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COM(2013) 348 final

2013/0188 (CNS)

Proposal for a

COUNCIL DIRECTIVE

**amending Directive 2011/16/EU as regards mandatory automatic exchange of
information in the field of taxation**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1. In recent years, the challenge posed by tax fraud and tax evasion has increased considerably and has become a major focus of concern within the European Union and worldwide. Billions of euros are being lost. By reducing fraud and evasion Member States could increase tax revenues which would also provide them with added scope to restructure their tax systems in a way that better promotes growth as outlined in the 2013 Annual Growth Survey. In addition, given the order of magnitude of the challenge, stepping up the fight against tax fraud and evasion is not only an issue of revenue, but also of fairness. Particularly in these difficult economic times, honest taxpayers should not suffer additional tax increases to compensate for revenue losses incurred due to tax fraudsters and evaders.
2. For years, the European Union (EU) has been working actively on these problems, in particular by adopting specific legal instruments to implement automatic exchange of information ("AEOI") within the Union. The EU Savings Directive (the "EUSD") ensures AEOI on interest income and a proposal to enlarge its scope is under discussion in the Council. The Directive on Administrative Cooperation (the "DAC") ensures that, from 2015, Member States will exchange information automatically upon availability on five categories of income and capital: employment, directors' fees, life insurance products not covered by other Directives, pensions and ownership of and income from immovable property.
3. Member States have now expressed a clear wish to go beyond current levels of cooperation. The European Council of 2 March 2012 invited the Council and the Commission to develop rapidly concrete ways to improve the fight against tax fraud. On 6 December 2012, the Commission presented an Action plan to strengthen the fight against tax fraud and tax evasion¹. The Action Plan highlights the need to promote AEOI as the European and international standard of transparency and exchange of information in tax matters. On 14 May 2013, the ECOFIN Council adopted conclusions welcoming the work by the Commission on developing measures to combat tax fraud, tax evasion and aggressive tax planning and recognising the useful role the Commission Action Plan can play in this regard².
4. The European Council on 22 May 2013 went even further, requesting the extension of AEOI at EU and global levels with a view to fighting against tax fraud, tax evasion and aggressive tax planning. On that occasion, the Commission committed itself to proposing amendments to the DAC in June 2013 in order to expand the scope of AEOI, in anticipation of the revision of the DAC already foreseen for 2017.
5. The objective of the present proposal is, therefore, to expand the scope of AEOI in the EU beyond that provided for in existing EU automatic information exchange arrangements. It would bring the following other items within the scope of the AEOI: dividends, capital gains, other financial income and account balances. The provision for a review and expansion of the DAC in 2017 would remain. However, in line with the objective of enhancing AEOI the removal of the condition of availability would now be considered at that time in respect of all five existing categories together so

¹ COM(2012)722 final.

² Council Conclusions on tax fraud and tax evasion of 14 May 2013 (doc. 9549/13 – FISC 94 – ECOFIN 353).

that the DAC would cover the full range of income. Furthermore, the categories to be considered for inclusion at that time would be amended in the light of the present proposal (see below). Extending the scope of the AEOI would also contribute to ensuring equality of treatment between different types of assets and to avoiding undesirable reallocation of portfolios.

