the Commission	

### 3. COMPARISON OF OPTIONS

Options will be assessed to the extent of their relative advantages and disadvantages compared to doing nothing.

The options will be analysed on the basis of the following criteria:



- Effectiveness: The extent to which different options would be able to achieve tax transparency and tackle the direct (and/or, where applicable) indirect problems.
- Efficiency: A qualitative assessment, contrasting the benefits of the respective option with the implied administrative burden and/or compliance costs for Member State authorities<sup>44</sup>. The assessment will indicate the efficiency compared to the baseline scenario;
- Coherence: The consistency with or complementarity to other already existing initiatives and legislation, like the Action Plan to strengthen the fight against tax fraud and tax evasion, the Model Instruction, and the Commission horizontal objectives;
- Fundamental rights: Assessment of the implications for fundamental rights as guaranteed by the Charter of Fundamental Rights of the European Union, description of concerns with respect to such fundamental rights and assessment of the extent to which possible negative consequences are justified and minimized.

#### General considerations with respect to the current situation

If no action were to be taken, the exchange of information on tax rulings would remain based on the work of the Code of Conduct Group and the Model Instruction. As this Model Instruction is legally non-binding and "could be used as a reference by the Member States for internal application and follow-up"<sup>45</sup>, it does not create an additional legal incentive to exchange information compared to the current state of play and runs a large risk that the lack of transparency between Member States shall remain as it currently is. The exchange of information has been subject of discussion within the Code of Conduct Group since 1998 without leading to actual improvements of the situation. The voluntary commitments have thus proven ineffective.

However, some positive changes could be possible in the future. If the CCCTB would be adopted and implemented, common rules would apply to determine the tax base of companies with operations in several EU Member States. These established rules would thus eliminate the need for such types of tax rulings in which enterprises and Member State authorities agree on the determination of the relevant tax base. This would lift also to a large extent the lack of transparency with respect to profit shifting by companies and eliminate certain types of aggressive tax planning arrangements in the EU. However, the CCCTB has been with the Council since 2011, without a clear perspective regarding possible political agreement in the near future as Member States are still sharply divided on this proposal. The Commission is currently reflecting on the way forward and will present in the near future an Action Plan on corporate taxation. All in all, it appears not likely that the CCCTB in its current form will be adopted and implemented in the near future.

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<sup>44</sup> For a discussion of (indirect) on enterprises, please see section 3.3.

<sup>45</sup> Code of Conduct Group (Business Taxation) (2012), Document 10903/12 FISC 77, paragraph 19.

The information inquiry launched by the Commission under State aid rules could lead to an increase in transparency in the future. As State aid control is carried out on a case-by-case basis and only enforced in the case that selective tax advantages can be proven, state aid control will not contribute to an overall transparency on tax ruling practices in the EU. State aid inquiries mainly function as a warning to enterprises that use aggressive tax planning and could show individual aggressive tax planning structures or harmful tax practices, however they do not address the drivers of the lack of transparency. Where the European Court of Justice rules that certain cases of tax practices fall under State aid, this will have legal consequences for the Member State and taxpayer involved. It is expected that Member States would change their national tax practice to follow up on such rulings, which could lead to improved transparency.

Furthermore, peer pressure by Member States, but also public pressure following the LuxLeaks, has surged since the publication of the Commission's information inquiry. Member State authorities are now potentially more willing to share tax rulings with other Member States. However it is questionable that such peer and public pressure would have a comprehensive and/or lasting effect.

As the future of the CCCTB and the outcomes of the State aid cases is highly uncertain, tackling the lack of transparency, and thereby harmful tax practices, is not likely to happen at a fast pace.

### **3.1. Type of taxes**

1.1. All taxes: Discarded beforehand.

1.2. Taxes excluding VAT, custom duties, excise duties and compulsory social security contributions: As this option is in line with the baseline scenario, it would therefore not lead to a different level of effectiveness of efficiency.

1.3. Taxes excluding VAT, custom duties, excise duties, compulsory social security contributions and wage tax: Beyond the taxes excluded in option 1.2, this option would also exempt rulings covering wage taxes from information exchange.

