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Proposal for a

# COUNCIL DIRECTIVE

## amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities

# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE PROPOSAL

### • Reasons for and objectives of the proposal

The European Commission is pursuing an ambitious agenda against tax evasion and avoidance, with a view to delivering fairer and more effective taxation in the EU. Increasing tax transparency is central to this agenda. Over the past few years, significant progress has been made in enhancing tax transparency and strengthening the cooperation between tax authorities across the EU. Member States have agreed on new legislation to automatically exchange information on tax rulings[1] and on tax-related country-by-country reports of multinationals'[2]. In April 2016, the Commission also proposed that large multinationals should publicly disclose a specified set of tax-related data on a country-by-country basis. With regard to individuals' accounts, new EU legislation entered into force in January 2016, under which Member States' tax authorities will automatically exchange information on financial accounts held abroad. This will help prevent funds from being hidden offshore to escape taxation.

Recent media leaks, which exposed the large scale concealment of offshore funds, confirm the importance of the EU's tax transparency agenda. They also highlighted areas where further measures still need to be taken to reinforce the EU and international transparency framework. In particular, it has become apparent that tax authorities need greater access to information on the beneficial owners of intermediary entities and other relevant customer due diligence information, if they are to effectively identify and address tax evasion.

The G20 statement of 18 April calls on the Financial Action Task Force ('FATF') and the Global Forum on Transparency and Exchange of Information for Tax Purposes to make initial proposals to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information, and its international exchange.

In their statement of 14 April 2016, the five EU Ministers of Finance attending the G20 focused on fight against tax evasion, aggressive tax planning and money laundering. In particular, the statement stressed the vital importance of the effective and rapid implementation of the Global Standard for Automatic Exchange of Financial Account Information in Tax Matters ("Global Standard"). In addition, it outlined the challenges faced with regard to availability of beneficial ownership information and underlined the common patterns among money laundering, tax evasion and illicit finance.

Directive 2014/107/EU ("Directive") amending Directive 2011/16/EU ("Directive on Administrative Cooperation") was adopted in 2014 and applies as of 1 January 2016 to 27 Member States and as of 1 January 2017 to Austria. This Directive implements the Global Standard for Automatic Exchange of Financial Account Information in Tax Matters ("Global Standard") within the EU. As such, it ensures that information on Account Holders of Financial Accounts is reported to the Member State where the Account Holder is resident.

In addition, the Directive foresees that, where the Account Holder is an intermediary structure (i.e. a Passive Non-Financial Entity), the Financial Institutions shall look through that Entity and identify and report its Controlling Persons (beneficial owners in anti-money-laundering

[1] OJ L 332, 18.12.2015, p. 1–10
[2] OJ L 146, 3.6.2016, p. 8–21

terminology[3]). That important element in the application of the Directive involves a step relying entirely on anti-money-laundering ("AML") information for the identification of the Controlling Persons.

Without access by the tax authorities to that AML information, the effectiveness of the monitoring of Financial Institutions on applying the Directive on Administrative Cooperation will be reduced significantly. In the absence of that information, those authorities will not be able to monitor, audit and confirm that the Financial Institutions apply properly the Directive and identify correctly and report the Controlling Persons of intermediary structures.

Therefore, the objective of this initiative is to enable tax authorities to consistently access the AML information for the performance of their duties in monitoring the proper application of the Directive on Administrative Cooperation by Financial Institutions.

Tax administrations' access to AML information differs considerably throughout the EU. Even when this access is granted, authorities often still encounter significant barriers that hinder the effectiveness of their work against tax avoidance and evasion. The amendments to the Fourth Anti-Money-Laundering Directive, referred to in the next section, are important to improve the identification of money-laundering, corruption, terrorist financing and other criminal activities. Tax authorities should also have access to such information in order to maximise their capacity to tackle tax evasion and avoidance. The Commission is therefore proposing that this access should be granted through the Directive on Administrative Cooperation, which is the framework for many of the EU's other tax transparency measures.