6. The Commission proposes to remove the reference in Article 8(3) of the Directive to a threshold below which a Member State may not wish to receive information from other Member States. Discussions have revealed that such a threshold is not practical for the Member States that are required to report. However, a Member State could continue to opt not to receive any information on a particular category of income.
7. An EU initiative is needed both from an internal market perspective and in terms of efficiency and effectiveness:
 - An EU initiative ensures a coherent, consistent and comprehensive EU-wide approach to AEOI in the internal market. It would mean a single reporting approach across Member States which would lead to costs savings both for tax administrations and economic operators (see also point 11 below).
 - An EU legal instrument would also ensure certainty for tax administrations and economic operators within the EU.
 - An EU legal instrument would contribute to the development of the international standard of AEOI.
 - An EU legal instrument based on the DAC would involve the use of the IT arrangements already in place or under development to facilitate information reporting under the EUSD and the DAC. Under those Directives, EU Member States share information in specific formats using a specific communication channel (the CCN/CSI system). These formats could easily be extended so as to be usable also for the additional items now proposed for inclusion. As Member States have invested considerable time and money in developing these formats, there would be economies of scale if Member States also exchanged information on the new items using these formats.
 - Furthermore, the Council already committed itself, in Article 8(5) of the DAC, to consider in due course whether automatic information exchange should be extended, on the basis of an EU-wide legal instrument, to cover other categories of income such as dividends and capital gains. The present proposal is, therefore, merely accelerating work in line with this commitment.
8. The agreements that many governments have concluded or will conclude with the US as regards the US Foreign Account Tax Compliance Act (FATCA)³ have given further impetus to AEOI as a way of combating tax fraud and evasion.
9. On 9 April 2013, France, Germany, the United Kingdom, Italy and Spain announced plans for a pilot action on AEOI using the FATCA model agreed with the US as a basis. These Member States also called on Europe to take a lead in promoting AEOI in the world and expressed the wish to discuss how progress could be made within the EU on improving tax information exchange between all Member States.

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<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>

10. Article 19 of the DAC states that a Member State that provides wider cooperation to a third country may not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State. The fact that Member States have concluded or will conclude agreements with the US as regards FATCA means that they provide for a wider cooperation within the meaning of that provision.
11. Expanded AEOI on the basis of an EU-wide legislative instrument would remove the need and incentive for Member States to invoke Article 19 of the DAC, with a view to concluding bilateral or multilateral agreements that may be considered appropriate on the same subject in the absence of relevant Union legislation. The scenario of various agreements concluded under that provision would, in fact, present a number of disadvantages, compared to a solution brought about by EU action:
 - The level playing field between the Member States might be put at risk if Member States agreed to cooperate on increased AEOI in different ways. This could lead to distortions and artificial flows of capital within the internal market.
 - If the agreements between Member States were not identical, this could also create difficulties for economic operators that are active in several Member States as they could then face different compliance requirements in different Member States.
 - It might also mean that Member States would not be able to utilise the IT reporting systems that have been developed within the EU (see above).
12. Timely adoption and implementation are crucial so as to reap the benefits as quickly as possible. In order to ensure consistency with the deadline for the application of AEOI to the categories of income and capital already covered by the DAC, the time limits proposed for transposition and application of the new rules are 31 December 2014 and 1 January 2015, respectively.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

In addition to the discussions held in the Council of Ministers since April 2013 (see above under item 1), the Commission held a technical meeting with Member States on 21 May 2013 to confirm the need for a legislative proposal and to discuss its practical modalities and content.

The discussions revealed that Member States generally supported the need for enhancing automatic information exchange and for accelerating the extension of the scope of Article 8 of the DAC as already envisaged in Article 8(5).

Most Member States wish to take speedy action to increase AEOI but uncoordinated action by Member States on this matter could lead to potentially lasting fragmentation in the internal market. It has, therefore, become exceptionally urgent to provide for a consistent and coherent EU legal framework; for this reason, no impact assessment has been prepared.

The European Parliament adopted a resolution on 21 May 2013⁴, whereby it welcomes the Commission Action Plan and its Recommendations, urges Member States to follow up their

⁴ European Parliament Resolution of 21 May 2013 on fight against tax fraud, tax evasion and tax havens (Kleva Report) – 2013/2025(INI).

commitments and embrace the Commission's action plan, as well as emphasises that the EU should take a leading role in discussions on the fight against tax fraud, tax avoidance and tax havens and, in particular, in relation to the promotion of automatic exchange of information.

The European Economic and Social Committee also adopted an opinion on 17 April 2013⁵. The Committee endorses the Commission's Action Plan and supports its efforts to find practical solutions as regards reducing tax fraud and tax evasion. In particular, it supports in points 4.6 and 4.7 the Commission's initiatives as regards the improvements in relation to the AEOI.

