Council of the European Union
General Secretariat

Brussels, 23 January 2018

WK 725/2018 REV 1

LIMITE

FISC
ECOFIN
IA

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From: To:	Presidency Working Party on Tax Questions (Direct Taxation – DAC)
Subject:	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

Delegations will find attached a document for Working Party on Tax Question (DAC) meeting of January 26.

Delegations will find in Annex the 4th compromise on the DAC6 proposal. New text (compared to the previous compromise text set out in doc. WK 15066/2017) is marked in **bold and underlined**, deletions are marked with ~~strikethrough~~.

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 and 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with a special legislative procedure,

Whereas:

(1) In order to accommodate new initiatives in the field of tax transparency at the level of the Union, Council Directive 2011/16/EU[3] has been the subject of a series of amendments over the last years. In this context, Council Directive (EU) 2014/107[4] introduced a common reporting standard (CRS) for financial account information within the Union. The standard that was developed within the OECD ~~Global Forum~~ prescribes for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for this exchange worldwide. Directive 2011/16/EU was amended by Council Directive (EU) 2015/2376[5] which provided for the automatic exchange of information on advance cross-border tax rulings and by Council Directive (EU) 2016/881[6] which provided for the disclosure and the mandatory automatic exchange of information on country-by-country reporting (CbCR) of multinational enterprises between tax authorities. Being aware of the use that anti-money laundering information can have for tax authorities, Council Directive

---

1 OJ C , , p. .

2 OJ C , , p. .

3 Council Directive (EU) 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation (OJ L 64, 11.3.2011, p. 1).

4 Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.2.2014, p. 1).

5 Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1).

6 Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3.6.2016, p. 8).

(EU) 2016/2258[7] placed an obligation on to Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European Parliament and of the Council[8]. Although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to react to aggressive tax planning, there is still a need for reinforcing certain specific transparency aspects of the existing taxation framework.

(2) Member States find it increasingly difficult to protect their national tax bases from erosion as tax planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility of both capital and persons within the internal market. These structures commonly consist of arrangements which are developed across various jurisdictions and move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer´s overall tax bill. As a result, Member States often experience considerable reductions in their tax revenues which hinder them from applying growth-friendly tax policies. It is therefore critical that Member States' tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. This information would enable those authorities to be able to promptly react against harmful tax practices and to close loopholes through enacting legislation or by undertaking adequate risk assessments and carrying out tax audits. No reaction by tax authorities against a reported scheme should not however imply clearance.

(3) Considering that most of the potentially aggressive tax planning arrangements span across more than one jurisdiction, the disclosure of information about those arrangements would bring additional positive results where that information was also exchanged amongst Member States. In particular, the automatic exchange of information between tax ~~administrations~~**authorities** is crucial in order to provide these authorities with the necessary information to enable them to take action where they observe aggressive tax practices.

(4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market, the Commission has been called on to embark on initiatives on the mandatory disclosure of potentially aggressive tax planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS). In this context, the European Parliament has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion. **It is also important to note that the OECD started discussing possible ways to address arrangements designed to circumvent reporting under the CRS or aimed at providing beneficial owners with the shelter of non-transparent structures, considering also model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.**

---

7 Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16.12.2016, p. 1).

8 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

(5) It is necessary to recall how certain financial intermediaries and other providers of tax advice seem to have actively assisted their clients to conceal money offshore. Furthermore, although the CRS introduced by Council Directive (EU) 2014/107[9] is a significant step forward in establishing a tax transparent framework within the Union, at least in terms of financial account information, it can still be improved.

(6) The 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. In this light, an obligation on intermediaries to inform tax authorities on certain cross-border arrangements that could potentially be used for aggressive tax planning would constitute a step in the right direction. In order to develop a more comprehensive policy, it would also be significant that as a second step, following disclosure, the tax authorities share information with their peers in other Member States. Such arrangements should also enhance the effectiveness of the CRS. In addition, it would be crucial to grant the Commission access to a sufficient amount of information so that it can monitor the proper functioning of this Directive. Such access to information by the Commission does not discharge a Member State from its obligations to notify any state aid to the Commission.

