Council of the European Union
General Secretariat

Brussels, 21 September 2017

WK 9978/2017 INIT

LIMITE

FISC
ECOFIN
IA

MEETING DOCUMENT

From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation – DAC)
Subject:	Proposal for mandatory automatic exchange of information on reportable cross-border tax arrangements - Examination of the proposal

Delegations will find attached a document from the Presidency in view of the meeting of the Working Party on Tax Questions (Direct Taxation - DAC6) on 27 September 2017.

Proposal for Mandatory Automatic Exchange of Information on Reportable Cross-Border Tax Arrangements

Examination of the proposal

1. In July, High Level Working Party (Taxation) and Working Party on Tax Questions – Direct Taxation had exchange of views accompanied with presentations from Commission on the Commission's proposal for a mandatory automatic exchange on reportable cross-border tax arrangements (hereinafter DAC6).

2. In order to continue the work in September, EE PRES invited all the delegations to submit their comments by 1st of September. In response to that request, 12 Member States submitted their comments.

3. A number of contributions included re-drafting suggestions concerning certain detailed points. These amendments will be discussed in the regular course over a PRES compromise text.

4. However, major part of the Member States´ comments are substantial and sometimes contradictory, giving ground to a need to discuss them in more detail before going into drafting exercise.

5. Annex I of this room document gives an overview of the main points raised in Member States' contributions for each of the key elements of the proposed directive: material scope, personal scope, exchange of information, timing for reporting and exchanging information, penalties, retroactivity, timeframe for implementation, delegated acts, hallmarks etc.

6. In order to facilitate meaningful discussion, the meeting is expected to begin with examination of the impact assessment and end with the Commission presentation of examples on the workability of the hallmarks.

7. Delegations are invited to submit further written comments by 9th of October.

8. Taking into account all the discussions and written comments, EE PRES intends to propose a first compromise text for the next meeting in the end of October.

ANNEX I

Compilation of Member States' Comments[1]

1. Material scope

- Concept of a "cross-border arrangement" – Article 3 point 18

1.	Proposal for a ***de minimis* threshold**, to exclude reporting of immaterial cases and avoid over-burdening smaller businesses.
2.	The notion of "*arrangement*" should be defined in a more accurate and robust manner (see **unconstitutionality** of the definition of abusive tax planning schemes as it stood in the 2014 Finance Bill).
3.	It is recommended to define "arrangement" in detail. Consider using the word "transaction".
4.	The term "cross-border arrangements" should be more specific.
5.	o Suggestion to refer to "participants in" rather than "parties to" (in the context of "reportable arrangements" and "cross-border arrangements"), to ensure that indirect conduct is also captured. o The reference to "tax-related impact" may not capture all arrangements that have no directly identifiable tax advantage or those that conceal the beneficial owner of an asset. o If an impact is required for an arrangement to be reportable, it may be possible to circumvent the rules by claiming there is no impact. Suggestion to refer to "**expected** tax related impact".

- Concept of a "reportable cross-border arrangement" – Article 3 point 19

1.	Proposed addition to the rule (in bold letters and in line with the request for a *de minimis* threshold under Art. 3 point 18): "reportable cross-border arrangement" means any cross-border arrangement or series of arrangements that satisfy at least one of the hallmarks set out in Annex IV **and the amount of the transaction or series of transactions included in such arrangement or series of arrangements exceed EUR 500 000."**
2.	The phrase "or series of arrangements" is not required as it is already covered by the definition of ″cross-border arrangement″ (Art. 3 point 18). This issue recurs across the Directive.
3.	o The scope of the rule should be extended to cover not only "reportable cross-border arrangements" but also "reportable DAC avoidance arrangements". The definition of "cross-border arrangement" (Art. 3 point 18) may not capture all DAC [reporting] avoidance arrangements. o "Reportable DAC avoidance arrangements" should be defined as those that meet one or more of the hallmarks in section D of Annex IV, without reference to whether they meet the definition of "cross-border arrangement" (Art. 3 point 18).

- Hallmarks – Article 3 point 20 (see Annex)

[1] Each numbered item corresponds to a separate Member State's contribution.