3. LEGAL ELEMENTS OF THE PROPOSAL

The proposal aims at modifying Article 8 of the current DAC. The modifications are contained in Article 1 of the proposal.

The first modification concerns paragraph 3 of Article 8. The proposal is to remove the reference to a threshold below which a Member State may not wish to receive information from other Member States. Discussions with Member States revealed that such a threshold is not practically manageable. In addition, it is proposed to insert the expression "one or several of" before the term "the categories"; this would prevent misunderstandings in a case where a Member State indicates that it does not wish to receive information on one or several categories of income and capital referred to in paragraph 1 even if it does want to receive information on others.

It is proposed to introduce, by way of a new paragraph 3a of Article 8, automatic exchange of information for dividends, capital gains, any other income generated with respect to the assets held in a financial account, any amount with respect to which the financial institution is the obligor (i.e. is legally or contractually obliged to pay) or the debtor, including any redemption payments, and account balances. These additional items relate to income paid directly or indirectly to beneficial owners who are natural persons, as defined by Article 3(11)(a) of Directive 2011/16/EU, or capital held directly or indirectly by such persons. It is not proposed to extend to the new items the existing condition provided for in Article 8(1) in respect of income currently included in the Directive, which is that the information only has to be exchanged if it is "available". Information about those new items will certainly be available as financial intermediaries will be required to report it to tax administrations under the agreements that Member States have concluded or will conclude with the US as regards FATCA.

Regarding paragraph 5 of Article 8, the following changes are proposed:

- In the first subparagraph, a reference is made to the new paragraph 3a and the review of the condition of availability will concern all five categories listed in paragraph 1 (instead of only three of them);
- In point (b) of the second subparagraph, the reference to "dividends and capital gains" as matters to be considered for future addition to the Directive is removed as these categories are now added in the new paragraph 3a; "other categories and items, including royalties" (royalties is already quoted in the existing text) is substituted so as to leave more open the scope of a new proposal in 2017.

⁵ European Economic and Social Committee Opinion of 17 April 2013 on the Communication from the Commission to the European Parliament and the Council - An action plan to strengthen the fight against tax fraud and tax evasion COM(2012) 722 final (Dandea Report) – CESE 101/2013.

Article 2 contains the usual provision compelling Member States to transpose the Directive. The time limits proposed for transposition and application of the new rules are 31 December 2014 and 1 January 2015 respectively, in order to align them with the dates applicable in respect of the categories of income and capital included in Article 8.1 of the existing Directive.

4. BUDGETARY IMPLICATION

The proposal does not entail budgetary implications. This applies in particular in regard to the use of IT tools, since the tools under development will also be used for the implementation of this Directive.

Proposal for a

COUNCIL DIRECTIVE

amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 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 Parliament⁶,

Having regard to the opinion of the European Economic and Social Committee⁷,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) In recent years, the challenge posed by tax fraud and tax evasion has increased considerably and has become a major focus of concern within the Union and at global level. Unreported and untaxed income is considerably reducing national tax revenues. An increase in the efficiency and effectiveness of tax collection is therefore urgently needed. The automatic exchange of information constitutes an important tool in this regard and the Commission in its Communication of 6 December 2012 containing an Action plan to strengthen the fight against tax fraud and tax evasion⁸ highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters. The European Council on 22 May 2013 requested the extension of automatic information exchange at Union and global levels with a view to combatting tax fraud, tax evasion and aggressive tax planning.
- (2) Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC⁹ already provides for the mandatory automatic exchange of information between Member States on certain categories of income and capital. It also establishes a step-by-step approach to reinforcing automatic exchange of information by its progressive extension to new categories of income and capital and the removal of the condition that the information only has to be exchanged if available.
- (3) As highlighted by the request of the European Council, it is appropriate to bring forward the extension of automatic information exchange already envisaged in Article

⁶ OJ C , , p. .

⁷ OJ C , , p. .

⁸ COM(2012)722 final.

⁹ OJ L 64, 11.3.2011, p.1.

8(5) of Directive 2011/16/EU. A Union initiative ensures a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of information in the internal market which would lead to cost savings both for tax administrations and economic operators.