(7) It is acknowledged that the disclosure of potentially aggressive cross-border tax planning arrangements would stand a better chance of achieving its envisaged deterrent effect where the relevant information reached the tax authorities at an early stage, in other words before the disclosed arrangements are actually implemented. Where the disclosure obligation is shifted to taxpayers, it would be practical to place the obligation to disclose those potentially aggressive cross-border tax planning arrangements at a slightly later stage, as taxpayers may not be aware of the nature of the arrangements at the time of the inception. To facilitate Member States' administrations, the subsequent automatic exchange of information on these arrangements could take place every quarter.

(8) To ensure the proper functioning of the internal market and to prevent loopholes in the proposed framework of rules, the obligation for disclosure should be placed upon all actors that are usually involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or a series thereof as well as those who provide assistance or advice. It should not be ignored either that in certain cases, the obligation to disclose would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house. It would thus be crucial that, in such circumstances, tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning. It would therefore be necessary to shift the disclosure obligation to the taxpayer who benefits from the arrangement in these cases. **Nevertheless, disclosure should not be mandatory where it would result in infringement of the taxpayer's privilege against self-incrimination under national law.**

[9] Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.2.2014, p. 1).

(9) Aggressive tax planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive counter-measures by the tax authorities. Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. These indications are referred to as 'hallmarks'.

(10) Given that the primary objective of such legislation should focus on ensuring the proper functioning of the internal market, it would be critical not to regulate at the level of the Union beyond what is necessary to achieve the envisaged aims. This is why it would be necessary to limit any common rules on disclosure to cross-border situations, namely situations in either more than one Member State or a Member State and a third country. In such circumstances, due to the potential impact on the functioning of the internal market, one can justify the need for enacting a common set of rules, rather than leaving the matter to be dealt with at the national level. A Member State may take further national reporting measures of a similar nature, but any information collected in addition to what is reportable in accordance with the Directive should not be communicated automatically to the competent authorities of the other Member States without their explicit consent.

(11) Considering that the disclosed arrangements should have a cross-border dimension, it would be important to share the relevant information with the tax authorities in other Member States in order to ensure the maximum effectiveness of this Directive in deterring aggressive tax planning practices. The mechanism for the exchange of information in the context of advance cross-border rulings and advance pricing arrangements should also be used to accommodate the mandatory and automatic exchange of disclosed information on potentially aggressive cross-border tax planning arrangements amongst tax authorities in the Union.

(12) In order to facilitate the automatic exchange of information and enhance the efficient use of resources, exchanges should be carried out through the common communication network (CCN) developed by the Union. In this context, information would be recorded on a secure central directory on administrative cooperation in the field of taxation. Member States should have to implement a series of practical arrangements, including measures to standardise the communication of all requisite information through creating a standard form. This should also involve specifying the linguistic requirements for the envisaged exchange of information and accordingly upgrading the CCN.

(13) **In order to minimise costs and administrative burdens both for tax administrations and intermediaries and ensure the effectiveness of this Directive in deterring aggressive tax planning practices, the scope of automatic exchange of information in relation to reportable cross-border arrangements within the Union should be consistent with international developments. It is thus expected that Member States implement the parts of this Directive addressing CRS avoidance arrangements and offshore structures in a way that is consistent with the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.**

(14) In order to improve the prospects for effectiveness of this Directive, Member States should lay down penalties against the violation of national rules that implement this Directive and ensure that these penalties actually apply in practice, that they are proportionate and have a dissuasive effect.

~~(14) In order to supplement or amend certain non-essential elements of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in connection with updating the hallmarks in order to include in the list of hallmarks potentially aggressive tax planning arrangements or series of arrangements in response to updated information on those arrangements or series of arrangements which is derived from the mandatory disclosure of such arrangements.~~

(15) In order to ensure uniform conditions for the implementation of this Directive and in particular for the automatic exchange of information between tax authorities, implementing powers should be conferred on the Commission to adopt a standard form with a limited number of components, including the linguistic arrangements. For the same reason, implementing powers should also be conferred on the Commission to adopt the necessary practical arrangements for upgrading the central directory on administrative cooperation in the field of taxation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[10].

