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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**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**

{COM(2017) 335 final}  
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## 1. INTRODUCTION

Tackling tax avoidance and evasion is among the political priorities in the EU, with a view to creating a deeper and fairer single market. In this context, the Commission has presented in recent years a number of initiatives in order to promote a fairer tax system. Enhancing transparency is one of the key pillars in the Commission's strategy to combat tax avoidance and evasion. In particular the exchange of information between tax administrations is crucial in order to provide them with the necessary information to exercise their duties efficiently.

Recent leaks, including the Panama Papers, have highlighted how certain intermediaries appear to have actively helped their clients to make use of aggressive tax planning schemes in order to reduce the tax burden and to conceal money offshore. Whilst some complex transactions and corporate structures may have entirely legitimate purposes, it is also clear that some activities, including offshore structures, may not be legitimate and in some cases, may even be illegal. Different and complex structures, often involving a company located in a jurisdiction which is low tax or non-transparent, are used to create distance between the beneficial owners and their wealth with a view to ensuring low or no taxation. Certain taxpayers use shell companies registered in tax/secretary havens and appoint nominee directors to conceal their wealth and income by hiding the identity of the real owners of the companies (beneficial owners). The Commission Staff Working document on Corporate Income Taxation in the European Union<sup>1</sup> as well as the Commission staff working document prepared for the Anti-Tax Avoidance Package<sup>2</sup>, provide evidence on profit shifting and base erosion practices.

Given the nature of tax avoidance and evasion, the impact on total tax loss is difficult to measure. A recent study commissioned by the European Parliamentary Research Service<sup>3</sup> found that corporate income tax revenue loss from profit shifting within the EU amounted to about EUR 50-70 billion in 2013. The UK reported that the overall cost of tax avoidance was GBP 2.7 billion in 2013-14.<sup>4</sup>

Several calls have been made to the EU to take the lead in this field and further investigate the role of intermediaries. In particular, the European Parliament has called for tougher measures against intermediaries who assist in tax evasion schemes.<sup>5</sup> Member States at the informal ECOFIN Council of April 2016<sup>6</sup> invited the Commission to consider initiatives on mandatory disclosure rules inspired by the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action 12<sup>7</sup>, with regard to introducing more effective disincentives for intermediaries who assist in

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<sup>1</sup> Commission Staff Working Document [SWD\(2015\)121 final](#) "Corporate Income Taxation in the European Union"

<sup>2</sup> Commission Staff Working Document [SWD\(2016\)06 final](#) "Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU"

<sup>3</sup> European Parliamentary Research Service – EPRS (2015): "[Bringing transparency, coordination and convergence to corporate tax policies in the European Union](#)"

<sup>4</sup> HM Revenue & Customs (2015): "[Measuring tax gaps 2015 edition](#)"

<sup>5</sup> European Parliament resolution of 6 July 2016 on tax rulings and other measures similar in nature or effect ([2016/2038\(INI\)](#))

<sup>6</sup> Informal ECOFIN Council of 22 April 2016

<sup>7</sup> OECD Base erosion and profit shifting – BEPS (2015): "[Public Discussion Draft BEPS Action 12: Mandatory Disclosure Rules](#)". See also for further clarification the entry in the glossary.

tax evasion schemes. In May 2016, the Council presented conclusions on an external strategy and measures against tax treaty abuse<sup>8</sup>. In this context, the ECOFIN invited “the Commission to consider legislative initiatives on Mandatory Disclosure Rules inspired by BEPS Action 12 of the OECD project in order to introduce more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes”.<sup>9</sup>

With the aim to enhance transparency, the OECD/G20 Action 12 recommends countries to introduce a regime for the mandatory disclosure of aggressive tax planning arrangements but does not define any minimum standard for member countries to comply with. Instead, the recommended actions are drafted as alternatives without pointing to preferred options. The final report on Action 12 was published as part of the set of BEPS actions in October 2015. The report stresses that the lack of timely, comprehensive and relevant information on the aggressive tax planning strategies is one of the main challenges faced by the tax authorities worldwide.