- (4) The fact that Member States have concluded or have expressed an intention to conclude agreements with the United States of America relating to its legislation on Foreign Account Tax Compliance (commonly referred to as "FATCA") means that they are providing or will provide for a wider cooperation within the meaning of Article 19 of Directive 2011/16/EU, and are or will be under an obligation to provide such wider cooperation to other Member States as well.
- (5) The conclusion of parallel and uncoordinated agreements by Member States under Article 19 of Directive 2011/16/EU would lead to distortions that would be detrimental to the smooth functioning of the internal Market. Expanded automatic information exchange on the basis of a Union-wide legislative instrument would remove the need for Member States to invoke that provision, with a view to concluding bilateral or multilateral agreements that may be considered appropriate on the same subject in the absence of relevant Union legislation.
- (6) The scope of Article 8 of Directive 2011/16/EU, should be extended to include the following items covered by FATCA and related agreements by Member States: dividends, capital gains, other financial income and account balances, which are paid, secured or held by a financial institution for the direct or indirect benefit of a beneficial owner who is a natural person resident in other Member States.
- (7) The condition that automatic exchange may be subject to the availability of the information requested as provided for in Article 8(1) of Directive 2011/16/EU should not apply to the new items as information about those items must necessarily be made available by financial intermediaries to tax administrations under the agreements with the United States as regards FATCA.
- (8) The reference to a threshold in Article 8(3) of Directive 2011/16/EU should be removed since such a threshold does not appear to be manageable in practice.
- (9) The review of the condition of availability to be undertaken in 2017 should be extended to all the five categories referred to in Article 8(1) of Directive 2011/16/EU, so that the case for exchange of information by all Member States on all those categories be examined.
- (10) This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union.
- (11) Since the objective of this Directive, namely the efficient administrative cooperation between Member States under conditions compatible with the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity and effectiveness required, be better achieved at the level of the Union, 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.
- (12) Directive 2011/16/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Article 8 of Directive 2011/16/EU is amended as follows:

(a) Paragraph 3 is replaced by the following:

“3. The competent authority of a Member State may indicate to the competent authority of any other Member State that it does not wish to receive information on one or several of the categories of income and capital referred to in paragraph 1. It shall also inform the Commission thereof.

A Member State may be considered as not wishing to receive information in accordance with paragraph 1, if it does not inform the Commission of any single category in respect of which it has information available.”

(b) After paragraph 3, the following paragraph is inserted:

“3a. The competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2014 concerning the following items which are paid, secured or held by a financial institution for the direct or indirect benefit of a beneficial owner who is a natural person resident in that other Member State:

- (a) dividends;
- (b) capital gains;
- (c) any other income generated with respect to the assets held in a financial account;
- (d) any amount with respect to which the financial institution is the obligor or debtor, including any redemption payments;
- (e) account balances.

The first subparagraph shall not apply to the extent that the exchange of information at issue is ensured by paragraph 1 or by any other Union legal instrument.”

(c) Paragraph 5 is replaced by the following:

“5. Before 1 July 2017, the Commission shall submit a report that provides an overview and an assessment of the statistics and information received, on issues such as the administrative and other relevant costs and benefits of the automatic exchange of information, as well as practical aspects linked thereto. If appropriate, the Commission shall present a proposal to the Council regarding the categories and the conditions laid down in paragraph 1, including the condition that information concerning residents in other Member States has to be available, or the items referred to in paragraph 3a, or both.

When examining a proposal presented by the Commission, the Council shall assess further strengthening of the efficiency and functioning of the automatic exchange of information and raising the standard thereof, with the aim of providing that:

(a) the competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2017 concerning residents in that other

Member State, on all categories of income and capital listed in paragraph 1, as they are to be understood under the national legislation of the Member State communicating the information;

(b) the lists of categories and items laid down in paragraphs 1 and 3a be extended to include other categories and items, including royalties"

Article 2

1. Member States shall adopt and publish, by 31 December 2014 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 2015.

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*