(16) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council[11]. Any processing of personal data carried out within the framework of this Directive must comply with Directive 95/46/EC of the European Parliament and of the Council[12] and Regulation (EC) No 45/2001.

(17) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

---

10 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

11 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

12 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

(18) Since the objective of this Directive, namely to improve the functioning of the internal market through discouraging the use of cross-border aggressive tax planning arrangements, cannot sufficiently be achieved by the Member States acting individually in an uncoordinated fashion but can rather be better achieved at Union level by reason of the fact that it targets schemes which are developed to potentially take advantage of market inefficiencies that originate in the interaction amongst disparate national tax rules, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, especially considering that it is limited to arrangements of a cross-border dimension of either more than one Member State or a Member State and a third country.

(19) Directive 2011/16/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2011/16/EU is amended as follows:

(1) Article 3 is amended as follows:

(a) point 9 is amended as follows:

(i) point (a) is replaced by the following:

"(a) for the purposes of Article 8(1) and Articles 8a, 8aa and 8aaa, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. For the purposes of Article 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State;"

(ii) point (c) is replaced by the following:

"(c) for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a, 8aa and 8aaa, the systematic communication of predefined information provided in points (a) and (b) of this point."

(b) the following points are added:

"18. "cross-border arrangement" means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions are met:

(a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

(d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;

(e) such arrangement has a possible impact on the automatic exchange of information.

For the purposes of points 18 - ~~22~~**26** of Article 3, Article 8aaa and Annex IV, an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part.

19. "reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV.

20. "hallmark" means a characteristic or feature of an arrangement which is listed in Annex IV.

21. "intermediary" means~~:~~

~~(a) in the case of a bespoke arrangement any person that carries the responsibility for designing, marketing, organising, or managing the implementation of, a bespoke reportable cross-border arrangement and also means any person that undertakes to provide, directly or by means of other persons aid, assistance or advice with respect to designing, marketing, organising, or managing the implementation of, the reportable cross-border arrangement;~~

~~(b) in the case of a marketable arrangement,~~ any person that designs, markets, **organises** or makes available for implementation ~~a marketable~~**or manages the implementation of a** reportable cross-border arrangement~~ to any person whether they are a relevant taxpayer or not~~. It also means any person who ~~knows or could reasonably be expected to know that they have undertaken~~**undertakes** to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, or managing the implementation of a~~ marketable~~ reportable cross-border arrangement.

In order to be an intermediary, a person shall meet at least one of the following additional conditions:

(a) ~~be incorporated in, and/or governed by the laws of, a Member State;~~

~~(b)~~ be resident for tax purposes ~~or~~ **in a Member State;**

(b) have a permanent establishment in a Member State;

(c) **be incorporated in, ~~and~~/or governed by the laws of, a Member State;**

(d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.

22. "relevant taxpayer" means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

23. **for the purposes of Article 8aaa,** "associated enterprise" means a taxpayer who is related to another taxpayer in at least one of the following ways:

    (a) a taxpayer participates in the management of another taxpayer by being in a position to exercise a significant influence over the other taxpayer;

    (b) a taxpayer participates in the control of another taxpayer through a holding that exceeds ~~20~~**25**% of the voting rights;

    (c) a taxpayer participates in the capital of another taxpayer through a right of ownership that, directly or indirectly, exceeds ~~20~~**25**% of the capital.

    If more than one taxpayer participates in the management, control or capital of the same taxpayer, all taxpayers concerned shall be regarded as associated enterprises.

    If the same taxpayers participate in the management, control or capital of more than one taxpayer, all taxpayers concerned shall be regarded as associated enterprises.

    In indirect participations, the fulfilment of requirements under ~~points (b) and~~**point** (c) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.

    An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single taxpayer.