The enabling of that access concerns internal organisational matters in Member States and does not involve any reporting or other administrative obligations on the side of external stakeholders. Any potential additional burden from Financial Institutions having to present AML information to tax authorities during checks, reviews and audits would be:

(i) strictly linked to the *supervision of already existing obligations*, whose impact on the administrative burden was already taken into consideration when those obligations were first laid down,

(ii) on a case by case basis depending on the findings during checks, reviews and audits, and

(iii) always in the context of comprehensive checks, reviews and audits of the fulfilment of all those existing obligations for identification of reportable persons under the Directive on Administrative Cooperation and not only the one for identifying controlling persons/beneficial owners

- **Consistency with existing policy provisions in the policy area**

Amendments to the Fourth Anti-Money-Laundering Directive (COM(2016) 450)

In its Action plan for strengthening the fight against terrorist financing adopted on 2 February 2016, the Commission committed to propose amendments to the Fourth Anti-Money-Laundering Directive[4] ("4 AMLD") in the first half of 2016 to further reinforce the rules against terrorist financing. The need to further reinforce the AML rules in order to improve transparency and the availability of beneficial ownership information also led the Commission

[3] Ref.: Section VIII, point D.5 of Annex I to Directive 2014/107/EU.

[4] 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)

to propose amendments to the 4 AMLD after assessing policy options in a second part of the Impact Assessment of those amendments to the 4 AMLD.

The amendments to the 4 AMLD recognise the links between the AML and tax evasion and the challenges faced globally. Those amendments rely on the clear synergies in the customer due diligence performed under the 4 AMLD and the customer due diligence performed under the Directive on Administrative Cooperation.

Similarly, the fact that the AML information is clearly identifiable and available under specific provisions in the 4 AMLD provides an opportunity for a direct reference to those provisions, without the need for Financial Institutions to duplicate such information for the purposes of the Directive on Administrative Cooperation.

Those two proposals are presented together with the Communication issued on the same date (COM(2016) 451).

## 2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

### • Legal basis

The proposal modifies Directive 2011/16/EU[5] as amended by Directive 2014/107/EU[6], Directive 2015/2376/EU[7] and by Directive 2016/881/EU[8] by introducing a provision enabling access by tax authorities to specific AML information for taxation purposes.

The modifications are contained in Article 1 of this proposal. In particular:

Article 22 of Directive 2011/16/EU is supplemented with paragraph 1a enabling the access by the tax authorities to beneficial ownership and customer due diligence implementation measures, documentation and information in the 4 AMLD. The paragraph is added to the general Article 22 on the specific obligations of Member States, rather than the specific Article 8(3a) implementing the automatic exchange. This is because that automatic exchange will inevitably generate exchanges of information upon request and spontaneous exchanges with regard to the quality and completeness of the information automatically exchanged. It can also lead to for further investigations, for example into accounts or other assets that have not been subject to the automatic exchange. The access powers of tax authorities would otherwise also be needed in the context of such exchanges.

### • Subsidiarity (for non-exclusive competence)

The subject-matter of these modifications falls within the same legal basis as Directive 2011/16/EU, i.e. Article 115 of the Treaty on the Functioning of the European Union (TFEU), which aims to ensure the proper functioning of the Internal Market. Article 115 TFEU provides for the approximation of such laws, regulations or administrative provisions of the Member States which directly affect the establishment or functioning of the internal market and make the approximation of laws necessary.

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[5] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1)

[6] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.12.2014, p. 1)

[7] 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)

[8] 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)

To ensure the proper functioning of the internal market and the level playing field in terms of the abilities of Member States to properly monitor the implementation of the Directive on Administrative Cooperation, the tax authorities of all EU Member States shall be entitled to the necessary access powers.

- **Proportionality**

The problems identified in the recent revelations have highlighted the fact that tax evaders and their facilitators always target the weaker transparency regimes and exploit vulnerabilities in their application. In order to ensure that such opportunities are curtailed and to ensure the level playing field among Member States, a common set of rules enabling the tax authorities to fulfil their monitoring obligations is necessary.

Thus, the proposal represents the most proportionate answer to the identified problem. The proposed amendments consequently do not go beyond what is necessary to address the issues at stake and, in that way, to achieve the Treaty's objectives of a proper and effective functioning of the Internal Market.

This proposal complies with the principles of proportionality as set out in Article 5, paragraph 4 of the Treaty on the European Union.

- **Choice of the instrument**

The monitoring powers relate directly to the Directive on Administrative Cooperation. Therefore, the provisions enabling those monitoring powers shall be made part of that same Directive.

## 3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

The amendments may involve only internal organisational arrangements within the administrations of Member States and they do not concern external stakeholders.

- **Member States**

In their statement of 14 April 2016, five Member States outlined the importance of the effective and rapid implementation of the Global Standard, which is implemented by the Directive, and the related AML challenges. That statement is now joined by all the other Member States.

- **Impact assessment**

The Impact Assessment to the changes of the 4 AMLD contains an extensive analysis in section “5.4 Certain public authorities lack information” and the preferred option as submitted to the Regulatory Scrutiny Board is “Clarification regarding access by tax authorities”.