2. Personal scope

- Concept of Intermediary – Article 3 point 21

1.	The definition is vague. The system needs more specific rules. o What is specifically meant by the terms "material aid", "assistance" or "advice" as used in the definition of "intermediaries"? o Need for more specific examples of such intermediaries and their activities. o Are there any other limits to be taken into consideration in this case? o Where the intermediary is missing and the services in question are provided by a subsidiary of the taxpayer or any other company within a group, who is liable to report?
2.	o The current wording may create ambiguity as to whether a person provides a service or services relating to taxation. The definition of an intermediary should include the concepts of designing, marketing, organising or managing a reportable cross-border arrangement. o It is recommended to delete "to which it is related". There is no reason to consider the relationship between the participants if services are provided through another party. It would also require a definition of the required level of relationship.
3.	o The current definition of an intermediary seeks to cover too many categories of persons. As drafted, multiple participants may have obligations, whilst they may not have a sufficient level of knowledge or information about the arrangements. Or, they could have a reporting obligation, and there would be no way to link the reported information. o It would be more effective to define the roles of the promotor/enabler/advisor and their activities with more precision and make the reporting obligations **contingent on specified activities rather than the relationship to a user/taxpayer.** Different types of obligations are likely to be required for those who would be termed "enablers", as compared to those termed "promotors". o It is suggested to place a reporting obligation on another participant in the arrangement who knows or has reason to suspect that the person with the primary reporting obligation has not reported. Example: where they cannot establish this through due diligence or where they are unable to determine through due diligence the ultimate identity of the beneficiary of the arrangement. o The reference to an intermediary being a "person designing, marketing … the 'tax aspects' of an arrangement" could allow intermediaries to circumvent the rules by claiming that the "tax aspects" are either non-existent or incidental. o A system of reference numbers or unique identifiers is essential but this could be administratively burdensome to organise across multiple jurisdictions. This is why it would be most effective to align this work with the ongoing developments at the OECD.

- Concept of Taxpayer - Article 3 point 22

1.	Proposed addition to the rule (in bold letters and in line with the request for a *de minimis* threshold under Art. 3 point 18): "taxpayer means any person that uses a reportable cross-border arrangement or a series of such arrangements in order to potentially optimize their tax position **and whose turnover exceeded for the previous tax year EUR 2 million. For the newly established taxpayer the estimated turnover should be taken into account**".
2.	The definition of "taxpayer" is too broad as the term is used as part of other definitions throughout the Directive. For example, the definition of associated enterprises uses the term "taxpayer" in its ordinary meaning of a person who pays tax. However, as the term is defined in the Directive, it must be interpreted in accordance with that definition every time it is used. As a result, the definition of associated enterprises is limited to cases where both related "taxpayers" meet the definition of taxpayer in Art. 3 point 22. Recommendation: to change the term under Art. 3 point 22 into "relevant taxpayer".
3.	The definition of "taxpayer" includes the wording "potentially optimise", which is quite vague and may give rise to different interpretations.
4.	Suggestion for a *de minimis* threshold in the taxpayer's definition.
5.	The Directive should also define and refer to a "reportable taxpayer". This would ensure consistency with the OECD and provide for arrangements that are available but not yet implemented.

- Associated Enterprises – Article 3 point 23

1.	o The definition should be reviewed, after its intended use has been clarified, in conjunction with Art. 8aaa(3). o The final sentence should begin with the words "For the purpose of this point," in order to limit the interpretation of "individual" to the associated enterprise.
2.	o The definition of "associated persons" raises some doubts since it differs from the one enshrined in the Anti-Tax Avoidance Directive. o Does this proposal leave Member States the possibility to apply a stricter definition of "associated persons" at national level?
3.	The definition of "associated enterprise" could be too narrow, might not capture informal arrangements and could allow reporting obligations to be avoided.