A reason to exclude also tax rulings on aspects of wage tax could be that currently this type of rulings on wage taxes is not in the focus of aggressive tax planning, an exclusion of wage taxes would thus not reduce the efficiency of the instrument per se. At the same time, since wage tax are not covered by any other legal instrument on exchange of information, this could potentially create a potential future problem, making potential aggressive tax planning strategies based on wage tax rates or local exemptions invisible for other Member States, limiting thus the effectiveness of the proposal. Excluding wage taxes would clearly limit the administrative burden on Member States, as less information would need to be collected and exchanged, but at the same time also limit the benefit of increased transparency. Apart from departing of the approach used in the current DAC, exclusion of wage taxes from the scope would reduce the complementarity of this legislation on exchange of information with other existing instruments, thus resulting in a negative assessment on the criterion on coherence.

Conclusion: Although the administrative burden is more limited if tax rulings on wage tax were excluded, broader transparency and full coherence with the current DAC is

preferred. Furthermore, excluding wage taxes might open the possibility to circumvent the obligation for information exchange. Hence, option 1.2 is preferred.

### **3.2. Decision on foreseeable relevance of rulings for other Member States**

2.1. Assessment by the issuing Member State on the foreseeable relevance (baseline option): In this baseline option the authority to assess whether a tax ruling is foreseeably relevant for another Member State would remain with the issuing Member State. As past practice has shown, this discretionary power is one of the reasons that the actual exchange of tax rulings remains limited. Furthermore, as there would be no change in approach, this option would remain incoherent with the commitment made in the Action Plan to improve transparency (thus leading to a negative assessment on the aspect of coherence due to the inherent incoherence of these aspects in the baseline).

2.2. No assessment by the issuing Member State on the foreseeable relevance: Under this option, there would be no prior assessment of foreseeable relevance to other Member States by the issuing Member State. Information would have to be exchanged with all other Member States during the "push" phase. The receiving Member States would then be in a position to decide whether they are possibly affected by the respective tax ruling and, if so, to request ("pull") more information from the issuing Member State. Furthermore, the information exchanged in the "push" phase is expected to be of interest also for those Member States that are not directly impacted by the respective tax ruling, as it would allow monitoring of developments and of principles applied in other national tax practices. This option is expected to be very effective in establishing transparency among Member States, as past experience shows that the discretionary element in the decision for or against information exchange was one reason for the ineffectiveness of the current approach.

As the issuing Member State does not have to carry out an assessment of the relevance for other Member States, this presumably reduces the administrative burden compared to the baseline scenario. At the same time, this reduction is likely outbalanced by an increase in administrative burden, given that now information will have to be exchanged on every tax ruling, not only on those for which the issuing Member State would have decided that they might be relevant to other Member States. The benefits of the increase in transparency largely outweigh the related administrative burden for Member State authorities, resulting in a positive assessment of the efficiency for this option, compared to the baseline.

Although this option does not follow the Model Instruction, it would be coherent with the Action Plan as limiting the discretion by the issuing Member States would further promote the actual exchange of information. This leads to an increase in coherence compared to the baseline.

Removing the discretionary element in the decision whether or not to exchange information on tax rulings will result in a clear increase in transparency, as there would now be a clear obligation for information exchange. As a consequence, the number of exchanges is expected to increase considerably. Removing the assessment of foreseeable relevance has limited potential impact on fundamental rights in itself to the extent that information (for the limited extent of information exchanged see section 3.5 in this Annex) on tax rulings will also be sent to Member States that are in fact not impacted by

the ruling. But, more importantly it is the consequential rise in the absolute number of information exchanges could lead to potential negative consequences on the fundamental rights concerned. The respective rights concern in particular the right to protection of personal data (to the extent summaries contain personal data), confidentiality of sensitive or secret business information as explained under sections 2.4 and 3.4 in this Annex. Just based on the expected increase in the absolute number of information exchange, we conclude therefore on a negative change in the criterion on fundamental rights. The limitation of the information to be exchanged and the safeguarding of information is further discussed in feature 4: Type of taxpayers covered, feature 5: Scope of information exchanged, and feature 8: Means for exchanging information.

Conclusion: The current approach in the DAC and Model Instruction leaves the decision whether or not to inform other Member States to the issuing authority, which resulted in a complete lack of transparency. Thus, the decision on whether a tax ruling is of relevance or not should be moved from the issuing to the receiving Member State. This would be coherent with the Action Plan to strengthen the fight against tax fraud and tax evasion. Option 2.2 is thus the preferred option.

