



Council of the European Union
General Secretariat

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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 - Hallmarks D |

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.

"ANNEX IV HALLMARKS

Generic hallmarks under category A and specific hallmarks under categories B and D and paragraph 1 of category C 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 or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage or circumventing the automatic exchange of information.

[...]

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

An arrangement which may circumvent Union legislation or any agreements on the automatic exchange of information, including agreements with third countries, or which takes advantage of the absence of such agreement, and that has the effect of avoiding the reporting of income to the State of tax residence of the relevant taxpayer obligation. 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 and capital into categories or into products that are not subject to the automatic exchange of information;
- (c) the use of legal entities ~~-, arrangements or and structures that, regardless of whether they are reportable, do not require reporting of all Account Holders or Controlling Persons under~~ 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 ~~and-or arrangements~~, 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:

- *Main benefit test is extended to Hallmark D to target the arrangements that are designed to circumvent automatic exchange of information.*
- *Section is updated by the PRES following discussions with the Commission and OECD and taking into consideration feedback from MSs*