- There is more than one Intermediary and/or more than one Taxpayer – Article 8aaa para 3

1.	There is a need for more precise rules in cases of a mixed participation of intermediaries and taxpayers in designing and setting up a single complex reportable arrangement. In these cases, it is not clear whether each participant should report the whole arrangement or the reporting obligation should be split among them according to the type of participation of each intermediary and/or taxpayer.
2.	It is not apparent where the obligation lies if different intermediaries have the responsibility for "designing". It is also possible that the responsibility for "designing" and "implementing" lies with different people. As regards "associated enterprises", we assume that the intention is to avoid reporting by or on behalf of more than one taxpayer. - It seems that the 'intermediary' as a reporter has been ignored in this

	construction. - The reliance on an agreement with an intermediary would be inappropriate in the case where a scheme has been designed and implemented in-house by a taxpayer. - There is lack of clarity about where precisely the burden of reporting would fall, especially in a global group. The term "used by" more than one taxpayer is unclear. This well-intentioned provision might be a source of some confusion and should be redrafted.
3.	It may be difficult to apply "vis-à-vis the taxpayer". It will be better to: - define the roles and activities of promoters, enablers, clients etc. with more precision; and - make the reporting obligation contingent upon specified activities rather than the relationship to the user/taxpayer.

- Waiver due to Professional Secrecy – Article 8aaa para 2

1.	The necessity of providing a waiver for professional secrecy is questioned altogether.
2.	Suggestion for debate on the limits of professional confidentiality with the aim to agree on reasonable exemptions from the confidentiality rule.
3.	Where the reporting obligation shifts to the taxpayer due to the intermediary enjoying professional secrecy, the Directive should explicitly provide that Member States shall take the necessary measures to ensure that intermediaries inform taxpayer(s) of this responsibility.
4.	Where legal professional privilege is claimed, details of the fact that such a claim is being made should also be reported to the relevant competent tax authority, as an aid to ensuring the compliance of the taxpayer.
5.	It is not clear whether the disclosure obligations are imposed on intermediaries/taxpayers of the particular Member State only or whether the scope is wider. The Commission, during the last WPTQ, indicated the latter, in which case it will be very difficult to administer and enforce the provisions of the Directive. Furthermore, this could lead to double reporting in situations where an intermediary is incorporated in one Member State and registered with a professional association in another. The Directive should apply only to the intermediaries/taxpayers of the particular Member State.
6.	To improve the effectiveness of the application of the Directive, the scope of professional privilege of intermediaries should be downsized where the Directive applies. This would however be justifiable and proportionate only if the scope of mandatory disclosure were limited only to situations where there is an actual risk of tax avoidance.
7.	o The scope of professional secrecy may vary country-by-country. There is a serious concern that due to strict professional secrecy provisions for regulated professions in some Member States, the effectiveness of a measure may be severely undermined. o Arrangements reported in an anonymised way, i.e. without identifying the taxpayer's specific data, would not clash with the professional privilege. This should be a minimum standard. o Intermediaries should be required to inform taxpayers of the latter's obligation to report in the place of the intermediary who benefits from professional secrecy. o It is suggested to add wording, to ensure that third-country intermediaries are

	not in a better situation than their EU peers, because there is no reason to delay the reporting until implementation in these cases.
8.	If the intermediary and the taxpayer are resident in different Member States, the intermediary would have to report to the competent tax authorities in the Member State where the taxpayer is tax resident, according to the Commission. Appropriate wording should be added to Art. 8aaa(1) or (2) to clarify this point, including a note about the State where the taxpayer will have to report to under Art. 8aaa(2).
9.	The Directive should define more precisely the intermediaries that have to file information with the competent authorities. The exceptions to the filing obligations of intermediaries should be set very strictly, so that there would be as few of them as possible.
10.	If the waiver for the legal professional privilege is too broad, as currently drafted, it would allow arrangements to be shielded. It is suggested that this is limited to where disclosure would breach a legal obligation of secrecy.

3. Exchange of Information – Article 8aaa para 5

1.	It might be worthwhile to consider adding a reference to paragraph 2 of the same Article as it covers cases in which information has to be submitted by the taxpayer himself.
2.	The information to be disclosed should include a provision on intermediaries to report their client list as well as details of the arrangement, in line with BEPS Action 12.