### **3.3. Types of tax rulings**

#### *3.3.1. Area 1: Cross-border vs. domestic tax rulings*

3.1. Cross-border tax rulings: This option is broadly in line with the baseline scenario but with explicit definition of cross-border tax rulings as further improvement ("baseline +"). The main objective of increasing transparency is to ensure that Member States are informed of situations, where their tax base might be affected by tax rulings issued in another Member State. For that reason, limiting the information exchange to cross-border tax rulings remains proportionate and an effective tool with the correct focus to ensure transparency and addressing aggressive tax planning. The limitation to cross-border tax rulings also contributes to the general objective of ensuring a smooth functioning of the Internal Market. The focus also limits the related administrative burden, entailed by the sharing of information, to that share of rulings that matter the most in the fight against aggressive tax planning. Finally this option would be fully coherent with the Model Instruction and the legal basis used in direct taxation (i.e. Article 115 TFEU) as it remains the cross-border tax rulings that may possibly affect the establishment or functioning of the Internal Market. Tax rulings that have no cross-border activity should under normal circumstances not be of interest to any other country except perhaps from a perspective of fair competition. However, existing State Aid Rules cater for that already. As the focus remains the same as in the baseline scenario, there is no increase in efficiency. The definition of cross-border tax rulings is expected to have a positive impact on effectiveness, as it eliminates any potential ambiguity in the interpretation.

3.2. Cross-border and domestic tax rulings: Discarded beforehand.

Conclusion: The current approach to limit information exchange to cross-border tax rulings is considered adequate and proportionate to contribute to transparency, fully in line with the legal base. Based on the reasons presented above, the conclusion is to retain the current approach, complemented by a definition of the cross-border aspect of tax ruling.

### 3.3.2. *Area 2: Advance tax ruling vs. post-return tax rulings*

3.3. Advance tax rulings: A focus on advance tax rulings, i.e. pre-transaction or pre-return tax rulings would in principle follow the approach applied in the baseline scenario. This includes exchange of information on tax rulings that derive from a tax audit, insofar as they have an impact on future tax returns. As the option would not amend the scope of the baseline, there are no changes expected in terms of efficiency or coherence. The definition of advance tax rulings is expected to have a positive impact on effectiveness, as it eliminates any potential ambiguity in the interpretation.

3.4. Advance tax rulings and post-return tax rulings: This option would imply an extension of tax rulings covered to include also post-return tax rulings and decisions made by national tax authorities during tax audits of past periods. However, while an increased coverage improves overall transparency (thus leading to higher effectiveness compared to the baseline), post-return tax rulings are considered of less relevance to detect aggressive tax planning. The increase in administrative burden would not appear to justify the extended coverage. This option would not be coherent with the Model Instruction and the Action Plan.

Conclusion: An extension of tax rulings covered to include also post-return tax rulings would lead to administrative burden that appears not justified given only limited potential increase in the effectiveness of the measure compared to the baseline. The preferred option is thus to remain within the current approach applied, enhanced by the definition of advance tax rulings.

### 3.3.3. *Area 3: Definition of tax ruling*

3.5. No definition of tax rulings. This option is the baseline. The current DAC does not provide for a definition of a tax ruling; instead, the directive relates to general exchange of information with foreseeable relevance to other administrations (within the established scope of taxes).

3.6. Tax rulings defined as any communication or any other instrument or action with similar effects, by or on behalf of the Member State regarding the interpretation or application of tax laws: A wide-encompassing definition of tax rulings would follow the rationale of what is commonly understood under the term tax ruling and would therefore render the approach coherent with the Action Plan. A clarification of the concepts would increase the clarity and thus the effectiveness of the political instrument as it would subject any form of communication regarding the interpretation or application of tax laws of a person's tax affairs to an exchange of information. The administrative burden could increase in such cases where now information would need to be exchanged on tax rulings that, in the understanding of the Member State authority in the past did not meet their respective definition of tax ruling. However, the benefits of an increase in transparency and the fact that all relevant tax rulings would be covered by the wide definition would outweigh the limited increase in administrative burden compared to the baseline, thus leading to an increase in efficiency.

3.7. Tax rulings defined as any practice, agreement with tax offices or exercise of discretion by a tax authority, which provides some degree of agreement as to the level of taxation on a particular company, activity or business: This narrower definition of a tax ruling has been used in the Code of Conduct Group. While providing a definition would

improve the current situation, establishing a narrow definition would not prove fully effective for addressing the issue of lack of transparency and aggressive tax planning: Member States have appeared to consider that there is no need to exchange any communication between a taxpayer and the tax authorities as long as it consists in an interpretation of legal provisions without any discretionary powers by the tax authorities and without approving any level of taxation. This narrow definition could therefore lead to limiting exchange of information to a subset of tax rulings. While this would reduce the administrative burden of the associated restricted information exchange, the number of tax rulings subject to an exchange of information would be limited as well, thus limiting the intended increase in transparency.

