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WORKING PAPER

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MEETING DOCUMENT

From:	Commission Services
To:	Working Party on Tax Questions (Direct Taxation – DAC)
Subject:	Proposal for a 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 - Presentation by the Commission

Delegations will find attached a presentation by the Commission in view of the meeting of the Working Party on Tax Questions (Direct Taxation - DAC) on 14 July 2017.

Proposal for a Directive

Mandatory Disclosure of Potentially Aggressive Tax Planning Arrangements

Amendment to the DAC

First reactions – critical elements

- Most MS expressed support for the initiative
- **Key points raised:**
 - ❖ Definitions - Hallmarks
 - ❖ Distinction between tax avoidance and evasion
 - ❖ Effect on 3rd countries
 - ❖ De-minimis rule / SMEs
 - ❖ Data protection issues
 - ❖ Administrative burden – usefulness of information
 - ❖ Exchange of information – two step approach
 - ❖ Delegated act

Problem

- **Aggressive tax planning usually evolves faster than the thinking of the legislator**
- Aggressive tax planning schemes are often a step ahead of existing anti-tax avoidance and transparency measures
- Tax authorities learn about questionable schemes **late** when the negative tax implications have already done harm to the internal market

The New Initiative

- **Policy objective**
 - ❖ To increase the effectiveness of tax authorities in tackling cross-border tax avoidance and evasion in the internal market
- **How?**
 - ❖ By disclosing potentially aggressive tax planning schemes to the tax authorities –**before implementation**; &
 - ❖ **Sharing** information with all Member States
- This proposal **amends the DAC**

Material Scope (i)

- All schemes that include at least one indicator – '**Hallmark**'
- The **hallmarks** determine what arrangements are reportable
 - ❖ There is **no presumption of tax avoidance**
 - ❖ The **authorities may determine** whether there is an illegitimate tax practice based on the information
- **No action** by the authorities **does not mean clearance**
- Taxes covered coincide with the scope of the DAC

Material Scope (ii) Categories of Hallmarks

- Generic hallmarks & some of the specific ones require an additional "**main benefit**" test;
- **Main benefit** refers to obtaining a tax advantage, including through the way that the scheme is structured

Material Scope (iii)

- **Only cross-border arrangements** are reportable:
 - ❖ Two or more Member States; or
 - ❖ One Member State and a third country
- The focus is on implications on the internal market (regardless of possible involvement of a third country)

Material Scope (iv) Examples of Hallmarks

- **Generic hallmarks + "main benefit" test**
 - ❖ **Premium or contingency fee** for the intermediary fixed by reference to the amount of the tax advantage (incl. refunds if the tax advantage is not achieved)
 - ❖ **Standardised mass-marketed** schemes promoted without customisation

Material Scope (v) Examples of Hallmarks

- **Specific hallmarks + "main benefit" test**
 - ❖ Use of **losses** to obtain a tax advantage
 - ❖ **Round-tripping of funds**
 - ❖ **Converting** income into other categories of revenue taxed at lower level

Material Scope (vi) Examples of Hallmarks

- **Specific hallmarks – cross-border transactions**
 - ❖ **Royalties** leave the internal market without WHT towards a zero-rate third country or low-rate patent box regime within the EU
 - ❖ **Hybrid mismatches – deemed PE**
 - ❖ **Assets depreciated in more than one jurisdiction**

Material Scope (vii) Examples of Hallmarks

- **Specific hallmarks – AEoI**
 - ❖ Use of **jurisdictions not bound** by Union legislation or AEoI agreements
 - ❖ **Structures not captured** by Union legislation or agreements on AEoI
 - ❖ Jurisdictions with **weak anti-money laundering regimes**

Material Scope (viii) Examples of Hallmarks

- **Specific hallmarks – Transfer Pricing**
 - ❖ **Non-conformity** with ALP or OECD Transfer Pricing Guidelines
 - ❖ Rulings under DAC 3

Personal Scope – Who is liable to disclose?

- Primary reporting obligation is with the **Intermediary**
Who is an Intermediary?
- The reporting obligation is shifted to the **Taxpayer** if:
 - ❖ **No intermediary** (in-house schemes)
 - ❖ **Waiver** (professional secrecy)
 - ❖ **Outside the EU**
- What if there is **more than one** Intermediaries or Taxpayers?

Timing – When is the reporting due?

- **Intermediaries: before an arrangement is implemented,** within 5 days after available for implementation or after the first step
- **Taxpayers:** is given the right to report until slightly after – within 5 days after implementation

Exchange of Information

- The disclosed information is exchanged **automatically**
- Exchanges take place **after each quarter** of the year
- It is made **available to all Member States** on a Central Directory set up by the Commission
- The **Commission** has **limited access** to this information in order to monitor the functioning of the Directive

Penalties

- Design is left to Member States – national law
- Penalties shall be effective, proportionate & dissuasive

Information to the Commission

- Information for evaluating effectiveness in **combating tax avoidance and evasion** (Art. 23(2))
- Yearly assessment of **AEoI** (Art. 23(3))
- **Statistical data** for evaluation of the Directive (Art. 23(4))

Retroactivity

- Unlike DAC 3, there is **no retroactive effect**

However:

- Contracts concluded **after** Member States have reached **political agreement** on this Directive are captured
- Existing arrangements become reportable if they are modified subsequently
- Proposed application as of 1 January 2019

Reporting

- The Commission shall report on the application of the Directive to Parliament and the Council
- **Every 5 years after 1 January 2013:**
 - by 1 Jan. 2018;
 - 1 Jan. 2023, etc.