4. Timing for Reporting and Exchanging Information – Article 8aaa paras 1, 2 & 9

1.	The 5-day deadline for intermediaries is too hard to comply with, especially in cases of long leave or health unavailability of the responsible person. Proposal to lengthen the period to 15 working days, or to allow its extension at request. Furthermore, there is a request for specific examples of what "implementation" of a reportable cross-border arrangement or series of arrangements means. This is a critical point in time as it marks the beginning of the reporting period.
2.	Suggestion for a 5-working-day deadline for both intermediaries and taxpayers (in the case where they are required to do so). Where taxpayers are required to report, the obligation should be triggered by the effective implementation of the scheme. It should thus be made clear that the "implementation" of the scheme is linked to the use of the scheme and does not go as far as having derived a tax benefit from it.
3.	Strong objections to the 5-working-day deadline for intermediaries.
4.	In case the arrangement was invented and made available by a person other than an "intermediary" in the meaning of Art. 3 point 21 (e.g. third-country intermediary), there is no reason to delay the reporting until implementation. Otherwise, third-country intermediaries would have a privileged position.
5.	The fact that the deadline for reporting where the obligation has been shifted to the taxpayer in the absence of an intermediary is placed later in time might encourage the use of intermediaries from third countries.

5. Penalties – Article 25a

1.	Preference for a penalty system harmonized at the EU level, to avoid a situation where most arrangements be designed and set up in the Member State(s) that apply the lowest/mildest penalties.
2.	The proposed penalty system which refers to national rules may be difficult to administer, as there may be lack of jurisdiction (e.g. if the intermediary/taxpayer is not resident/incorporated/has a physical presence in the Member State).

6. Retroactivity – Article 8aaa para 4

1.	Article 8aaa(4) provides for the retroactive effect of this Directive. It is suggested to remove the retroactive effect, particularly as there is little experience on such measures.

7. Timeframe for Implementation – Article 8aaa para 4

1.	The proposed timeframe will be difficult to achieve, especially considering the administrative burden for the tax authorities. Does the proposed rule require that the legal framework and technical infrastructure would have to be set no later than the date of political agreement (in order to capture the reportable arrangements as of then)?

8. Delegated Acts – Articles 23aa and 26a

1.	Considering its potential (financial and organizational) consequences, the list of hallmarks that includes potentially aggressive tax planning arrangements or series of arrangements can hardly be labeled as a "non-essential" element (in accordance with the requirement of TFEU for delegated acts).
2.	Against delegating power to the Commission for the update of the hallmarks.
3.	In favour of the goal that the Commission intends to achieve by amending the directive in order to be able to respond promptly and flexibly to tax fraud and evasion issues that were not identified at the time of adoption of the act. However, delegated acts may only be used for amending, supplementing, or deleting non-essential elements of the basic legislative act. A way out could be to maintain the delegation but restrict its scope to hallmarks that **would be further identified in the internationally agreed BEPS principles after the adoption of this proposal (i.e. DAC6)**.
4.	Against the proposed use of delegated acts which undermines the requirement for unanimity on tax matters.
5.	Against the proposed use of delegated acts
6.	It is important for Member States to retain unanimity since the effects of these changes are not purely administrative but will have a potentially wide-ranging economic impact by affecting advisors and businesses.
7.	As the hallmarks are core tools of the DAC6 and are crucial to determine the functioning and effectiveness of the exchange of information, we propose to keep the prerogative to discuss, amend and agree on any proposal amending the Directive or the Annex of the Member States within the Council of the European Union.

9. Hallmarks (Annex)

1.	A more conclusive wording of the hallmarks is imperative for creating a useful instrument against aggressive tax planning structures.
2.	International hallmarks should be based on protecting agreed EU tax policy areas, such as those of the ATAD and the DAC. There is thus a risk that the provisions of these directives be eroded by schemes which might attempt to create loopholes to their rules.
3.	We should construct a hypothetical test for general hallmarks like in the UK or Ireland. It is better to set thresholds instead of a "main benefit test" for hallmarks under category B.
4.	Hallmarks linked to issues addressed in ATAD 1 or/and 2 should be excluded.
5.	We highlight the need to agree on set of hallmarks which will be more specific and targeted to the typical situation of tax avoidance. More targeted hallmarks could also decrease the administrative burden on the tax administration when assessing the risks of reported schemes.

