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REPORT

From:	Presidency
To:	Permanent Representatives Committee/Council
No. prev. doc.:	9487/15 FISC 54
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Subject:	Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation - State of play

I. INTRODUCTION

1. The Commission presented its Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation¹ on 18 March 2015.
2. This proposal constitutes the key element of a Tax Transparency Package, which is the first step in the Commission agenda against corporate tax avoidance. It has been presented together with a proposal to repeal the Savings Directive as well as a Commission communication outlining a number of other initiatives to advance tax transparency.

¹ Doc. 7374/15 FISC 25 + ADD 1.

3. The purpose of this proposal is to build into the Directive 2011/16/EU on administrative cooperation in the field of taxation² (DAC) new rules on mandatory automatic exchange between tax administrations of information regarding advance cross-border tax rulings (ATRs) and advance pricing arrangements (APAs; a particular type of advance tax ruling used in the area of transfer pricing). The proposal also suggests to create a secure central directory by the Commission concerning information communicated in the framework of this proposal.
4. Currently, Article 9 of DAC indirectly provides for spontaneous exchange of information on tax rulings, but only in certain circumstances. The practical benefits of this provision remain very limited. While the issuance of ATRs and APAs to businesses for the purposes of legal certainty is a common practice in the EU, this over time has in some cases developed into strategic tax planning mechanisms which, dwelling on this practice, lead to (sometimes serious) erosion of tax base or tax loopholes (e. g. as a result of profit shifting).
5. The European Economic and Social Committee has delivered its opinion on 27 May 2015.

II. STATE OF PLAY

6. One of the priorities that the June 2014 European Council set for the Union for the next five years (in the field "A Union that empowers and protects all citizens") is to "guarantee fairness: by combatting tax evasion and tax fraud so that all contribute their fair share."³ Moreover, the December 2014 European Council concluded that "there is an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels."⁴

² OJ L 64, 11.3.2011, p. 1., as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ L 359, 16.11.2014, p. 1.)

³ Doc. EUCO 79/14 CO EUR 4 CONCL 2, point 2.

⁴ Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

7. The abovementioned Commission proposal is therefore high on the Council agenda and all Member States attach great importance to it, while supporting the main objectives of that proposal and calling for quick adoption of the new Directive. A number of Member States support almost all provisions of the Commission proposal.
8. During this Presidency term, four meetings of the Working Party on Tax Questions took place (31 March, 30 April, 21 May and 9 June 2015), where this legislative proposal was discussed. The Presidency has tabled two compromise proposals for the WPTQ meetings⁵, for discussion purposes, in order to better understand how the concerns raised by Member States could be addressed. This preparatory work will have to continue in the second semester of 2015.

III. SELECTED ISSUES FOR AN ORIENTATION DEBATE

9. In this context, the Presidency is of the view that, at the present stage, it would be appropriate that Council, while discussing the state of play with regard to this legislative proposal, exchanges views on a number of selected issues set out below,⁶ that have been identified so far. Such a debate could serve as further guidance to the incoming Presidency in drafting the compromise text that could eventually be tabled for a political agreement of the Council in the Autumn of 2015.

⁵ Doc. 8710/15 FISC 42 LIMITE and doc. 9487/15 FISC 54 LIMITE.

⁶ This report is not intended to cover absolutely all of the issues that delegations have raised nor prejudice the outcome of the ongoing technical work.

