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REPORT

From:	General Secretariat of the Council
To:	Council
No. prev. doc.:	12256/15 FISC 114
No. Cion doc.:	7374/15 FISC 25 - COM(2015) 135 final
Subject:	Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation - Political agreement

I. INTRODUCTION

1. The Commission presented the abovementioned legislative proposal¹ on 18 March 2015, together with a proposal to repeal the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, as well as a Commission communication outlining a number of other initiatives to advance tax transparency.

¹ Doc. 7374/15 FISC 25 + ADD 1.

2. The purpose of this legislative proposal is to strengthen tax transparency by building into the existing Directive 2011/16/EU on administrative cooperation in the field of taxation² (DAC) new rules on automatic exchange between tax administrations of information regarding advance cross-border rulings and advance pricing arrangements (a particular type of ruling used in the area of transfer pricing). The Commission will receive the information required to determine whether and to what extent Member States comply with this Directive. This proposal also foresees tasking the Commission with adopting the necessary practical arrangements to create a secure central directory for exchange and storage of information from Member States.
3. The proposed amendments to the current DAC would reinforce the rules on exchange of information by making exchange of advance cross-border rulings and advance pricing arrangements automatic, in order to limit possibilities for erosion of tax base or tax loopholes (e. g. as a result of profit shifting).
4. The European Economic and Social Committee has delivered its opinion on this proposal on 27 May 2015, the opinion of the European Parliament is pending.

II. STATE OF PLAY

5. The issues covered by this legislative proposal are high on the EU and wider international agenda. One of the priorities that the June 2014 European Council set for the Union for the next five years is to "guarantee fairness: by combatting tax evasion and tax fraud so that all contribute their fair share."³ Moreover, the December 2014 European Council concluded that "there is an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels."⁴

² OJ L 64, 11.3.2011, p. 1., as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ L 359, 16.11.2014, p. 1.)

³ Doc. EUCO 79/14 CO EUR 4 CONCL 2, point 2.

⁴ Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

6. In the first half of 2015, the work on this dossier during the term of the Latvian Presidency was subject to four meetings of the Working Party on Tax Questions (WPTQ) and to an orientation debate in June 2015 ECOFIN, where all Member States attached great importance to this proposal, while supporting its main objectives and calling for quick adoption of the Directive.
7. The Luxembourg Presidency has prioritized work on this file. It invited delegations to aim at reaching a political agreement on this dossier at the 6 October 2015 ECOFIN Council, as this would be a well-timed and important development also in the context of international work conducted in this area. The final G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan⁵ is expected to be reviewed by the G20 Ministers of Finance in their meeting⁶ which is planned for 8 October 2015, so that it could be submitted for endorsement to the upcoming 2015 G-20 Antalya summit (which is expected to take place in November 2015).
8. During the term of the Luxembourg Presidency, four meetings of the Working Party on Tax Questions (WPTQ) took place (16 July, 22 July, 9 September and 24 September 2015), where the Presidency aimed at addressing the concerns raised by a number of Member States on the original Commission proposal.
9. In the meeting of the Committee of Permanent Representatives (Coreper 2) of 30 September 2015 delegations could support all the elements of the Presidency compromise text, set out in doc. 12525/15 FISC 119 ECOFIN 737, while leaving one open issue for a discussion at ECOFIN level, as set out in part III of this note.

⁵ In 2013, OECD and G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS

⁶ See point 11 of the press communique of the 4 September G20 Finance Ministers and Central Bank Governors Meeting: <https://g20.org/wp-content/uploads/2015/02/Communique-G20-Finance-Ministers-and-Central-Bank-Governors-Istanbul1.pdf>

III. OPEN ISSUE FOR DISCUSSION - *Exchange of past rulings (Article 8a(2) and recital 6)*

10. The Commission has proposed that advance cross-border rulings and advance pricing arrangements are automatically exchanged if they are issued up to a period of 10 years before the date of entry into force of the Directive and under the condition that these are still valid on the date of entry into force of the new Directive. While this approach was supported by some delegations, a large number of Member States have raised concerns, such as that this proposal would run contrary to their national constitutional provisions and that the "look-back" of 10 years would cause an administrative burden disproportionate to the sought objectives of achieving tax transparency. It was felt that legal constraints may anyway not allow Member States to go back for such a long past period, or that this approach goes too far beyond what has been agreed in the framework of the OECD, especially as the scope of the Directive is much broader than that of the exchange at the OECD.
11. In the meeting of the Committee of Permanent Representatives, a large number of delegations could support the compromise, set out in doc. 12525/15 FISC 119 ECOFIN 737, which foresees that:
 - i) advance cross-border rulings and advance pricing arrangements issued as from 1 January 2012 onwards would be exchanged as from 1 January 2017 (the starting date of application of the Directive), provided that those rulings are still valid on 1 January 2017 (this means, in practice, a "look-back" of 5 years instead of 10 years);
 - ii) in order to reduce administrative burden, there is a possibility (not an obligation) for Member States wishing to do so to exclude from automatic exchange of past advance cross-border rulings and advance pricing arrangements issued to persons or group of persons that satisfy the conditions of a threshold (the so-called "threshold exemption").

12. However, in the meeting of the Committee of Permanent Representatives, several delegations could not support this compromise and requested that information about past advance cross-border rulings and advance pricing arrangements is exchanged regardless of whether they are "still valid" or not as these would be important for tax examination or auditing of past fiscal years.⁷ Most of these delegations also requested to abolish the threshold exemption described above, which, if used, could additionally reduce the scope of the exchange of past advance cross-border rulings and advance pricing arrangements.
13. Notably, concerning the "still valid" criterion, some of the delegations pointed to the agreement recently reached at the OECD, at the level of the Forum on Harmful Tax Practices, on the report on the BEPS Action 5 for 2015⁸, which foresees a mandatory spontaneous exchange of information concerning rulings which were still valid on 1 January 2014.
14. However, a number of delegations deemed the discrepancies between the OECD recommendations and the new EU rules justified, due to the fact that the proposed EU rules on automatic exchange are indeed of a broader scope and need to be transposed into national law, while the scope of information to be exchanged under OECD recommendation is narrower and could be implemented by using the existing national laws on spontaneous information exchange.

⁷ The original Commission proposal covered only "still valid" rulings and arrangements, issued up to 10 years before the date of entry into force of the new Directive.

⁸ The text of the BEPS Action 5 reads as follows: "*Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.*"

IV. THE WAY FORWARD

15. Against this background, the Presidency continues to be of the view that the compromise text, set out in doc. 12525/15 FISC 119 ECOFIN 737, should address and strike the right balance between the concerns raised by most delegations, with a view to reaching an agreement.
 16. The Council is therefore invited:
 - to discuss the open issue set out in part III of this note, concerning Article 8a(2) and recital 6 of the Presidency compromise, and
 - to reach a political agreement on the Directive, as set out in doc. 12525/15 FISC 119 ECOFIN 737, with a view to adopting the Directive, subject to receiving the opinion of the European Parliament and legal-linguistic revision, as an "A" item on the agenda of a forthcoming Council.
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