- Main Benefit Test

1.	The text is disputable, since an intermediary or taxpayer can argue that the main benefit is not tax related, but that is serves an economic or corporate goal. Thus, for the major part, the test can be side-stepped.
2.	The current wording is unclear. It is recommended to amend the text as follows: *"The test will be satisfied if it can be established that the main benefit that a person may expect to derive from an arrangement is the obtaining of a tax advantage".* However, this proposed wording would not cover the following element of the current wording: *"including through taking advantage of the specific way that the arrangement or series of arrangements are structured".* The intention of this must be explored further so that it can be properly integrated into the drafting. It may be best included in a definition of arrangement rather than in the main benefit test.
3.	The wording "if it can be established" does not specify by whom.
4.	There is a need for a better understanding of what is meant by "the main benefit" and how this would work in practice.
5.	Need for clarity and simplicity. Preferably, the definition should be included in the text of the directive and not only in the annex.
6.	It is easy to point to other benefits/objectives of an arrangement and so circumvent the rules if the test is narrowly focused on a tax advantage as a definitive outcome. Therefore, it is suggested that: - the test be for "**a main benefit or one of the main benefits";** - the term "**tax advantage"** be replaced with "**expected tax advantage or to evade tax";** - the scope is broadened by referring to "one or more jurisdictions"; - the wording is modified to read "an outcome which one may reasonably expect", instead of "the outcome".

- Category A - Generic Hallmarks

1.	The reference to a "fee" is very general, it needs to be better specified.
2.	Hallmark A3 (mass-marketed schemes) seems unduly vague and could be a source of legal uncertainty. This hallmark acts as a tool to identify mass-marketed schemes that are easily made available to multiple taxpayers without any particular need for customisation. Is such interpretation correct?
3.	The scope of generic hallmarks should be narrowed down, to exclude routine or legitimate tax planning. For example, the use of standardised documentation is not, per se, an indicator of avoidance.
4.	Reference to standardized documentation: it is not clear what this is. Is it the documentation between the intermediary and taxpayer or other documentation related to the economic commercial activity? It is also unclear how a tax advantage is obtained due to standard documentation.
5.	There is reference to "the use of standardised documentation including standard forms". It is not clear who formulates such forms.
6.	"Other" (cat. A.1): it implies that there is an original intermediary which is not mentioned in the sentence.
7.	A hallmark should be added to cover an arrangement or series of arrangements containing abnormal or contrived steps which would not be undertaken but for an expected tax advantage for any person related to the arrangement or series of arrangements.

- Category B - Specific hallmarks which may be linked to the main benefit test

1.	B.3 refers to a "primary" commercial function, but when is such commercial function primary? Is the coverage of the corporate risk an acceptable ground for involving interposed entities? Perhaps "without other primary commercial function" could be replaced by "with a crucial tax evasion purpose".
2.	o B.1 and B.3 require more clarification o B.2: what is the impact of "round-tripping" funds? o B.2: suggestion to include "***or exempt from tax***"**.**
3.	B.1 should not cover all situations in which losses occur abroad. This point is still subject to examination.
4.	B.1 relates to transfers of losses to another jurisdiction. Given the Marks & Spencer case, one wonders whether this should apply to intra-EU transfers as well.
5.	Examples for B.2 and B.3 are needed to explain what kind of structures they are referring to. B.1 should best be deleted.
6.	It is suggested to include the following: o Conversion of income into and out of real property and other assets; o Concealing, disguising or making more difficult the identification of the beneficial owner or recipient of a potential tax advantage; o Arrangements involving loans on non-commercial terms, or loans which would not have been undertaken but for a main benefit being an expected tax advantage for any person in one or more jurisdictions; o Arrangements that enable cash to be withdrawn by a beneficial owner without legal ownership being affected, making it harder to trace the movement of funds, e.g. use in one jurisdiction of corporate card accounts based in another jurisdiction.

