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**FISC 103**  
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## NOTE

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From: Presidency  
To: Council

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Subject: Mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

- *Political agreement*

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## I. INTRODUCTION

1. The Commission presented the abovementioned legislative proposal<sup>1</sup> on 21 June 2017. The main purpose of this initiative is to strengthen tax transparency and fight against aggressive tax planning by including into the existing Council Directive 2011/16/EU on administrative cooperation in the field of taxation<sup>2</sup> (DAC) new provisions, which would require Member States to:
  - lay down rules for mandatory disclosure to national competent authorities of potentially aggressive tax planning schemes with a cross-border element ("arrangements") by the "intermediaries" (e. g. tax advisers or other actors that are usually involved in designing, marketing, organising or managing the implementation of such "arrangements"); and

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<sup>1</sup> Doc. 10582/17 FISC 149 ECOFIN 572 IA 115 + ADD 1, ADD2, ADD 3.

<sup>2</sup> OJ L 64, 11.3.2011, p. 1, as amended.

- ensure that national tax authorities automatically exchange this information with the tax authorities of other Member States by using the mechanism provided for in DAC.
2. The issues covered by this legislative proposal are high on the EU and wider international agenda. In its conclusions of 25 May 2016, on an external taxation strategy and measures against tax treaty abuse, the Council of the EU invited the European Commission *"to consider legislative initiatives on Mandatory Disclosure Rules inspired by Action 12 of the OECD BEPS project<sup>1</sup> with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes"*.<sup>2</sup>
3. The Commission proposal broadly reflects the elements of BEPS Action 12, and work is ongoing in the OECD on the model mandatory disclosure rules covering tax avoidance arrangements. In this context, as well as in view of the upcoming meeting of the G20 Finance Ministers and Central Bank Governors on 17-20 March 2018 in Buenos Aires, it is important to recall that the March 2013 European Council has stated that "close cooperation with the OECD and the G20 is needed to develop internationally agreed standards for the prevention of base erosion and profit shifting".<sup>3</sup> Political agreement by the Council on this file would be an important development in this context.
4. One of the priorities that the June 2014 European Council set for the Union for the next five years is to "guarantee fairness: by combatting tax evasion and tax fraud so that all contribute their fair share."<sup>4</sup> 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."<sup>5</sup> In June 2016 the European Council stated that "the fight against tax fraud, evasion and avoidance, and against money laundering remains a priority,

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<sup>1</sup> The OECD Base Erosion and Profit Shifting (BEPS) Action Plan, was endorsed in 2015 by G20 Finance Ministers and G20 Heads of State, and it was welcomed by ECOFIN in its December 2015 "Council Conclusions on base erosion and profit shifting (BEPS) in the EU context (doc. 15150/15 FISC 185 ECOFIN 965, point 6).

<sup>2</sup> Doc. 9452/16 FISC 85 ECOFIN 502, point 12.

<sup>3</sup> Doc. EUCO 23/13 CO EUR 3 CONCL 2, point 6.

<sup>4</sup> Doc. EUCO 79/14 CO EUR 4 CONCL 2, point 2.

<sup>5</sup> Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

both within the EU and internationally"<sup>1</sup>, specifically referring to two recent amendments of DAC<sup>2</sup>.

5. The European Economic and Social Committee has delivered its opinion on this legislative proposal on 18 January 2018<sup>3</sup>, the opinion of the European Parliament has been delivered on 1 March 2018.<sup>4</sup>

## II. STATE OF PLAY

6. The Bulgarian Presidency has prioritized work on this file, building on considerable progress made by the Estonian Presidency at the Working Party on Tax Questions (WPTQ) and at the High Level Working Party on Tax Issues (HLWP). In its Tax Policy Roadmap, the Bulgarian Presidency committed to work towards achieving an early agreement on this dossier.<sup>5</sup> In 2018, four meetings of WPTQ took place (9 January, 26 January, 8 February and 26 February 2018) This file was also discussed at the HLWP meeting of 28 February 2018, as well as at the meeting of the Committee of Permanent Representatives (Part II) on 7 March 2018.
7. All delegations agree on the principle that disclosure of potentially aggressive tax planning arrangements of a cross-border dimension can contribute effectively to an environment of fair taxation in the internal market and that tax authorities share the disclosed information with their peers in other Member States.
8. At the meeting of the Committee of Permanent Representatives (Part II) on 7 March 2018, most of the delegations could support the Presidency compromise text presented at that meeting. However, some member States still had reservations on "hallmark C.1" (see Part III of this note) and one delegation had a reserve on the text of "hallmark E.3".