The set of BEPS measures, as recommended by the OECD, has been endorsed by the G20 and most EU Member States have committed, in their capacity as OECD members, to implement them. Furthermore, the current G20 President, Germany, has identified tax certainty as one of the main themes.<sup>10</sup> Providing tax administrations with timely information on the design and use of potentially aggressive tax planning schemes supplies them with an additional tool to take appropriate measures against certain tax planning schemes, which ultimately increases tax certainty and is fully compatible with the G20 priorities.

The July 2016 Communication on further measures to enhance transparency and the fight against tax evasion and avoidance<sup>11</sup> outlined the Commission's assessment of the priority areas for action in the coming months, at EU and international level. Increasing oversight of intermediaries was identified as one of the areas for future action. Indeed, Lux Leaks and the Panama Papers<sup>12</sup> have demonstrated that the role of intermediaries in the area of aggressive tax planning has not been addressed in a comprehensive fashion. The European Parliament (EP) and EU Finance Ministers (ECOFIN) are pushing for swift action.

In fact, Member States adopted EU legislation for the automatic exchange of foreign account information according to the Common Reporting Standard (CRS) and also implemented several of the BEPS Actions on Transparency and Fairer Taxation through common rules. It is now critical to ensure that these instruments are actually applied and bring positive results as well as that they are not circumvented.

It is therefore critical to act on time and make use of the existing momentum. Deferring this initiative to a later stage would risk that it would be out of context or no longer useful.

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<sup>8</sup> Council of the European Union (2016), Conclusions on the "[\*Commission Communication on an External Strategy and Recommendation on the implementation of measures against tax treaty abuse – Council conclusions\*](#)", 25.5.2016 (May 2016 ECOFIN Conclusions).

<sup>9</sup> May 2016 ECOFIN Conclusions, point 12.

<sup>10</sup> G20 priorities: [https://www.g20.org/Web/G20/EN/G20/Agenda/agenda\\_node.html](https://www.g20.org/Web/G20/EN/G20/Agenda/agenda_node.html)

<sup>11</sup> European Commission, Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016) 451 final, 5.7.2016 (*Panama Communication*).

<sup>12</sup> The Panama Papers consists of 11.5 million leaked documents from Panamanian Law firm Mossack Fonesca, detailing how the corporate service provider helped creating 214,488 offshore entities around the world for its clients since the 1970's. <https://panamapapers.icij.org/>

## 2. POLICY CONTEXT

### 2.1. Initiatives taken by the EU

Aggressive tax planning includes taking advantage of the technical features of a tax system or of mismatches in the interaction between two or more tax systems for the purpose of reducing the overall tax liability of a taxpayer or group of companies. A key characteristic of these practices is that they usually involve strictly legal arrangements which however contradict the intent of the law. Aggressive tax planning may also benefit from weaknesses in compliance frameworks or even extend to measures resulting in tax evasion.

A number of initiatives at the EU level, which aim at tackling tax avoidance by improving the coherence of tax systems and increasing tax transparency, have been adopted in recent time or are still under consideration. Some of these initiatives represent a direct response to – and go even beyond – the new international standards developed by the G20/OECD with the BEPS project.<sup>13</sup>

All of these initiatives aim to clamp down on aggressive tax planning. None of these measures specifically addresses the role of intermediaries in aggressive tax planning. This issue is one of the remaining elements for finalising our agenda on implementing BEPS in a coordinated fashion in the EU. Only some of the initiatives are aimed at gathering information that could be used for detecting and countering aggressive tax planning and where certain intermediaries could help to assist in the detection and response. However, the use of information would only be possible with considerable time delay. Therefore, further efforts concerning the existing information tools or in the field of coherence do not represent a direct alternative to an instrument which would target the intermediaries directly and would ensure that information is available to tax authorities early in the process, in the best case before the potentially

#### 2.1.1. *Anti-Tax Avoidance Directive*

At EU level, the efforts to tackle aggressive tax planning and implement the anti-BEPS measures led to the Anti-Tax Avoidance Directive of 12 July 2016 (ATAD).<sup>14</sup> ATAD focuses on legally-binding measures aimed to create a minimum level of protection for the internal market against corporate tax avoidance.<sup>15</sup> Furthermore, on 21 February 2017, the Council agreed its position on rules aimed at neutralising 'hybrid mismatches' in the interaction of the tax systems between Member States and/or between the system of a Member State and that of a third country<sup>16</sup>. The agreed directive is the latest of a number of measures designed to prevent tax avoidance, mainly by large companies. It seeks to prevent taxpayers from exploiting mismatches between two or more tax jurisdictions for the purpose of reducing their overall tax liability. Such arrangements can result in a substantial erosion of the taxable bases of corporate taxpayers in the EU.