24. ~~"bespoke" means an arrangement designed specifically for the relevant taxpayer and where the totality of the arrangement is not repeated by another relevant taxpayer.~~

25. "marketable **arrangement**" means ~~an~~**a cross-border** arrangement that is **designed, marketed or** made available ~~to more than one relevant taxpayer~~**for implementation** without a need to be substantially customised ~~for implementation~~**.**

26. "bespoke arrangement" means any cross-border arrangement that is not a marketable arrangement.

(2) in Section II of Chapter II the following Article is added:

"Article 8aaa

Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements

1. Each Member State shall take the necessary measures to require the intermediaries~~, as defined in the last paragraph of point 21 of Article 3~~ to file information on reportable cross-border arrangements with the competent tax authorities within fifteen working days beginning:

(a) in the case of bespoke arrangements, on the day after the reportable cross-border arrangement is made available for implementation by the intermediary to one or more relevant taxpayers, or where the first step in implementing such arrangement has been made, whichever occurs first;

(b) in the case of marketable arrangements, on the day ~~when~~**after** the **reportable cross-border** arrangement is made available for implementation, or is ready for implementation, or when the first step in its implementation has been made, whichever occurs first.

1a. In the case of marketable arrangements, Member States shall take the necessary measures to ensure that a periodic report is made by the intermediary every 3 months providing an ~~updated list of further~~**update with new** reportable information which has become available since the last report was filed.

1b. **Where** ~~Where, in accordance with the last paragraph of point 21 of Article 3,~~ the intermediary is liable to file information on reportable cross-border arrangements with the competent tax authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:

(a) in the Member State where the intermediary is resident for tax purposes~~ or has a permanent establishment~~;

(b) in the Member State ~~to~~**where the intermediary has a permanent establishment;**

(c) in the Member State which the intermediary is incorporated in or governed by the laws of;

(~~c~~**d**) in the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

1c. Where the application of the paragraph 1b leads to multiple reporting, the intermediary shall be exempt from filing the information if the intermediary has a proof that such information has been filed in another Member State.

2. Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify~~:~~.

~~(a) the tax authority in accordance with the last subparagraph of Article 8aaa(1), that the intermediary has information on a reportable cross-border arrangement that shall not be disclosed due to this waiver; and~~

~~(b)~~ the relevant taxpayer **or another intermediary** of their disclosure obligations under Article 8aaa, paragraph 2a.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.

2a. Each Member State shall take the necessary measures to ensure that, where there is no intermediary ~~within the meaning of point 21 of Article 3~~ or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph 2, the obligation to file information on a reportable cross-border arrangement shall be the responsibility of the **other notified intermediary, or, if there is no such intermediary, of the** relevant taxpayer.

The relevant taxpayer on whom lies the reporting obligation, shall file the information to the Member State where the taxpayer is resident for tax purposes or has a permanent establishment, within fifteen working days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first**.**

3. Each Member State shall take the necessary measures to ensure that, where more than one intermediary is involved in a ~~bespoke~~ reportable cross-border arrangement, ~~only~~ the intermediary that agreed the ~~bespoke~~ reportable cross-border arrangement ~~with the relevant taxpayer~~ shall file information in accordance with paragraph 1. In the absence of such an intermediary, the **obligation to file information lies with all other intermediaries involved in the same reportable cross-border arrangement.. An** intermediary ~~that manages~~**is not required to disclose such information to** the ~~implementation of~~**extent that it has a proof that** the ~~arrangement shall file~~**same** information ~~in accordance with paragraph 1.~~ **has already been disclosed by another intermediary.**

3a. **Each Member State shall take the necessary measures to ensure that, where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary shall file information in accordance with paragraph 2a. A relevant taxpayer is not required to disclose such information to the extent that it has a proof that the same information has already been disclosed by another relevant taxpayer.** ~~Without prejudice to the first subparagraph of paragraph 2a, each Member State shall take the necessary measures to ensure that, where more than one intermediary is involved in a marketable reportable cross border arrangement, only the intermediary that takes whichever of the steps in paragraph 1(b) that occurs earliest in time shall file information in accordance with paragraph 1.~~