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<sup>1</sup> Doc. EUCO 26/16 Co EUR 5 CONCL 3, point 17.

<sup>2</sup> The Council extended the scope of DAC to automatic exchange of information on tax rulings and advance pricing arrangements (in 2015), and on country-by-country reports by large multinational groups of enterprises (in 2016).

<sup>3</sup> Doc. 5631/18 FISC 34 ECOFIN 60.

<sup>4</sup> Not yet published in the Official Journal.

<sup>5</sup> Doc. 5668/18 FISC 37, point 9.

9. Therefore, in view of the meeting of the ECOFIN Council and with the objective of addressing the remaining concerns of all delegations, the Presidency tables an updated compromise text, set out in Annex I to this note. Also, the Presidency suggests that the text of the Directive is accompanied by a statement of the Council (as set out in Annex II to this note) that would be inserted into the Council minutes upon adoption of this Directive.
10. The Presidency hopes that the key issue set out in Part III of this note (concerning "hallmark C.1") is resolved, that all delegations can accept the text of "hallmark E.3" and that a political agreement can be reached on the compromise text at the ECOFIN meeting in March 2018.

### **III. KEY ISSUE - "*Hallmark C.1*" on reportable arrangements**

11. One of the "hallmarks" (descriptions of reportable "arrangements") covers deductible cross-border payments with specific features (see Annex IV, preamble and Section C, point 1 of the Presidency compromise text of the draft Directive).
12. At the meeting of the Committee of Permanent Representatives (Part II) on 7 March 2018, essentially, the following issues were referred to in connection with "hallmark C.1":
  - a) Annex IV, point (C.1(b)(i)): some delegations could not accept, as one of the features of the arrangements falling under "hallmark C.1", that a jurisdiction of a recipient of such payments imposes no corporate tax, or imposes such tax at a zero rate. These delegations indicate that such a requirement, if not limited in scope, would cause an administrative burden disproportionate to the objectives sought by the amending Directive. Most of the delegations, however, were of the view that the absence of a corporate tax or zero rate corporate tax are attractive features for tax avoidance arrangements and "hallmark C.1" should definitely cover these cases;

- b) Annex IV, point (C.1(b)(ii)): a number of delegations could not, for the same reason, as set out above, support that "hallmark C.1" would cover arrangements involving jurisdictions, which impose corporate tax at a statutory rate lower than 35% of the average statutory corporate tax rate in the EU. In this context, many delegations recalled their objection of principle to a reference to a statutory corporate rate as an indicator of potential risk of aggressive tax planning. On the other hand, a number of delegations insisted that this feature should remain within the scope of the "hallmark C.1" (C.1(b)(ii));
- c) Annex IV, point (C.1(c)): one delegation requested to exclude from the scope of this point payments that benefit from "partial exemption from tax";
- d) Annex IV, point (C.1(d)): some delegations were of the view that, in order to reduce the administrative burden and focus the attention to the arrangements causing the highest risk, the scope of this arrangement should be limited only to "harmful preferential tax regimes". Some other delegations required that the scope of this point, and of the whole hallmark C.1 is maintained as broad as possible.

13. It is important to note that the scope of the "main benefit test", as described in the preamble of Annex IV, in the draft amending Directive, remains an important building block of the "hallmark C.1".<sup>1</sup> It is necessary to find the right balance when deciding which types of arrangements described in "hallmark C.1" should eventually be subject to the "main benefit test". Some delegations were of the view that, if the arrangements under "hallmark C.1" are not subject to the "main benefit test", the competent authorities would receive too much information, which would be too cumbersome to process and determine cases of tax avoidance. On the contrary, many delegations indicated, that it is useful to maintain as broad scope of "hallmark C.1" as possible, without applying the "main benefit test", so that all such information is exchanged between competent authorities automatically.

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<sup>1</sup> Essentially, the "main benefit test" is satisfied, and the arrangement becomes reportable, where the main or one of the main benefits that a person would expect to derive from the reportable arrangement falling under "hallmark C.1" is to obtain a tax advantage.