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<sup>13</sup> [OECD base erosion and profit shifting \(BEPS\)](#)

<sup>14</sup> [Council Directive \(EU\) 2016/1164](#) of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14 (ATAD)..

<sup>15</sup> The anti-avoidance measures in the ATAD are: controlled foreign company (CFC) rule, exit taxation, interest limitation general anti-abuse rule and rules on hybrid mismatches.

<sup>16</sup> Council of the European Union, Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries – General approach, 6595/17, ECOFIN 143, 21 February 2017.

### 2.1.2. *Directive on Administrative Cooperation (DAC)*

EU Member States have agreed that their tax authorities cooperate in order to apply their taxes correctly to their taxpayers and combat tax fraud, tax evasion and tax avoidance. Council Directive 77/799/EEC<sup>17</sup> was the first response to the need for enhanced mutual assistance in the field of taxation. This was replaced by Council Directive 2011/16/EU<sup>18</sup>, which is the essential piece of legislation on administrative cooperation in the field of taxation ('DAC'). The DAC establishes useful tools for better cooperation between tax administrations in the European Union, such as exchanges of information on request, spontaneous and automatic exchanges, and the participation in administrative enquiries, simultaneous controls or notifications of tax decisions amongst tax authorities<sup>19</sup>.

The Directive was recently amended several times as a result of which its scope was significantly extended to also cover: automatic exchange of financial account information<sup>20</sup>; exchange of information involving cross-border tax rulings and advance pricing arrangements<sup>21</sup>; and country-by-country reporting requirements for multinational enterprise groups operating in the EU<sup>22</sup>. The most recent amendment to the DAC<sup>23</sup> was legally adopted on 6 December 2016 and ensures that tax authorities have access to beneficial ownership information gathered in the context of anti-money laundering.

The DAC was adopted in 2011 and Member States started applying its rules on 1 January 2013, with the exception of the provisions on the automatic exchange of information, which followed on 1 January 2015. Under spontaneous exchange, a country provides its treaty partner(s) with information about likely tax evaders if it happens to uncover such information during its own audits. Automatic exchange consists of a periodic exchange of information of pre-defined content from the authorities of one country to the authorities of another regarding the income of residents of the second country. In the case of cross-border tax rulings and advance pricing arrangements, the exchange is to all other Member States and the Commission. When it comes to the latter, the disclosed information is subject to certain limitations. The exchange is usually in electronic form and takes place on a mutually agreed periodic basis. Information exchange on request is a response by one country to a request for information by another country.

### 2.1.3. *Extension of the DAC to financial account information (DAC 2)*

DAC 2 amended Directive 2011/16/EU, in order to include a mandatory automatic exchange of financial account information in the field of taxation. Section VIII(D)(4)(c) of the Directive

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<sup>17</sup> Council Directive [77/799/EEC](#) of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L 336, 27.12.1977, p. 15–20.

<sup>18</sup> 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 (DAC).

<sup>19</sup> An outline of the Directive and its main provisions can be found [here](#).

<sup>20</sup> 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. 1–29 (DAC 2).

<sup>21</sup> 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. 1–10 (DAC 3).

<sup>22</sup> 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 (DAC 4).

<sup>23</sup> 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 (DAC 5).



stipulates that the European Commission publishes a list of jurisdictions with which there is an EU agreement in place to provide Member States with financial account information to the standard mentioned in the extension of the Directive. The list currently comprises the Swiss Confederation, the Principality of Liechtenstein, the Republic of San Marino, the Principality of Andorra, the Principality of Monaco and Saint-Barthelemy.