As explained above, while the amendments to the Fourth Anti-Money-Laundering Directive are important from the perspective of the fact that the work of tax authorities is key in identifying and reporting other suspected serious crimes such as corruption, money laundering and terrorism financing, the access by tax authorities to information for their own purposes as set out by Union and national law, and in particular for the purposes of the Directive on Administrative Cooperation and its proper application, should be regulated in a tax directive.

- **Fundamental rights**

Article 6(1) of the Treaty on European Union states that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights.

The impact of the increased access to beneficial ownership information and the underlying customer due diligence procedures have been analysed from the perspective of ensuring respect of Article 7 (right to private and family life) and Article 8 (protection of personal data) of the Charter. Against the background that the new measures deal with personal data, the provision of the access is the only way that the tax authorities can confirm not only the information being reported to them but also that the person being taxed is the real beneficial owner, and provide them with strategic tools to fight tax fraud and evasion.

In addition, tax administrations are already covered by secrecy requirements. The information obtained in the course of the fulfilment of their duties would fall into the scope of those secrecy requirements and would be subject to the necessary safeguards. Article 25 of the Directive on Administrative Cooperation refers to the applicable data protection rules regarding the administrative cooperation among tax authorities and on the collection and use of data collected by and from obliged entities.

To that effect, the proposed measures whilst potentially interfering with the fundamental rights to private life including confidentiality of communications as well as protection of privacy and of personal data they are necessary and proportionate to ensure the proper functioning of the tax systems and the supervision of the proper fulfilment of the obligations of all actors.

## 4. BUDGETARY IMPLICATIONS

There is no budgetary implication for the EU Budget.

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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[9],

Having regard to the opinion of the European Economic and Social Committee[10],

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Directive 2011/16/EU[11] as amended by Directive 2014/107/EU[12] applies as of 1 January 2016 to 27 Member States and as of 1 January 2017 to Austria. That Directive implements the Global Standard for Automatic Exchange of Financial Account Information in Tax Matters ("Global Standard") within the Union. As such, it ensures that information on Account Holders of Financial Accounts is reported to the Member State where the Account Holder is resident.

(2) In addition, Directive 2011/16/EU stipulates that, where the Account Holder is an intermediary structure, Financial Institutions are to look through that structure, and identify and report its beneficial owners. That important element in the application of the Directive relies on anti-money-laundering ('AML') information obtained pursuant to Directive 2015/849/EU of the European Parliament and of the Council[13] for the identification of the beneficial owners.

(3) To ensure effective monitoring of the application by Financial Institutions of the due diligence procedures set forth in Directive 2011/16/EU, the tax authorities need access to AML information. In the absence of such access, those authorities would not be

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9 OJ C , , p. .

10 OJ C , , p. .

11 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1).

12 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.12.2014, p. 1).

13 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).

able to monitor, confirm and audit that the Financial Institutions apply properly Directive 2011/16/EU by identifying correctly and reporting the beneficial owners of intermediary structures.

(4) It is therefore necessary to ensure the access by the tax authorities to the AML information, procedures, documents and mechanisms for the performance of their duties in monitoring the proper application of Directive 2011/16/EU.

(5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Where this Directive requires that access to personal data by tax authorities be provided by law, this does not necessarily require an act adopted by the parliament, without prejudice of the constitutional order of the Member State concerned. However, such a law should be clear and precise and its application should be clear and foreseeable to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union and the European Court of Human Rights.

(6) Since the objective of this Directive, namely the efficient administrative cooperation between Member States and its effective monitoring 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 Union level, 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.

(7) The customer due diligence carried out by Financial Institutions under Directive 2011/16/EU has already started and the first exchanges are to be finalised by September 2017. Therefore, in order to ensure that the effective monitoring of the application is not delayed, this Amending Directive should enter into force and be transposed by 1 January 2017.

(8) Directive 2011/16/EU should therefore be amended accordingly.

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

In Article 22 of Directive 2011/16/EU, the following paragraph 1a is inserted:

"(1a) For the purpose of the implementation and enforcement of the laws of the Member States giving effect to this directive, and to ensure the functioning of the administrative cooperation it establishes, Member States shall provide by law for access by tax authorities to the mechanisms, procedures, documents and information referred to in articles 13, 30, 31, 32a and 40 of Directive 2015/849/EU of the European Parliament and of the Council*.

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* 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).".

*Article 2*

1. Member States shall adopt and publish, by 31 December 2016 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 2017.

   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 date of its adoption.

*Article 4*

This Directive is addressed to the Member States.

Done at Strasbourg,

*For the Council*
*The President*