14. In view of March ECOFIN meeting, the Presidency hopes that the following compromise text on "hallmark C.1", as set out in Annex I to this note, could be acceptable to all delegations. It would consist of the following amendments:

- hallmark C.1 would include point (b)(i) (0% or absence of corporate tax) and the scope of this point would also be extended to cases of corporate tax rate of "almost zero";
- point b(ii) (statutory corporate tax rate lower than 35% of the average statutory corporate tax rate in the Union) would be deleted, given that most of the relevant arrangements would effectively be covered by the remaining part of "hallmark C.1";
- the scope of point (c) would cover only payments that benefit from full exemption from tax;
- the scope of point (d) would continue to cover all preferential tax regimes, and it would be subject to the "main benefit test";
- the arrangements covered by the points referred to above ((b)(i); (c) and (d)) would be subject to the "main benefit test";

#### **IV. THE WAY FORWARD**

15. Against this background, the Presidency hopes that the text, set out in Annex I to this note, together with the draft Council statement in Annex II, could be acceptable to all delegations, and pave the way to a political agreement at the ECOFIN Council.
16. The Council is therefore invited to:
  - reach a political agreement on the draft Directive, on the basis of the Presidency compromise text, set out in Annex I to this note, with a view to adopting the Directive, subject to legal-linguistic revision; and
  - request the insertion of a Council statement for the minutes, as set out in Annex II to this note, upon adoption of the Directive.

**DRAFT  
COUNCIL DIRECTIVE**

**amending Directive 2011/16/EU as regards mandatory automatic exchange of information in  
the field of taxation in relation to reportable cross-border arrangements**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 and 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .



- (1) In order to accommodate new initiatives in the field of tax transparency at the level of the Union, Council Directive 2011/16/EU<sup>1</sup> has been the subject of a series of amendments over the last years. In this context, Council Directive (EU) 2014/107<sup>2</sup> introduced a common reporting standard (CRS) for financial account information within the Union. The standard that was developed within the OECD prescribes for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for this exchange worldwide. Directive 2011/16/EU was amended by Council Directive (EU) 2015/2376<sup>3</sup> which provided for the automatic exchange of information on advance cross-border tax rulings and by Council Directive (EU) 2016/881<sup>4</sup> which provided for the mandatory automatic exchange of information on country-by-country reporting (CbCR) of multinational enterprises between tax authorities. Being aware of the use that anti-money laundering information can have for tax authorities, Council Directive (EU) 2016/2258<sup>5</sup> placed an obligation on to Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European Parliament and of the Council<sup>6</sup>. Although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to react to aggressive tax planning, there is still a need for reinforcing certain specific transparency aspects of the existing taxation framework.

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<sup>1</sup> Council Directive (EU) 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation (OJ L 64, 11.3.2011, p. 1).

<sup>2</sup> Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.2.2014, p. 1).

<sup>3</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1).

<sup>4</sup> Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3.6.2016, p. 8).

<sup>5</sup> Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16.12.2016, p. 1).

<sup>6</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

- (2) Member States find it increasingly difficult to protect their national tax bases from erosion as tax planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility of both capital and persons within the internal market. These structures commonly consist of arrangements which are developed across various jurisdictions and move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer's overall tax bill. As a result, Member States often experience considerable reductions in their tax revenues which hinder them from applying growth-friendly tax policies. It is therefore critical that Member States' tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. This information would enable those authorities to be able to promptly react against harmful tax practices and to close loopholes through enacting legislation or by undertaking adequate risk assessments and carrying out tax audits. No reaction by tax authorities against a reported scheme should not however imply clearance.
- (3) Considering that most of the potentially aggressive tax planning arrangements span across more than one jurisdiction, the disclosure of information about those arrangements would bring additional positive results where that information was also exchanged amongst Member States. In particular, the automatic exchange of information between tax authorities is crucial in order to provide these authorities with the necessary information to enable them to take action where they observe aggressive tax practices.

- (4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market, the Commission has been called on to embark on initiatives on the mandatory disclosure of potentially aggressive tax planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS). In this context, the European Parliament has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion. It is also important to note that in the “G7 Bari Declaration on fighting tax crimes and other illicit financial flows” of 13 May 2017, the OECD was asked to start discussing possible ways to address arrangements designed to circumvent reporting under the CRS or aimed at providing beneficial owners with the shelter of non-transparent structures, considering also model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.
- (5) It is necessary to recall how certain financial intermediaries and other providers of tax advice seem to have actively assisted their clients to conceal money offshore. Furthermore, although the CRS introduced by Council Directive (EU) 2014/107<sup>1</sup> is a significant step forward in establishing a tax transparent framework within the Union, at least in terms of financial account information, it can still be improved.

