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**WORKING PAPER**

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**MEETING DOCUMENT**

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From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation – DAC)
Subject:	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

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Delegations will find attached a document with a view to the meeting of the Working Party on Tax Questions (Direct Taxation - DAC) on 26 February 2018.

SELECTED PROVISIONS - PRESIDENCY COMPROMISE - AFTERNOON 26 FEBRUARY  
2018 - FOR DISTRIBUTION

Delegations will find in Annex the Presidency compromise proposal on selected provisions (recitals and "definitions") of DAC6 (with doc. WK 2167/18 as a basis). New text is marked in **bold and underlined**, deletions are marked with ~~striketrough~~.

Recitals:

[...]

- (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 ~~is~~could be exchanged on request or spontaneously according to applicable rules.

[...]

- (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 should 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.

- (13a) [NOTE: text of this recital will be turned into a Council Statement for the minutes, upon adoption of the Directive]~~To ensure an adequate level playing field with regard to the effective exchange of information and full transparency regarding circumvention schemes of CRS legislation, the European Union 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.~~

[...]

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 2011/16/EU is amended as follows:

- (1) Article 3 is amended as follows:

[...]

- (b) the following points are added:

[...]

20. "hallmark ", as listed in Annex IV, means a characteristic or feature of a cross-border arrangement (or series thereof) that present an indication of tax avoidance or evasion. that presents an indication of tax avoidance or abuse in order to capture potentially aggressive tax arrangements.

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.

Notwithstanding the second subparagraph, any person shall have the right to provide evidence that such person did not know or 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;
- (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.

[...]

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, ~~or~~ 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, ~~or~~ 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 .

[...]