A. *Scope and timing of the information exchange and further alignment with the OECD work*

10. At the WPTQ meetings a debate arose with regard to the proposed scope of exchange of information, more particularly:
- i) On the scope of definitions of ATRs and APAs: the definitions proposed by the Commission seemed too broad for a number of delegations. The Presidency made a number of suggestions to address this issue, without undermining the objective of the Commission proposal to cover as wide a scope of the ATRs and APAs as possible. Some delegations raised concerns that too much room for interpretation (e.g. by introducing a distinction between binding and non-binding rulings) would create uncertainty. The Presidency therefore deemed it appropriate, for example, to narrow the scope to ATRs and APAs which are issued to specific tax payers or groups thereof, thus exempting from automatic exchange the commentaries of tax laws of a general nature.
 - ii) On time limits applicable to exchange of rulings: the Commission proposed that Member States exchange ATRs and APAs that have been issued 10 years before the introduction of the new rules. However, for many delegations this seemed to go beyond what is reasonably required for achievement of tax transparency purposes, also in the context of administrative burden that would be required (the 'retroactivity clause').
 - iii) On the starting date of the exchange of new rulings: for many Member States at least 12 months would be required to transpose the new rules into national legislation. Therefore the Presidency deemed it appropriate to bind the starting date of mandatory exchange of information with the transposition deadline (12 months from entry into force of the new amending Directive).

11. A number of delegations also expressed the wish that further work on a Presidency compromise should take into account the work conducted at the OECD level, more specifically, at the Forum on Harmful Tax Practices (FHTP). In 2013, OECD and G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS. OECD's FHTP has recently made good progress with regard to Action 5⁷ of the G20/OECD BEPS Action Plan. It is expected that the FHTP will report on the developments on this issue in its 2015 Progress Report, inter alia, on the application of the framework for compulsory spontaneous information exchange on rulings to member and associate countries' preferential regimes, with a view to starting to apply the framework following the FHTP's Autumn meeting.⁸
12. While the OECD work currently seems to cover a narrower scope of ATRs and APAs, it seems worthwhile to aim at an agreement within the EU of a higher standard, in order not to undermine the objectives of the Commission proposal. In this context, the progress achieved under the OECD agenda, in particular concerning the standard form that could be used for the automatic exchange of information, as well as the 'retroactivity' date (i.e. the past date, after which the issued APAs and ATRs would have to be exchanged in the future) could be used as a source of inspiration for an EU compromise. Any further alignment between the two approaches has to be carefully considered.

⁷ The text of the Action 5 reads as follows: "*Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.*"

⁸ OECD (2014), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. P. 63-64. DOI: <http://dx.doi.org/10.1787/9789264218970-en>

B. Exemption of bilateral and multilateral APAs with third countries

13. All Member States support that APAs have to fall under the scope of mandatory automatic exchange of information. However, a number of delegations believe it is important, for reasons of legal certainty and under a set of very strict conditions, to exclude from the proposed Directive the information exchanged with third countries when agreeing bilateral or multilateral APAs with third countries, which have been agreed before the entry into force of this Directive, under existing international treaties, where those treaties foresee stricter confidentiality standards than would be provided for in Directive 2011/16/EC, once this legislative proposal on automatic exchange of ATRs and APAs has been adopted.

C. Role of the Commission in the new mechanism

14. Besides a set of regular provisions relating to monitoring of the mechanism, the Commission proposal foresees the following main features with regard to its role in this new mechanism on automatic exchange of information:
- i) the initial information on the ATRs and APAs would have to be communicated not only to the other member States, but also to the Commission;
 - ii) the Commission would have to develop a central directory, where the information exchanged would be stored and the Commission would have access to all data in that directory;
 - iii) the Commission would, by way of the "comitology" procedure, develop a standard form and all other measures and practical arrangements that are required for the first stage of the automatic exchange of information;

- iv) in the Commission proposal, there is reference to the confidentiality rules, but less no clarity with regard to whether or not the Commission would be able to use the information to which it can access for any purposes other than monitoring and evaluation of the effective application of the new rules. It is clearly stated, however, that the information provided to the Commission under the new Directive would not discharge Member State from its obligations to notify any state aid to the Commission.

IV. THE WAY FORWARD

15. Against this background, the Permanent Representatives Committee/Council are invited to exchange views and give orientation for further work on the selected issues as set out in Part II of this report, and in particular on:

- the scope of the information to be exchanged;
- the dates from which information exchange should start (including "retroactivity" issues);
- the role of the European Commission in the information exchange mechanism.