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<sup>1</sup> Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.2.2014, p. 1).

- (6) The disclosure of potentially aggressive tax planning arrangements of a cross-border dimension can contribute effectively to the efforts for creating an environment of fair taxation in the internal market. In this light, an obligation on intermediaries to inform tax authorities on certain cross-border arrangements that could potentially be used for aggressive tax planning would constitute a step in the right direction. In order to develop a more comprehensive policy, it would also be significant that as a second step, following disclosure, the tax authorities share information with their peers in other Member States. Such arrangements should also enhance the effectiveness of the CRS. In addition, it would be crucial to grant the Commission access to a sufficient amount of information so that it can monitor the proper functioning of this Directive. Such access to information by the Commission does not discharge a Member State from its obligations to notify any state aid to the Commission.
- (7) It is acknowledged that the disclosure of potentially aggressive cross-border tax planning arrangements would stand a better chance of achieving its envisaged deterrent effect where the relevant information reached the tax authorities at an early stage, in other words before the disclosed arrangements are actually implemented. To facilitate Member States' administrations, the subsequent automatic exchange of information on these arrangements could take place every quarter.
- (8) To ensure the proper functioning of the internal market and to prevent loopholes in the proposed framework of rules, the obligation for disclosure should be placed upon all actors that are usually involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or a series thereof as well as those who provide assistance or advice. It should not be ignored either that in certain cases, the obligation to disclose would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house. It would thus be crucial that, in such circumstances, tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning. It would therefore be necessary to shift the disclosure obligation to the taxpayer who benefits from the arrangement in these cases.

- (9) Aggressive tax planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive counter-measures by the tax authorities. Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. These indications are referred to as 'hallmarks'.
- (10) Given that the primary objective of such legislation should focus on ensuring the proper functioning of the internal market, it would be critical not to regulate at the level of the Union beyond what is necessary to achieve the envisaged aims. This is why it would be necessary to limit any common rules on disclosure to cross-border situations, namely situations in either more than one Member State or a Member State and a third country. In such circumstances, due to the potential impact on the functioning of the internal market, one can justify the need for enacting a common set of rules, rather than leaving the matter to be dealt with at the national level. A Member State could take further national reporting measures of a similar nature, but any information collected in addition to what is reportable in accordance with the Directive should not be communicated automatically to the competent authorities of the other Member States. That information could be exchanged on request or spontaneously according to applicable rules.
- (11) Considering that the disclosed arrangements should have a cross-border dimension, it would be important to share the relevant information with the tax authorities in other Member States in order to ensure the maximum effectiveness of this Directive in deterring aggressive tax planning practices. The mechanism for the exchange of information in the context of advance cross-border rulings and advance pricing arrangements should also be used to accommodate the mandatory and automatic exchange of disclosed information on potentially aggressive cross-border tax planning arrangements amongst tax authorities in the Union.

- (12) In order to facilitate the automatic exchange of information and enhance the efficient use of resources, exchanges should be carried out through the common communication network (CCN) developed by the Union. In this context, information would be recorded on a secure central directory on administrative cooperation in the field of taxation. Member States should have to implement a series of practical arrangements, including measures to standardise the communication of all requisite information through creating a standard form. This should also involve specifying the linguistic requirements for the envisaged exchange of information and accordingly upgrading the CCN.
- (13) In order to minimise costs and administrative burdens both for tax administrations and intermediaries and ensure the effectiveness of this Directive in deterring aggressive tax planning practices, the scope of automatic exchange of information in relation to reportable cross-border arrangements within the Union should be consistent with international developments. A specific hallmark should be introduced to address arrangements designed to circumvent reporting obligations involving automatic exchanges of information. For the purposes of this hallmark, agreements on the automatic exchange of financial account information under the Common Reporting Standard (CRS) of the OECD should be treated as equivalent to the reporting obligations laid down in Article 8(3a) and Annex I of Council Directive (EU) 2014/107. In implementing the parts of this Directive addressing CRS avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures, Member States could use the work of the OECD, and more specifically its Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, as a source of illustration or interpretation, in order to ensure consistency of application across Member States, insofar these texts are aligned with the provisions of EU law.