Conclusion: An explicit definition of tax rulings would clearly improve the effectiveness of the policy initiative. Between the two discussed options, the wider definition would ensure a more complete coverage, thus contributing better to the objectives to increase overall transparency.

#### *3.3.4. Area 4: Unilateral vs. bilateral and multilateral tax rulings*

3.8. Unilateral tax rulings (baseline): Member States are particularly interested in information on unilateral tax rulings, which are most likely to be used for aggressive tax planning by enterprises and for harmful tax practices by other Member States. A clarification and explicit obligation to exchange information on unilateral tax rulings would clearly enhance transparency and help the fight against tax avoidance. While this option would not cover the complete range of tax rulings, it would as a minimum cover the ones that are often expected to be the most problematic. The explicit legal obligation to exchange information on unilateral tax rulings would entail the related administrative burden – outweighed by the benefits of increased transparency. The focus on unilateral tax rulings could possibly be seen as a balance between administrative burden related to information exchange on one side, and the benefit of a wide scope of tax rulings covered. Establishing the legal obligation to exchange only for unilateral tax rulings is coherent with the current Model Instruction.

3.9. Unilateral, bilateral and multilateral tax rulings: This option would extend option 3.8 to include also bi- and multilateral tax rulings. While bi- and multilateral tax rulings are issued in agreement with two or more tax administrations, this does not necessarily imply that all Member States eventually impacted by the tax ruling had been party to the multilateral agreement. Furthermore, extending the coverage to all tax rulings without exception that would depend on its nature (unilateral, bi- or multilateral), would not only be a more effective measure to ensure overall transparency in tax practices without creating blind spots – it would also ensure a simplification: Including all tax rulings eliminates an otherwise necessary assessment whether all Member States for which the ruling might have been foreseeably relevant had been included (thus introducing once more a discretionary element). Last but not least, this approach would avoid potential circumvention of the information exchange by adapting aggressive tax planning strategies and tax practices in that direction. The additional administrative burden by including also bi- and multilateral tax rulings in the information exchange can be considered limited (see Annex 4: Statistics on advance pricing agreements) and justified.

The exchange of information to include also bi- and multilateral tax rulings would be an extension to the current framework, but in line with the horizontal objective to fight tax avoidance, thus having an important impact on overall coherence.

Conclusion: Inclusion of all tax rulings independent whether they had been issued unilaterally, bi- or multilaterally, would meet the objective of full transparency needed to address aggressive tax planning while simplifying the obligation and with proportionate administrative burden involved.

### **3.4. Taxpayers**

4.1. All taxpayers (baseline): Establishing full coverage in terms of tax payers would aim at full transparency. It would therefore be coherent with the current DAC and in line with the Action Plan. This means that for this option, we would not expect any change in effectiveness, efficiency, etc.

Improving transparency matters most when it comes to tax rulings issued to large multinational enterprises operating cross-border and with the opportunity and means to engage in aggressive tax planning. Including all taxpayers would cover also tax rulings issued to natural persons or SMEs. However, the obligation to exchange information about tax rulings would in no way restrict or limit natural persons or SMEs to request rulings. Furthermore, with respect to natural persons one has to keep in mind that it is not the average private consumer or taxpayer who would request a tax ruling concerning cross-border transactions. If natural persons are involved in tax rulings that would fall under the scope of this information exchange, then this would rather concern for instance large private shareholders, or a private person who requests a tax ruling concerning a trust he/she is involved. It could well be argued that tax rulings for these type of natural persons should well fall under the information exchange. Furthermore, Including all taxpayers, including natural persons and SMEs, would limit the possibility for future circumvention of the information exchange by adapting the respective setup of the tax structure. However, full coverage in terms of tax payers would imply also the maximum of related administrative burden which would have to be contrasted with the expected benefit of this maximalist option.