~~3b. Each Member State shall take the necessary measures to ensure that where an intermediary within the meaning of Article 3, point 21, paragraph (b), who is not involved in the first step of an arrangement and is unable to establish that another intermediary related to the same arrangement has already filed information, shall file information in accordance with paragraph 1 unless the intermediary has a right to a waiver under paragraph 2.~~

~~3c. Each Member State shall take the necessary measures to ensure that in the case of bespoke arrangements, where the reporting obligation lies with the relevant taxpayer and there is more than one relevant taxpayer, only the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary shall file information in accordance with paragraph 2a. In the absence of such a relevant taxpayer, the relevant taxpayer that manages the implementation of the arrangement shall file information in accordance with paragraph 2a.~~

~~3d~~**3b**. Each Member State shall take the necessary measures to ensure that ~~in the case of marketable arrangements,~~ each relevant taxpayer will disclose their use of the ~~marketable~~ arrangement to the tax administration in each of the years for which they use it.

4. Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between [date of political agreement] and 31 December [2018]. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 March [2019].

5. The competent authority of a Member State where the information was filed pursuant to paragraphs 1, 2 and 4 of this Article shall, by means of an automatic exchange, communicate the information specified in paragraph 6 of this Article to the competent authorities of all other Member States, in accordance with the practical arrangements adopted pursuant to Article 21(1).

6. The information to be communicated by a Member State under paragraph 5 shall contain the following:

   (a) the identification of intermediaries ~~and participant to~~**, relevant taxpayers and participants in** the reportable cross border arrangement, including their name, date and place of birth (in case of an individual), residence for tax purposes, and Taxpayer Identification Number (TIN) and, where appropriate, the persons who are associated enterprises to the relevant taxpayer;

   (b) details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;

   (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which they are commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy;

   (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;

   (e) details of the national provisions that form the basis of the reportable cross-border arrangement;

   (f) the value of the reportable cross-border arrangement, where applicable;

   (g) the identification of the **Member State of the relevant taxpayer(s) and any** other Member States which are likely to be concerned by the reportable cross-border arrangement;

   (h) the identification of any other person in Member State, if any, likely to be affected by the reportable cross-border arrangement indicating to which Member States such person is linked.

7. To facilitate the exchange of information referred to in paragraph 5 of this Article, the Commission shall adopt the practical arrangements necessary for the implementation of this Article, including measures to standardise the communication of the information set out in paragraph 6 of this Article, as part of the procedure for establishing the standard form provided for in Article 20(5*)*.

8. The Commission shall not have access to information referred to in points (a), (c) and (h) of paragraph 6.

9. The automatic exchange of information shall take place within one month from the end of the quarter in which the information was filed. The first information shall be communicated by the end of the first quarter of [2019]."

(3) in Article 20, paragraph 5 is replaced by the following:

"5. The Commission shall adopt standard forms, including the linguistic arrangements, in accordance with the procedure referred to in Article 26(2), in the following cases:

(a) for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;

(b) for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8aaa before [30 June 2018].

Those standard forms shall not exceed the components for the exchange of information listed in Articles 8a(6) and 8aaa(6), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a and 8aaa respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a and 8aaa in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union."

(4) in Article 21, paragraph 5 is replaced by the following:

"5. The Commission shall by 31 December [2017] develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of paragraphs 1 and 2 of Article 8a shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December [2018] develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of paragraphs 5, 6 and 7 of Article 8aaa shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8aaa(8). The necessary practical arrangements shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in paragraphs 1 and 2 of Article 8a and paragraphs 5, 6 and 7 of Article 8aaa shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements."

(5) in Article 23, paragraph 3 is replaced by the following:

"3. Member States shall communicate to the Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in Articles 8, 8a, 8aa and 8aaa as well as the practical results achieved. The Commission shall, by means of implementing acts, adopt the form and the conditions of communication for that yearly assessment. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2)."

