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MEETING DOCUMENT

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 note

Delegations will find attached a document from the Presidency in view of the meeting of the Working Party on Tax Questions (Direct Taxation - DAC) on 15 November 2017.

Based on the discussions at 8 November WPTQ meeting and written comments received, the EE PRES is envisaging two *tour de tables* on the diverging issues affecting the dual-purpose of DAC 6.

Commission has explained continuously that the structure of DAC 6 is designed to serve the dual-purpose of the proposal, namely:

- early warning mechanism that allows Member States (MSs) to receive information about potentially aggressive cross-border tax planning schemes as soon as possible for risk assessment and for closing loopholes; and
- a data collection system, that could complement the material at the disposal of the tax administration in the event of tax audits purposes.

During working party meetings, MSs have raised issues relating to large amount of reports that they expect to be reported, especially where many taxpayers use the same scheme, as well as the administrative and technical difficulties related to the fact that the intermediary shall report to the MS of the taxpayer. Reducing the amount of reports would reduce the administrative burden, both for intermediaries/taxpayers and tax authorities, but could compromise the benefits from using the collected data for risk assessment and tax audit purposes. Conversely, if the intermediary is due to report to its own MS, these administrative and technical challenges would be eased but the reporting would retain less of its function as an early warning mechanism.

This room document describes the trade-off between these considerations and EE PRES is inviting the delegations to give their preferences at the 15 November WPTQ meeting.

I Amount of information reported/exchanged

It is of paramount importance that the information that reaches the tax authorities is relevant. Therefore it is essential to set reasonable limits to the information collected under DAC6.

1. Limits to reporting in the current compromise text.

The proposed Directive addresses that issue in the latest compromise text through minimising the chances of a multiplication of reporting (i.e reporting the information set in paragraph 6 of Article 8aaa multiple times) and minimising reporting of schemes without possible tax advantage as follows:

a) *Intermediary-wise*, the reporting obligation lies only on one intermediary and in one MS. An intermediary is liable to report only to the MS where the intermediary has a taxable presence[1] (point 21 of Article 3 and first clause of paragraph 1 of Art 8aaa). In case the intermediary has a taxable presence in more than one Member State, the report is expected to be submitted only to the Member State where the relevant services are provided (second clause of Art 8aaa par 1). In case more than one intermediary is involved in the same arrangement, only one of them has the reporting obligation (Art 8aaa par 3).

b) *Taxpayer-wise*, in case there are more than one taxpayer associated with the same arrangement, only one of them has the reporting obligation (Art 8aaa par 3a[2])[3].

[1] Term used in ATAD1, but can be substituted with resident for tax purposes or subject to tax or other similar term referring to the fact that the intermediary has a previous connection with a tax authority in that jurisdiction.
[2] Please note there is a typo in par 3a. Reference to paragraph 2a should be made instead.

c) *Arrangement-wise*, the "main benefit test" is extended to Hallmarks C1 and D to downsize the volume of reporting to the ones that, as their main benefit or one of their main benefits, can reasonably be expected to bring a tax advantage or circumvent the automatic exchange of information.

2. Further possibilities for limiting the number of reports

In addressing a request by several Member States, the EE PRES proposes to hold a discussion over further options that could limit the information flows.
During the discussions at the WPTQ and in written comments, three possibilities to further limit the amount of information have gained the most of attention:

a) *Exeption for mass-marketed cross-border arrangements*[4]. It is proposed that these arrangements, differently from all other arrangements under the Directive, be reported earlier, i.e. upon designing (or production) by the intermediary and before any contact with potential customer(s). The reporting of mass-marketed cross-border arrangements would be made only once and only to the Member State of the intermediary. Only information referred to in art 8aaa par 6 points b and c is to be reported;
b) *Threshold*. It is proposed that a threshold be set, for example, on the turnover of the intermediary, turnover of the taxpayer or value of the arrangement. All of these options are trying to exclude the reporting of schemes that would otherwise be reportable, but are potentially with little tax advantage for a single taxpayer;
c) *"Negative" hallmark*. It is proposed to create a negative hallmark that would exempt from reporting those schemes that are, for example, already well-known to tax authorities or that are based on the use for statutory exemptions and reliefs in a routine fashion for *bona fide* purposes.

The EE PRES acknowledges that these further options would limit the amount of information reported and exchanged, but at the same time, they could facilitate the circumvention of DAC6 or undermine one of the dual objective of DAC 6, namely being a comprehensive data collection system that allows to use the collected data for tax audit purposes (e.g. each time that the same mass-marketed scheme is used, the information on the taxpayer(s) is different).

MS are kindly invited to explain their views towards further limiting the amount of information during *tour de table.*

[3] The report must be submitted by the one who has the closest associations with the intermediary (in case of secondary reporting) or the one who is in control of the implementation of the arrangement (in case of primary reporting)
[4] By mass-marketed arrangements we are referring to the ones that fall under hallmark A.3 – an arrangement that has a standardised structure and is commonly available to more than one relevant taxpayer without a need to be substantially customised for implementation.

II The Member State to where the report is to be submitted

Receiving timely information is of utmost importance in the context of every reporting and subsequent exchange of information in the field of taxation. DAC6, as proposed by the Commission, highlights this objective by foreseeing that the intermediary report to the MS of the taxpayer. In this way, the MS which would be most likely to be affected would receive the information before the automatic exchange takes place.

Another option would be to follow the approach of DAC 2 and DAC 4, where the reporting is done to the tax authority of the intermediary´s MS. When choosing between these two options, some considerations are mentioned in OECD BEPS Action 12 report paragraphs 210, 211, 221 and 233. MS have highlighted their concerns about the enforceability of penalties and the compliance burden for intermediaries who will have to report to a tax authority with which it does not have any other connection. EE PRES underlines that also the tax authorities will face higher compliance burden when communicating and receiving reports from foreign intermediaries.

After careful consideration, EE PRES has proposed in the latest compromise text to change the reporting obligation so that intermediary would need to report to its own jurisdiction. We fully recognise that this change undermines the early warning system to some extent, as the access to information is delayed by a period of between 1 day and 4 months (paragraph 9 of Article 8aaa). However, based on the following considerations, the EE PRES finds the approach in the latest compromise to be more practical.

1. Advantages of reporting to the Member State of the intermediary

a) Familiar arrangement of current fields of automatic exchange of information (DAC1 and DAC2) for the tax authorities
b) Familiarity with the forms for reporting to the tax authorities for the intermediaries
c) Higher voluntary compliance, as reporting is easier and there is an ongoing prior relationship with the relevant tax authority
d) Possibility of risk-analysis regarding the compliance of the intermediaries because they are known to the tax authority
e) Swift reaction by the tax authority to fix errors in compliance, as there is no need to communicate with the intermediary via another MS´s tax authority
f) More clarity on whether the legislation on professional privilege applies (the legislation of the MS of the intermediary applies)

2. Advantages of reporting to the Member State of the taxpayer

a) Information on the relevant taxpayer within 15 days, which allows the tax authority to address possible harmful arrangements in a swiftest manner, whether in legislative or communicative form
b) In case of waiver based on professional privilege, the relevant tax authority remains the same

EE PRES recognises the importance of this choice and notes that MSs expressed diverging views on this point at the last WPTQ meeting. As this matter is likely to affect the main text of the DAC6 proposal in several respects, the EE PRES sees a clear need to have in-depth discussion between these choices before putting together the next Compromise.

MS are kindly invited to explain their preference of the reporting destination of the intermediary.