Furthermore, including natural persons in the scope may negatively affect the fundamental rights of such persons, and namely the right to protection of their personal data<sup>46</sup>. In cases where the legal person can claim the protection under the data protection (e.g. in cases when the official title of the legal person identified one or more natural persons) the data protection legal framework remains<sup>47</sup> applicable and should be taken into account by the issuing Member State. Data protection safeguards would have to be incorporated in case of a binding legislative proposal. As regards legal persons, the exchange of information concerning them may have an effect on the confidentiality of sensitive or secret business information, which in general is protected by the freedom to conduct a business and the right to property<sup>48</sup>. With respect to the option discussed here,

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<sup>46</sup> [Charter of fundamental rights](#), Article 8.

<sup>47</sup> Judgement of the European Court of Justice of 9 November 2010 in [joined cases C-92/09 and C-93/09](#), Volker und Markus Schecke Gbr.

<sup>48</sup> [Charter of fundamental rights](#), Article 16 and 17, respectively.

the restriction of these rights is only limited and proportionate in order to achieve the general objective to increase transparency.

4.2. All taxpayers, excluding natural persons: Natural persons are covered under the current provisions of the DAC and its amendment which encompasses the international standard for automatic exchange of financial account information. This implies that natural persons are already subject of information exchange. Furthermore, there are arguments that tax rulings concerning the tax affairs of natural persons might, in general, not be related with aggressive tax planning strategies. For these reasons, it appears reasonable to exclude tax ruling relating to natural persons from the exchange of information. In cases of "mixed rulings", where the rulings concerns at the same time natural and legal persons (e.g. enterprises), only those parts of tax rulings that concern and involve the tax affairs of natural persons should be excluded.

Excluding natural persons would reduce the effectiveness of the proposal to achieve full transparency compared to the baseline scenario. This could be outweighed by the reduced administrative burden by the related reduction in information exchange necessary. At the same time, given that natural persons are not considered to be in the core of the problem of aggressive tax planning, this would imply an increase in efficiency of the initiative. Given that natural persons are already subject to exchange of financial account information, excluding natural persons from the scope of this initiative would limit burden while ensuring complementarity and coherence with other instruments. Excluding natural persons from the scope would reduce concerns with respect to fundamental rights, as the fundamental rights of natural persons are completely safeguarded. This is considered to result in an improvement compared to the baseline scenario. In cases where the legal person can claim the protection under the data protection (e.g. in cases when the official title of the legal person identified one or more natural persons) the data protection legal framework remains applicable and would be respected.

4.3. All taxpayers, excluding natural persons and SMEs: Like natural persons, SMEs in general hardly have the means nor opportunities to engage in aggressive cross-border tax planning. However, excluding SMEs from the scope in addition to the exclusion of natural persons would further reduce the effectiveness of the political initiative to achieve transparency. Furthermore, excluding SMEs might allow for possibilities to adapt tax planning strategies in order to circumvent information exchange. While administrative burden would be further limited by the exclusion of SMEs it is important to note that the administrative burden with respect to information exchange does only fall on the administrations of Member States. While it is the Commission's overall strategy to limit regulatory burden on SMEs and micro-enterprises, this policy proposal does not require any adaptation in this respect – the right of SMEs (or natural persons to that extent) to request a tax ruling remains untouched and the proposal would not imply any increase in burden whatsoever on SMEs.

As this option deviates from the approach in the DAC and in the Model Instruction, the appraisal on the criterion coherence is negative. Exclusion of SMEs would limit the risk of negative consequences on fundamental rights.

Conclusion: Including all taxpayers would be in line with the current DAC and is comparable to the baseline scenario; it would also follow up on the public request to



ensure a wide coverage of the information exchange. To reduce the administrative burden and focus on the tax rulings where the main problems are, while limiting the risk of potential loopholes and keeping the information exchange as simple and broad as possible, it is appropriate to exclude only natural persons from the scope of the initiative. Leaving out natural persons would also limit possible data protection and privacy issues. Option 4.2 is the preferred option.

### **3.5. Scope of information sent**

General considerations: This discussion on the scope of information to be exchanged refers only to the "push" phase of the information exchange. The scope of information exchanged following a subsequent "pull" request remains untouched.

5.1. Minimum information per tax ruling ("baseline +"): The information exchanged would cover a explicitly listed minimum number of key elements (see section 2.5 in this Annex for a list of relevant variables) that should enable the receiving Member States to identify whether the respective ruling might be of relevance to them.