**13a) While direct taxation remains within the competence of Member States, it is appropriate to refer to a corporate tax rate of zero or almost zero, solely for the purpose of clearly defining the scope of the hallmark that covers arrangements involving cross-border transactions, which should be reportable under Directive 2011/16/EU by intermediaries or, as appropriate, taxpayers, and about which the competent authorities should exchange information automatically. Moreover, it is appropriate to recall that aggressive tax planning cross-border arrangements, the main purpose or one of the main purposes of which is obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are subject to the general anti abuse rule as set out in Article 6 of Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.**

(14) In order to improve the prospects for effectiveness of this Directive, Member States should lay down penalties against the violation of national rules that implement this Directive and ensure that these penalties actually apply in practice, that they are proportionate and have a dissuasive effect.

(15) In order to ensure uniform conditions for the implementation of this Directive and in particular for the automatic exchange of information between tax authorities, implementing powers should be conferred on the Commission to adopt a standard form with a limited number of components, including the linguistic arrangements. For the same reason, implementing powers should also be conferred on the Commission to adopt the necessary practical arrangements for upgrading the central directory on administrative cooperation in the field of taxation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>1</sup>.

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<sup>1</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (16) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>1</sup>. Any processing of personal data carried out within the framework of this Directive must comply with Directive 95/46/EC of the European Parliament and of the Council<sup>2</sup> and Regulation (EC) No 45/2001.
- (17) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (18) Since the objective of this Directive, namely to improve the functioning of the internal market through discouraging the use of cross-border aggressive tax planning arrangements, cannot sufficiently be achieved by the Member States acting individually in an uncoordinated fashion but can rather be better achieved at Union level by reason of the fact that it targets schemes which are developed to potentially take advantage of market inefficiencies that originate in the interaction amongst disparate national tax rules, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, especially considering that it is limited to arrangements of a cross-border dimension of either more than one Member State or a Member State and a third country.
- (19) Directive 2011/16/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

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<sup>1</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>2</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).



## *Article 1*

Directive 2011/16/EU is amended as follows:

(1) Article 3 is amended as follows:

(a) point 9 is amended as follows:

(i) point (a) is replaced by the following:

"(a) for the purposes of Article 8(1) and Articles 8a, 8aa and 8aaa, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. For the purposes of Article 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State;"

(ii) point (c) is replaced by the following:

"(c) for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a, 8aa and 8aaa, the systematic communication of predefined information provided in points (a) and (b) of this point."

(b) the following points are added:

"18. "cross-border arrangement" means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions are met:

- (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
- (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
- (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

For the purposes of points 18 - 26 of Article 3, Article 8aaa and Annex IV, an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part.

19. "reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV.

20. "hallmark " means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV.

21. "intermediary" means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could reasonably not be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, a person may refer to all relevant facts and circumstances as well as available information and its relevant expertise and understanding.

In order to be an intermediary, a person shall meet at least one of the following additional conditions:

- (a) be resident for tax purposes in a Member State;
  - (b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
  - (c) be incorporated in, /or governed by the laws of, a Member State;
  - (d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.
22. "relevant taxpayer" means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

23. for the purposes of Article 8aaa, "associated enterprise" means a person who is related to another person in at least one of the following ways:
- (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person ;
  - (b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights;
  - (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital ;
  - (d) a person is entitled to 25% or more of the profits of another person.

If more than one person participates, as aforesaid, in the management, control, capital or profits of the same person , all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as aforesaid, in the management, control, capital or profits of more than one person , all persons concerned shall be regarded as associated enterprises.

For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%.

An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person .

24. [...]
25. “marketable arrangement” means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised .
26. “bespoke arrangement” means any cross-border arrangement that is not a marketable arrangement.

- (2) in Section II of Chapter II the following Article is added:

*"Article 8aaa*

Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements

1. Each Member State shall take the necessary measures to require the intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within thirty days beginning:
  - (a) on the day after the reportable cross-border arrangement is made available for implementation, or
  - (b) on the day after the reportable cross-border arrangement is ready for implementation, or
  - (c) when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first.

