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WORKING PAPER

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WORKING DOCUMENT

From:	Presidency
To:	High Level Working Party
Subject:	DAC6 - Presidency note in view of preparation for ECOFIN

Delegations will find attached a document from the Presidency in view of the meeting of the High Level Working Party (Taxation) on 28 February 2018.

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 ("DAC 6")

State of play and preparation of discussion in ECOFIN

I. INTRODUCTION

1. The Commission presented the abovementioned legislative proposal¹ 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 taxation² (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
 - 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 project³ with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes*".⁴

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

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 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).

⁴ Doc. 9452/16 FISC 85 ECOFIN 502, point 12.

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 the 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".⁵
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."⁶ 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."⁷ In June 2016 European Council stated that "the fight against tax fraud, evasion and avoidance, and against money laundering remains a priority, both within the EU and internationally"⁸, specifically referring to two recent amendments of DAC, whereby 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 large multinational groups of enterprises (in 2016).
5. The European Economic and Social Committee has delivered its opinion on this legislative proposal on 18 January 2018⁹, the opinion of the European Parliament is still pending.¹⁰

⁵ Doc. EUCO 23/13 CO EUR 3 CONCL 2, point 6.

⁶ Doc. EUCO 79/14 CO EUR 4 CONCL 2, point 2.

⁷ Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

⁸ Doc. EUCO 26/16 Co EUR 5 CONCL 3, point 17.

⁹ Doc. 5631/18 FISC 34 ECOFIN 60.

¹⁰ NOTE: vote in the EP Plenary is scheduled for 1 March 2018.

II. STATE OF PLAY

6. Bulgarian Presidency has prioritized work on this file, building on considerable progress made by 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, Bulgarian Presidency committed to work towards achieving an early agreement on this dossier.¹¹ In 2018, four meetings of WPTQ took place (9 January, 26 January, 8 February and 26 February 2018).
7. To be noted, all delegations agree on the principle that 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 and that, as a second step, following disclosure, the tax authorities share information with their peers in other Member States.
8. At the meeting of the WPTQ of 26 February 2018, some delegations still had reservations that blocked them from accepting the Presidency compromise text discussed at that meeting¹².
9. With the objective of addressing the remaining concerns of all delegations, in time for March ECOFIN meeting, the Presidency tables an updated compromise text, set out in doc. WK 2454/2018 LIMITE, for discussion and endorsement at HLWP of 28 February 2018.
10. In view of the upcoming meeting of ECOFIN Council in March 2018, the Presidency also hopes to resolve the key issue set out in part III of this note.

¹¹ Doc. 5668/18 FISC 37, point 9.

¹² Doc. WK 2167/2018 and WK 2394/2018 LIMITE.

III. KEY ISSUE - "*Hallmark C.1*" (*Annex IV: preamble and Section C, point 1*)

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).
12. At the WPTQ meeting of 26 February, essentially, the following issues were raised in connection with "hallmark C.1":
 - a) 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 absence of corporate tax or zero rate corporate tax are often very attractive features for tax avoidance arrangements and hallmark C.1 should definitely cover these cases.
 - b) a number of delegations could not support that "hallmark C.1" would cover the arrangements that involves jurisdictions which impose corporate tax at a statutory rate lower than 35% of the average statutory corporate tax rate in the EU. On the contrary, some delegations, while insisting that this feature remains within the scope of the "hallmark C.1", also required to raise the percentage to 40%.
 - c) some delegations could not agree that the scope of "hallmark C.1" is limited only to arrangements that satisfy the "main benefit test" as described in Annex IV, in the draft amending Directive (essentially, the "main benefit test" is satisfied 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). These delegations indicated, that, for the purposes of fighting aggressive tax planning (tax avoidance), it is useful to maintain broad scope of "hallmark C.1", so that all available information on such arrangements is exchanged between competent authorities automatically. On the contrary, some delegations were of the view that, if scope of "hallmark C.1" is not reduced, the competent authorities would receive too much information, which would be too difficult to process and further complicate determining cases of tax avoidance.

13. In view of March ECOFIN meeting, the Presidency wishes to explore whether the following compromise text on "hallmark C.1", as set out in doc. 2454/2018, could be acceptable to all delegations, in the spirit of a compromise:
- hallmark C.1 would include both points (b)(i) (0% or absence of corporate tax) and b(ii) (statutory corporate tax rate lower than 35% of the average statutory corporate tax rate in the Union), as well as point b(iii);
 - scope of point (d) would be limited to harmful preferential tax regimes, but this point is not subject to the "main benefit test";
 - the remainder of hallmark "C.1" would be subject to the "main benefit test".

IV. THE WAY FORWARD

14. Against this background, the Presidency hopes that the text, set out in doc. WK 2454/2018 LIMITE, could be acceptable to all delegations, with a view to reaching an agreement in the spirit of a compromise.
15. The delegations, meeting in the HLWP, are therefore invited to lift the remaining reserves on the Presidency compromise text, so that at ECOFIN level all Member States are in a position to support the compromise text, set out in Doc. WK 2454/2018 LIMITE.
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