This option would increase effectiveness compared to the baseline scenario as it would establish a specific set of key information to be exchanged. The approach to limit the exchange to information on a minimum number of elements would keep the administrative burden proportionate to the objectives of the initiative. However, the more limited the set of key variables is to be exchanged in the "push" phase, the more likely that the receiving Member States will not be in a position to conclude whether the ruling issued might be of relevance to them or not. The consequence could be a large number of "pull" requests for detailed information than necessary, because the information sent in the "push" is too limited. A too strict limitation in the scope of information exchanged during the "push" phase may limit administrative burden in this part of the information exchange but could possibly be outweighed by a much higher administrative burden in the "pull" phase, only because the initial information might not be considered sufficient. As the original baseline already prescribes the exchange of relevant information and as the option does not establish a difference to the original baseline to that extent, there is no change in efficiency compared to the baseline.

Exchanging even summarised information may have a potential negative consequence on the fundamental rights concerned, i.e. the right to protection of personal data (to the extent summaries contain personal data), confidentiality of sensitive or secret business information as explained under sections 5.2.4 and 5.3.4. But, obligations on the exchanging Member States to safeguard any such information from access by third parties help to minimise the restrictions of the rights under Articles 8, 16, and 17 of the Charter of fundamental rights, confidentiality of existing business secrets and the right to conduct business. The option constitutes a variation of the baseline to the extent that it would include an explicit list of information to be exchanged. With respect to the criterion on fundamental rights, this clarification is an improvement compared to the unchanged baseline scenario: The clarification removes any ambiguity or risk that information is being exchanged that would restrict fundamental rights.

5.2: Summary information per tax ruling: In addition to the key elements exchanged with option 6.1, Member States would be required to provide brief summary descriptions of the ruling. The extent of such a summary could be limited in order to balance

information needs by the receiving Member State authorities and the administrative burden to be carried by the issuing Member State. This option appears to be closest in coherence with the rationale of the Action Plan to strengthen the fight against tax fraud and tax evasion.

The option would prove more effective than the option limited to minimum information. Not only would each receiving Member State be in a better position to conclude whether they are potentially impacted by the ruling, the limited summary information will also increase further transparency as it provides relevant information also to the other Member States not directly impacted. While the preparation of the summary requires limited additional administrative burden, this is clearly outweighed by the fact that this will limit the number of unnecessary "pull" requests which might be submitted if the basic information is not conclusive to decide whether the respective Member State might be affected or not. As such, the concept of this option is closest to the intention of the Action Plan and the commitments made, improving in that way the coherence compared to the baseline scenario. However, as more information is to be exchanged than in option 5.1, the evaluation with respect to the criterion fundamental rights is considered slightly lower.

5.3. Detailed information per tax ruling: Discarded beforehand.

Conclusion: Based on the above, the information exchange should include a number of key elements, complemented by summary information per ruling. It is effective given the possibility for Member States to ask for more detailed information in a second step, while maintaining the administrative burden proportional.

### **3.6. Timeframe**

6.1. Valid rulings irrespective of their date of issuance: As this option would cover all tax rulings given by Member States that are still valid today, it would ensure full transparency. However, in order to ensure the exchange of all valid tax rulings, this would require in practice the review of every individual tax ruling. This would create a disproportionately high administrative burden mainly on the issuing Member State, but also on the receiving Member States that need to process a maximum number of tax rulings to assess the relevance of the exchanged information for them. The limitation periods for tax liability limits the possibility for Member States to take action in response to tax rulings granted in the past, limiting the usefulness of this extreme option.

6.2. Valid rulings, issued after a cut-off date: According to EU legislation, State aid, that is deemed unlawful and incompatible, can be recovered subject to a limitation period of ten years. Aligning the requirement to exchange past rulings would be coherent with the limitation period applied under State aid rules would allow to act, under State aid rules, on potential past misconducts. In addition, a ten-year period should cover most valid tax rulings and for sure the advance pricing arrangements which have a limited validity of 5 years maximum. That way, the transparency of administrative practice by Member States would be ensured for the largest part of valid rulings. The administrative burden on issuing Member States to assess if rulings are still valid could be considered proportionate to reach the set objectives.

This time frame would provide a fair balance between the need to cover all currently still valid rulings while limiting the administrative burden to exchange information retroactively on tax rulings issued in the past.

6.3. Rulings issued as of the entry into force of the new legal instrument (baseline): As only new rulings would be exchanged, transparency would be limited to the moment of the entry into force of the new legal instrument and a large number of potentially harmful tax rulings would not be covered. This option would not impose any administrative burden on Member States to review past tax rulings, assess if they are still valid and exchange information on them. However, it would also limit the purpose of transparency and the need to address harmful tax practices only to the future, limiting the efficiency of the proposal. This option would be most coherent with the Model Instruction. Although the Model Instruction is not explicit on this point, it bases itself on the DAC which entered into force in 2013 without any reference to retroactivity.