Notwithstanding the first subparagraph, intermediaries referred to in the second subparagraph of Article 3(21) shall also be required to file information within thirty days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

- 1a. In the case of marketable arrangements, Member States shall take the necessary measures to require that a periodic report is made by the intermediary every 3 months providing an update which contains new reportable information as referred to in paragraph 6, points (a), (d), (g) and (h) that has become available since the last report was filed.

- 1b. Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:
- (a) in the Member State where the intermediary is resident for tax purposes ;
  - (b) in the Member State where the intermediary has a permanent establishment, through which the services with respect to the arrangement are provided;
  - (c) in the Member State which the intermediary is incorporated in or governed by the laws of;
  - (d) in the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.
- 1c. Where pursuant to paragraph 1b there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if it has a proof, in accordance with national law, that the same information has been filed in another Member State.
2. Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their disclosure obligations under paragraph 2a.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.

- 2a. Each Member State shall take the necessary measures to require that, where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph 2, the obligation to file information on a reportable cross-border arrangement shall lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.
- 2b. The relevant taxpayer with whom lies the reporting obligation, shall file the information within thirty days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information shall be filed only with the competent authorities of the Member State that features first in the list below:

- (i) the Member State where the relevant taxpayer is resident for tax purposes;
- (ii) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement ;
- (iii) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
- (iv) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.



- 2c. Where pursuant to paragraph 2b there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has a proof, in accordance with national law, that the same information has been filed in another Member State.
3. Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement shall lie with all intermediaries involved in the same reportable cross-border arrangement.

An intermediary shall be exempt from filing the information only to the extent that it has a proof, in accordance with national law, that the same information referred to in paragraph 6 has already been filed by another intermediary.

- 3a. Each Member State shall take the necessary measures to require that, where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that shall file information in accordance with paragraph 2a is the one that features first in the list below:
- (i) The relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;
  - (ii) The relevant taxpayer that manages the implementation of the arrangement.

Any relevant taxpayer shall only be exempt from filing the information to the extent that it has a proof, in accordance with national law, that the same information referred to in paragraph 6 has already been filed by another relevant taxpayer.

- 3b. Each Member State may take the necessary measures to require that each relevant taxpayer will file information about their use of the arrangement to the tax administration in each of the years for which they use it.
4. Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of this Directive . Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020 .
5. The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 4 of this Article shall, by means of an automatic exchange, communicate the information specified in paragraph 6 of this Article to the competent authorities of all other Member States, in accordance with the practical arrangements adopted pursuant to Article 21 .

6. The information to be communicated by a Member State under paragraph 5 shall contain the following, as applicable:
- (a) the identification of intermediaries and relevant taxpayers including their name, date and place of birth (in case of an individual), residence for tax purposes, and Taxpayer Identification Number (TIN) and, where appropriate, the persons who are associated enterprises to the relevant taxpayer;
  - (b) details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;
  - (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which they are commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy;
  - (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
  - (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
  - (f) the value of the reportable cross-border arrangement ;
  - (g) the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;
  - (h) the identification of any other person in Member State, if any, likely to be affected by the reportable cross-border arrangement indicating to which Member States such person is linked.

- 6a. Absence of reaction by a tax administration to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of this arrangement.
7. To facilitate the exchange of information referred to in paragraph 5 of this Article, the Commission shall adopt the practical arrangements necessary for the implementation of this Article, including measures to standardise the communication of the information set out in paragraph 6 of this Article, as part of the procedure for establishing the standard form provided for in Article 20(5).
8. The Commission shall not have access to information referred to in points (a), (c) and (h) of paragraph 6.
9. The automatic exchange of information shall take place within one month from the end of the quarter in which the information was filed. The first information shall be communicated by 31 October 2020 ."

(3) in Article 20, paragraph 5 is replaced by the following:

"5. The Commission shall adopt standard forms, including the linguistic arrangements, in accordance with the procedure referred to in Article 26(2), in the following cases:

- (a) for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;
- (b) for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8aaa before 30 June 2019 .

Those standard forms shall not exceed the components for the exchange of information listed in Articles 8a(6) and 8aaa(6), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a and 8aaa respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a and 8aaa in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union."

