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## **MEETING DOCUMENT**

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From:	Presidency
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 - Presidency compromise (ANNEX IV)

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Delegations will find attached a document from the Presidency in view of the Working Party on Tax Questions (Direct Taxation - DAC) on 25 October 2017.

## "ANNEX IV HALLMARKS

Generic hallmarks under category A and specific hallmarks under category B 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 ~~that~~**which, having regard to all relevant facts and circumstances,** a person may expect to derive from an arrangement ~~is~~ the obtaining of a tax advantage.

**[The test will be satisfied if it can be established that the main benefit that a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage]**

~~The test will be satisfied where the main benefit of an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured.~~

#### Presidency comments:

- *Amendments at the request of some delegations. Two alternative options for consideration.*

### **A. Generic hallmarks linked to the main benefit test**

1. An arrangement ~~or series of arrangements~~ where the **relevant** taxpayer 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 ~~or series of arrangements~~ where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement ~~or series of arrangements~~ and this fee is fixed by reference to:
  - (a) the amount of the tax advantage derived from the arrangement ~~or series of arrangements~~; or
  - (b) whether or not a tax advantage is actually derived from the arrangement ~~or series of arrangements~~. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement ~~or series of arrangements~~ was not partially or fully achieved.

3. ~~An arrangement or series of arrangements that involves the use of standardised documentation including standard forms. The documentation is commonly available to more than one taxpayer and does not need to be tailor-made to enable a taxpayer to implement the arrangement or series of arrangements.~~ **An arrangement that has a standardised structure and is commonly available to more than one relevant taxpayer without a need to be customised for implementation.**

*Presidency comments:*

- *Amendments at the request of some delegations*

## **B. Specific hallmarks ~~which may be linked to the main benefit test~~**

1. An arrangement or series of arrangements whereby the **relevant** taxpayer uses losses to reduce their tax liability, including through the transfers of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. ~~An arrangement or series of arrangements 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 or series of arrangements 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.~~

*Presidency comments:*

- *Amendments at the request of some delegations*

## **C. Specific hallmarks related to cross-border transactions**

1. An arrangement ~~or series of arrangements~~ that involves deductible cross-border payments made between two or more ~~related parties~~ **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~~
    - ii. ~~imposes corporate tax at zero rate or at a statutory corporate tax rate lower than half of the average statutory corporate tax rate in the Union, as it stands at the end of the previous calendar year; or~~
    - iii. is included in a list of certain third-country jurisdictions which have been assessed by Member States collectively or within the framework of ~~an international organisation~~ **the Organisation for Economic Co-operation and Development** as **non-cooperative or** having harmful tax regimes.

~~(e) 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;~~

Presidency comments:

- *Compromise wording proposal to target more precisely situations related to aggressive tax planning.*

~~(e)(cd)~~ there is an **unresolved** mismatch within the scope of Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, which was adopted by the Council of Ministers on 23 May 2017.

Presidency comment:

- *Point (d) should apply only until ATAD2 is fully implemented in 2022.*

2. ~~The same asset is subject to depreciation in more than one jurisdiction.~~ **Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.**
3. More than one **relevant** taxpayer can claim relief from double taxation in respect of the same item of income **or capital** in different jurisdictions.
4. There is an arrangement ~~or series of arrangements~~ 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.

Presidency comments:

- *Amendments at the request of some delegations*

#### **D. Specific hallmarks concerning automatic exchange of information agreements in the Union**

An arrangement ~~or series of arrangements~~ which circumvent Union legislation or agreements on the automatic exchange of information, including agreements with third countries, and that have the effect of avoiding the reporting **of income** to the State of tax residence of the **relevant** taxpayer. These arrangements may include:

- (a) the use of jurisdictions that are not bound by the Union legislation or agreements on the automatic exchange of information;
- (b) the re-classification of the types of income into categories that are not subject to the automatic exchange of information;
- (c) the use of legal entities and structures that are not captured by either the Union legislation or agreements on the automatic exchange of information;

- (d) the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation. This includes where there are a lack of rules for identifying the beneficial ownership of legal entities, including trusts, foundations and special purpose vehicles or where there is a use of nominees or powers of attorney to conceal the identity of the beneficial owner.

Presidency comment:

*This section will be discussed further after consulting with OECD and having seen the outcome of WP10 discussions in October.*

**E. Specific hallmarks concerning transfer pricing**

1. An arrangement ~~or series of arrangements~~ which does not conform with the arm's length principle ~~or with the OECD transfer pricing guidelines~~, including the **rules on the** allocation of profit ~~between different members of the same corporate group~~.
2. An arrangement ~~or series of arrangements~~ which **although it** falls within the scope of the automatic exchange of information on advance cross-border rulings, **benefits from a waiver under Article 8a and** ~~but which is not reported or exchanged."~~

Presidency comments:

- *Paragraph 1: amendments following discussion at the last meeting*
- *Paragraph 2: this wording explains better the Commission's intentions.*