Conclusion: Maximum transparency is reached if all valid and future rulings are exchanged. However, Member States should therefore re-assess all past rulings to decide on their validity which would cause too large a burden. As in general tax rulings have a limited duration, it would be more efficient to set a cut-off date, thereby reducing the administrative burden on Member States while keeping track of tax rulings that are still valid the moment the initiative is adopted and potentially inquiring current misconducts in still valid tax rulings. Option 7.2 is preferred.

### **3.7. Trigger for exchange of information, timeframe or frequency of exchange**

7.1. Spontaneous exchange ("baseline +"): This option is broadly in line with the baseline scenario. The Model Instruction provides for spontaneous exchange on tax rulings, indicating coherence of this option with other initiatives. The variation compared to the unchanged baseline scenario concerns the timeframe within which information has to be exchanged. To limit administrative burden for issuing Member States and receiving Member States to keep track, an exchange within three months (instead of within a month as in the DAC) after issuing the tax ruling appears to be reasonable and an improvement compared to the unchanged baseline. A timeframe of three months could also reduce the administrative burden compared to the DAC which requires currently the exchange within one month. A three-month interval is also being discussed at the OECD.

7.2. Automatic exchange: As the information would be exchanged in this option at pre-established intervals, this will help to ensure that information exchange is comprehensive and would allow receiving Member States to easily spot irregularities. Furthermore, the automatic exchange would, where applicable, also include also exchange of information that no tax ruling had been issued within the given period of time, which would further contribute to a maximum of transparency. Although this option does not follow the Model Instruction, it would be coherent with the Action Plan. In a similar way as for spontaneous exchange, an automatic exchange every three months appears to be a reasonable compromise ensuring timeliness of information while limiting administrative burden.

Conclusion: The spontaneous exchange of information would leave the issuing Member State a fixed period of time after issuing a tax ruling during which to exchange the information, while the automatic exchange of information would give the receiving

Member States fixed dates at which they can expect exchanges of information. The difference between the two options appears to be rather subtle, with a slightly increased effectiveness on the side of automatic exchange of information. Not only will receiving Member States be able to plan ahead for the receipt of information, the confirmation that no tax ruling might have been granted within a certain time interval might be of value, too – and is only exchanged within the option on automatic exchange.

### **3.8. Means for exchanging information**

General considerations: As indicated in the introduction to section 5.2 on page 21, the choice of means for the exchange of information cannot be taken separately from the decision on the scope of information to be exchanged. Nevertheless, this section discusses primarily the means for exchange of information. While the assessment has to be carried out subject to the extent of information to be exchanged – the scope of information exchanged is discussed in detail in the respective section 5.3.5. Furthermore, the means for exchange of information discussed here continues to refer to the "push" phase of information exchange. The subsequent "pull" phase would likely take place on a direct, bilateral basis between the Member State submitting a "pull" request and the issuing Member State.

8.1. Publication by the issuing Member State on a public website: this option would entail a maximum of transparency and openness on tax rulings, as these would become all accessible not only to all Member States, but to any interested party (e.g. competitors, third countries, NGOs, general public). The effectiveness of this option would be very high as for instance businesses would be able to verify whether they are treated equally to their competitors, creating peer pressure on enterprises active in aggressive tax planning, thus reducing the chance of unfair competition.

When publishing tax rulings on a website, the issuing Member States would have to consider potential negative consequences on fundamental rights, in particular with the right to conduct a business and with the right to personal data protection. Data protection principles must be observed, and the appropriate data protection safeguards provided, also in cases when the legal person can claim the protection under the data protection (e.g. in cases when the official title of the legal person identified one or more natural persons).

The scope of information to be exchanged has already been discussed in section 5.3.5. Arguably, the summary information as outlined in the preferred option on the scope of information to be exchanged would not conflict with fundamental rights to conduct a business as it does not lead to disclosure of commercial, industrial or professional secrets. Additionally, companies could be asked at submission of a request for a tax ruling for their explicit agreement with disclosure of summary information on the tax ruling<sup>49</sup> and/or highlight information therein which they consider to fall under confidential business information or business secrets. Such claims could then be assessed by the relevant authority taking into account its obligations under Article 16 and 17 of the

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<sup>49</sup> This approach to request prior approval for disclosure would, however, limit the possible choices on the timeframe of rulings covered by the initiative: In this case, it would not be possible to decide in favour of exchange of information on valid rulings issued during the last 10 years – for which the prior approval would not be available.