(4) in Article 21, paragraph 5 is replaced by the following:

"5. The Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of paragraphs 1 and 2 of Article 8a shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December 2019 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of paragraphs 5, 6 and 7 of Article 8aaa shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8aaa(8). The necessary practical arrangements shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in paragraphs 1 and 2 of Article 8a and paragraphs 5, 6 and 7 of Article 8aaa shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements."

(5) in Article 23, paragraph 3 is replaced by the following:

"3. Member States shall communicate to the Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in Articles 8, 8a, 8aa and 8aaa as well as the practical results achieved. The Commission shall, by means of implementing acts, adopt the form and the conditions of communication for that yearly assessment. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2)."

(6) Article 25a is replaced by the following:

*"Article 25a*

Penalties

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8aaa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."

(7) Article 27 is replaced by the following:

“Article 27

Reporting

1. Every five years after 1 January 2013, the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council.
2. Every two years after 1 July 2020 , the Member States and the Commission shall evaluate the relevance of Annex IV and the Commission shall present a report to the Council. That report shall, if appropriate, be accompanied by a legislative proposal.”

(8) Annex IV, the text of which is set out in the Annex to this Directive, is added.



## *Article 2*

1. Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 1 July 2020 .

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## *Article 3*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

## *Article 4*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council*

*The President*

## "ANNEX IV HALLMARKS

Generic hallmarks under category A and specific hallmarks under category B and paragraph 1 point (b)(i), ~~(b)(ii)~~, (c) and (d) of category C may only be taken into account where they fulfil the "main benefit test".

### Main benefit test

The test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

In the context of hallmark under category C paragraph 1, the presence of conditions set out in category C, paragraph 1 points b(i), ~~b(ii)~~, (c) or (d) can not alone be a reason for concluding that an arrangement satisfies the main benefit test.

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and this fee is fixed by reference to:
  - (a) the amount of the tax advantage derived from the arrangement; or
  - (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
  - (a) the recipient is not resident for tax purposes in any tax jurisdiction;
  - (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
    - i. does not impose any corporate tax or imposes corporate tax at **the rate of zero or almost zero** rate; or
    - ~~ii. imposes corporate tax at a statutory corporate tax rate lower than 35% of the average statutory corporate tax rate in the Union, as it stands at the end of the previous calendar year and the main purpose of the arrangement, having regard to all relevant facts and circumstances, is obtaining a tax advantage; or~~
    - iii. is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the Organisation for Economic Co-operation and Development as non-cooperative ;
  - (c) the payment benefits from a **partial or** full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
  - (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes ;
2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
  4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.
- D. Specific hallmarks concerning automatic exchange of information and beneficial ownership
1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of financial account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. These arrangements include at least the following:
    - (a) the use of an account, product or investment that is not, or purports not to be, a financial account, but has features that are substantially similar to those of a financial account;
    - (aa) the transfer of financial accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of financial account information with the State of residence of the relevant taxpayer;
    - (b) the re-classification of income and capital into products or payments that are not subject to the automatic exchange of financial account information;
    - (c) the transfer or conversion of a financial institution or a financial account or the assets therein into a financial institution or a financial account or assets not subject to reporting under the automatic exchange of financial account information;

- (d) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of financial account information;
  - (e) arrangements that undermine or exploit weaknesses in the due diligence procedures used by financial institutions to comply with their obligations to report financial account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation or with weak transparency requirements for legal persons or legal arrangements.
2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
- a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
  - b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
  - c) where the Beneficial Owners of such persons, legal arrangements or structures, as defined in Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, are made unidentifiable.

- E. Specific hallmarks concerning transfer pricing
1. An arrangement which involves the use of unilateral safe harbour rules.
  2. An arrangement involving the transfer of hard-to value intangibles. The term hard-to-value intangibles (HTVI) covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
    - (i) no reliable comparables exist, and
    - (ii) at the time the transactions was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
  3. An arrangement involving ~~an significant~~ intra-group cross-border transfer of functions and/or risks and/or assets, if ~~such transfer is estimated to result in decline of 50 % or more of the earnings before interests and taxes (EBIT) of the jurisdiction where the functions, risks and/or assets are transferred out of within a period of three tax years~~ **the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.**



**DRAFT COUNCIL STATEMENT TO THE MINUTES**

To ensure an adequate level playing field with regard to the effective exchange of information and full transparency regarding circumvention schemes of Common Reporting Standard (CRS), the Council expresses its firm political support to an action at the international level for a general implementation of the Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Structures.

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