- Category C - Specific hallmarks related to cross-border transactions

1.	○ C.1.b: the calculation of the tax rate may be a complex exercise. Perhaps a point "iv." could be added: **"allows corporations to benefit from a tax rate, applicable to non-profit associations".** ○ C.4 is formulated vague and unclear; alternative drafting suggestion: "There is an arrangement or series of arrangements that includes transfers of assets and **the material difference in the amount being treated as payable in relation to the assets in those jurisdictions involved, result in a tax advantage or a lack of tax transparency**".
2.	○ Proposal for two new hallmarks: (i) threshold of EUR 500,000 concerning payments of dividends, royalties and interest payments; and (ii) use of trust or estate managed by a trust. ○ Hallmark C.1.b: it is not clear which list is referred to.
3.	These hallmarks radically change the nature of the regime from the type contemplated by the OECD in BEPS Action 12 to one of harvesting bulk information, which is not a specific concern to the first Member State. It should be considered extending "the main benefit test" to category C. More specifically: ○ C.1.b: no support of reference to low corporate tax rates. ○ C.1.c: full or partial tax exemption arises for too many reasons for this to be a valid reporting trigger. ○ C.1.d: this should only apply where the preferential regime has been agreed as harmful by either the Code of Conduct group or the OECD Forum on Harmful Tax Practices. Better definition of preferential regimes. ○ C.1.e: hybrid mismatches will be dealt with by the recently agreed ATAD2. There is no obvious reason to collect data on structures that have been neutralised by ATAD2. Instead, it is submitted that it would be more appropriate to obtain reports on any hybrid structures that might emerge to take advantage of any weaknesses or loopholes in ATAD2. This point should apply equally to any arrangement designed to bypass the provisions of ATAD1.
4.	○ C.1.b: zero rate or minimum level of taxation should not be mentioned, not all regimes with low tax rates should be considered as harmful. ○ C.1.b, C.1.c and C.1.d are closely interrelated and all taken into consideration when designing a list of third country jurisdictions or assessing the harmfulness of a particular preferential tax regime.
5.	○ C.1.b.ii: against reference to tax rates. ○ C.1.b.iii: makes reference to a list. There was objection to this prospect when it was proposed in relation to the Interest and Royalties Directive. Consequently, it is not certain how this would work here; ○ C.1.d: uses term "preferential tax regimes" without defining what is such a regime. ○ C.2: could be better phrased, as such: *"Deductions for the same depreciation on the same asset is claimed in more than one jurisdiction"*.
6.	○ Suggestion to have hallmarks C.1.b.i, C.1.b.ii, C.1.c, C.1.d, D.a, D.b, D.c covered by the black list under C.1.b.iii: the black list assesses jurisdictions on exchange of information, harmful preferential features, zero CIT rate and their follow-up actions in implementing anti-BEPS measures. ○ C.1.d: preferential regimes which are approved by the Code of Conduct group

	should not be covered by the directive.
7.	Support of hallmarks in category C as a whole, except for those that are linked to the ATAD.
8.	o Category C should include a further group to cover mismatches of tax outcomes which do not fall within Directive 2016/1164 but are placed within the policy scope of BEPS Action 2. o It is important to consider the practical impacts of these hallmarks: - A very large number of non-tax motivated arrangements would become subject to disclosure if the hallmarks included deductible payments made to companies resident in countries with a corporate tax rate lower than 50% EU average statutory rate. - There is a shift of the focus away from the avoidance arrangements and evasion. o A **hallmark based on the EU list of non-cooperative jurisdictions** would constitute a defensive measure and should instead be discussed at the Code of Conduct group alongside the work still ongoing in this area.

- Category D - Specific hallmarks concerning automatic exchange of information agreements in the Union

1.	o Category D should integrate CRS avoidance schemes as identified by the work conducted by the OECD on this issue. o They could be adapted after the adoption of the directive through delegated acts.
2.	D.d: creates uncertainty as to the link between DAC2 and the anti-money laundering directive. It is not clear who makes the determination that a jurisdiction has an inadequate or weak enforcement regime of AML legislation. The language should be revised.
3.	It is suggested to leave out D.a, D.b and D.c.
4.	A new category should be included to specifically deal with DAC avoidance, including arrangements which are designed and marketed as enabling circumvention of reporting or disguising beneficial ownership.

- Category E - Specific hallmarks concerning transfer pricing

1.	o Some countries do not expressly adopt OECD transfer pricing rules. o There will always be a delay in updating countries domestic rules for new OECD transfer pricing guidelines. o It should be recognised that taxpayers should only be expected to comply with the arm's length principle to the extent that this is required by a Member State's national law.
2.	o **E.1:** unclear. Lack of conformity with the arm's length principle or with the OECD transfer pricing guidelines is duplicated. o **E.2:** seems superfluous, since there is DAC3. Are both advance cross-border rulings and advance pricing arrangements covered by hallmark E.2?
3.	E.1: why the text uses an "or" between arm's length pricing and OECD guidelines? It seems to imply there are more than one arm's length principles.
4.	E.2: its content requires clarification