Charter. Providing such safeguards would add administrative burden on the issuing Member State. This option would go beyond already existing EU legislation on the exchange of information and the Model Instruction. On the other side, the option would be coherent to some extent with the practice established in a small number of Member States publishing their tax rulings<sup>50</sup>.

8.2. Issuing Member State sends the information directly to other Member States and the Commission ("baseline +"): In this option, transparency would be limited to fellow Member State authorities and the Commission. This option would follow more closely the current DAC and Model Instruction with extension of the information exchange to the Commission. Any information exchange with third countries would remain based on international agreements (e.g. OECD guidelines), since this is beyond the competency of the legislative measure discussed in this Staff Working Document. The inclusion of the Commission in the information exchange will allow further ensure transparency and allow for an improved monitoring, leading to an improvement in effectiveness compared to an unchanged baseline. As exchange of information is limited to exchanges between tax authorities of Member States and the Commission, and furthermore remains on a confidential basis with them, the impact upon the fundamental rights is limited.

8.3. Indirect exchange through a central directory accessible to Member States and the Commission: A central directory would provide Member States and the Commission with one central access point for their exchange of information on tax rulings and therefore limit the administrative burden. The efficiency of this option is therefore high. The concerns with respect to fundamental rights remain, though, limited, as this option leaves space for a limitation in the number of recipients of the exchange, similarly to the previous option. A central directory needs time to be established, so this option could not be considered as a short-term option and limits the effectiveness in the short run compared to the previous option. In the longer term, such a directory could be set up using the budget already assigned to the FISCALIS Programme, which provides for the support of Member States and the Commission in combating aggressive tax planning and, in particular, for supporting the costs of the development of European Information Systems for the purpose of improving information exchange between tax administrations.

Conclusion: Although publication by the issuing Member States of all tax rulings on a website would establish full transparency and enhance fair competition between enterprises, there remains the question of potential negative impacts on fundamental rights concerned. The information exchange between tax authorities of the Member States appears to provide for a good balance to establish transparency on tax rulings between Member States. While in the long-term, a central directory (option 8.3) could be envisaged as a more efficient and preferable way to exchange information between Member States, direct exchange between Member States can easily be established in the short run, thus ensuring transparency at short notice.

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<sup>50</sup> However, the information published by these Member States is anonymized and arguably too limited so that other Member States are in no position to conclude whether the ruling is of relevance to them or not.

## **ANNEX 6: MONITORING AND EVALUATION**

### Monitoring

The current DAC provides already for a structured approach to monitoring and evaluation.

The Member States are requested to provide to the Commission data on exchange of information, in line with the existing guidelines for statistics. Data that should be collected include the number of tax rulings exchanged and the number of subsequent "pulls". Such data which will provide basis for an analysis of the efficiency and transparency of the information exchange. Furthermore, to the end of each year Member States shall submit to the Commission their assessment of the effectiveness of the framework for exchange of information as well as the practical results achieved.

Based on the statistical data provided by the Member States and their assessment of the effectiveness, the Commission will prepare annual monitoring reports. The reports will be published and made available to the Member States for the purpose of discussion in the Code of Conduct Group.

Actual information/indicators suggested to be collected depend on the content of the preferred option, but should include as a minimum the number of rulings issued in total by broad categories to be defined, the number of rulings exchanged between Member States (push), the number of rulings issued in other Member States for which they have requested information (pull). The purpose of collection of information and of the monitoring report is to determine whether the framework set up for information exchange is utilized and to follow the development of the volume of information exchange over time and across Member States. The information will furthermore feed the retrospective evaluation and allow taking lessons learned and identify potential problems to be analysed in more detail in the evaluation for the design of further initiatives/suggestions for improvements.

### Evaluation

Member States and the Commission shall examine and evaluate the functioning of the administrative cooperation provided for in this Directive. To that purpose, Member States shall communicate to the Commission any relevant information necessary for the evaluation of the effectiveness, efficiency, coherence with other interventions with similar objectives, and continued relevance of administrative cooperation in accordance with this Directive. The Commission will prepare a retrospective evaluation of the functioning of the directive five years after entry into force.