(6) Article 25a is replaced by the following:

"Article 25a

Penalties

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8aaa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."

(7) Article 27 is replaced by the following:

"Article 27

Reporting

1. Every five years after 1 January 2013, the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council.
2. Every two years after 1 January [2019], the Member States and the Commission shall evaluate the relevance of Annex IV and the Commission shall present a report to the Council. That report shall, if appropriate, be accompanied by a legislative proposal."

(8) Annex IV, the text of which is set out in the Annex to this Directive, is added.

Article 2

1. Member States shall adopt and publish, by 31 December [2018] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

   They shall apply those provisions from 1 January [2019].

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

"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 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.

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement 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 where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and this fee is fixed by reference to:

   (a) the amount of the tax advantage derived from the arrangement; or

   (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. **An arrangement that has substantially standardised documentation and/or structure and is commonly available to more than one relevant taxpayer without a need to be substantially customised for implementation**~~An arrangement, where the documentation is standardised, or substantially standardised; where a person implementing the arrangements must enter into a specific transaction or series of specific transactions; or where the transaction or series of transactions is standardised, or substantially standardised, in form~~.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.

2. An arrangement 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 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.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more 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 40% 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 the Organisation for Economic Co-operation and Development as non-cooperative ~~or having harmful tax regimes~~;

   (c) **[**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;]

~~2. 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.~~

3. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

4. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction .

5. There is an arrangement 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**.**

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

1. An arrangement which may ~~circumvent~~**have the effect of avoiding the reporting obligation under the laws implementing** Union legislation or any agreements on the automatic exchange of **financial account** 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 obligation.~~**. .** These arrangements include:

(a) **the use of an account, product or investment that is not, or purports not to be, a financial account, but has features that are substantially similar to those of a financial account;**~~the use of jurisdictions that are not bound by the automatic exchange of information;~~

(aa) the transfer of financial accounts or assets to jurisdictions that are not bound by the automatic exchange of financial account information with the State of residence of the relevant taxpayer;

(b) the re-classification of income ~~and capital~~ into ~~categories or into products~~**payments** that are not subject to the automatic exchange of **financial account** information;

(c) the **transfer or** conversion of a financial institution **or a financial account** into a financial institution **or a financial account** not subject to reporting under the automatic exchange of **financial account** information;

(d) the use of legal entities, arrangements or structures that~~, regardless of whether they are reportable, do not require~~ **eliminate or purport to eliminate** reporting of ~~all Account Holders or Controlling Persons~~**one or more controlling persons** under the automatic exchange of **financial account** information;

(da) arrangements that undermine or exploit weaknesses in the due diligence procedures used by financial institutions to comply with their obligations to report financial account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation.

(e) ~~the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation. This includes where there is a lack of rules for identifying the beneficial ownership of legal persons or arrangements, including trusts, foundations and special purpose vehicles and/or there is no requirement or mechanism to keep basic information and beneficial owner information on such legal persons accurate and up to date.~~

2. An arrangement involving offshore legal structures held through a non-transparent legal or beneficial ownership chain. These arrangements include the use of legal persons, arrangements or structures: a) that do not carry on a substantive economic activity supported by staff, equipment, assets and premises; and b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such legal persons, legal arrangements or structures and c) where the controlling persons of such legal persons, legal arrangements or structures are obscured

E. Specific hallmarks concerning transfer pricing

1. An arrangement which benefits from simplified determination of arm´s length price**, such as safe harbours**.

~~2. [An arrangement 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 is not exchanged.]~~**.**

3. Any arrangement involving the transfer of hard-to value intangibles or rights in hard-to-value intangibles. The term hard-to-value intangibles (HTVI) covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transactions was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

4. A significant intra-group cross-border transfer of functions and/or risks and/or assets, in particular, intangible assets. A transfer of functions and/or risks and/or assets is significant if they represent a key source of actual or potential economic benefits in the business operations, e.g. where it results in decline of 50 % or more of the earnings before interests and taxes.