*2.1.4. Extension of the DAC to information on cross-border tax rulings and advance pricing arrangements (DAC 3)*

DAC 3 amended Directive 2011/16/EU, in order to extend further the automatic exchange of information; that is, to cross-border rulings and advance pricing arrangements in the EU. This amendment was aimed at discouraging the engagement in potentially aggressive tax planning schemes in the EU by requiring the automatic exchange of information on advance cross-border tax rulings in the EU. However many aggressive tax planning schemes do not involve the issuance of a ruling and are therefore not subject to this requirement. Some Member States do not operate an advance tax ruling practice or their practice is very limited. Furthermore, taxpayers do not seek tax rulings from the authorities in connection with all structures they put in place. Finally, tax rulings may relate only to a specific transaction or a limited part of a tax planning scheme, which, if looked at individually – i.e. outside the full picture - would possibly not give rise to suspicion. Consequently, a substantial portion of aggressive tax planning schemes are neither reported nor exchanged.

*2.1.5. Extension of the Directive on Administrative Cooperation to country-by-country reporting (DAC 4)*

DAC 4 lays down an obligation for reporting revenues, profits before tax, taxes paid or accrued and the number of employees to tax authorities on a country-by-country basis. It should be noted that only large multinationals with a total consolidated group revenue exceeding EUR 750 million in the preceding financial year are captured by this reporting obligation. In addition, country-by-country reporting may not allow authorities to identify specific cases of aggressive tax planning. Thus, although the provided information may give an indication of certain BEPS-related risks, the set of high-level information that is given to the tax authorities does not usually include details of specific tax planning schemes. However, such reporting is confined to corporate income tax, and it is unlikely to bear direct effects on intermediaries as long as the ultimate responsibility for tax liabilities remains with the taxpayers.

*2.1.6. Access to Information on Beneficial Ownership (DAC 5)*

Recent media leaks, known as the Panama Papers, revealed how secret companies and accounts can be used to hide income and assets offshore, often for tax evasion and other illicit purposes. Although important progress has already been made at EU level to tackle such practices, especially through the series of initiatives on transparency, it was found that there are still gaps in the tax framework and this need to be addressed in order to prevent tax abuse and illicit financial flows.<sup>24</sup> For this purpose, tax authorities must know the ultimate beneficiary behind a company, trust or fund. Yet, this information is not always available throughout the EU.

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<sup>24</sup> In parallel to the proposal to amend the Fourth Anti-Money Laundering Directive, the Commission also presented a Communication setting out priorities for our work towards fairer, more transparent and more effective taxation.

The Commission proposed legislation<sup>25</sup> in this field whereby tax authorities can have access to national anti-money laundering information, particularly with regard to beneficial ownership registers and due diligence controls. The relevant legislation took the form of an amendment to the DAC. These amendments to the DAC aimed to reinforce the measures introduced by the Fourth Anti-Money Laundering Directive.<sup>26</sup>

#### *2.1.7. Revision of the fourth AML Directive with targeted amendments and Panama Communication<sup>27</sup>*

In the context of the fight against tax avoidance, money laundering and terrorism financing, the Commission proposed to further reinforce EU rules on anti-money laundering, to counter against terrorist financing and increase transparency on the beneficial ownership of companies and trusts.

#### *2.1.8. EU list of non-cooperative jurisdictions*

In the External Strategy for Effective Taxation, the Commission set out a new EU listing process to identify and address third-country jurisdictions that fail to comply with tax good governance standards. Member States have endorsed this initiative and called for a first EU list to be ready within 2017.

The new listing process is part of the EU's political priority to fight against tax evasion and avoidance and promote fairer taxation, both in Europe and beyond. The EU needs stronger instruments to tackle external tax avoidance and deal with third country jurisdictions which refuse to play fair. A single EU list should be expected to carry much more weight than the current patchwork of national lists, and will have an important dissuasive effect on third country jurisdictions that operate harmful tax regimes. It will also be clearer and fairer for businesses and third country jurisdictions, as it will be transparent, objective and aligned with international tax good governance standards.

Recently, the Commission presented the scoreboard of its pre-assessment of all third-country jurisdictions for tax purposes. This was the first step in the new EU listing process. On the basis of the scoreboard results, Member States are meant to decide on the third-country jurisdictions to be screened against tax good governance criteria in greater detail. The screening began in early 2017.<sup>28</sup>

#### *2.1.9. EU financial market sectorial legislation*

EU law in the area of financial regulation already contains certain existing or forthcoming reporting requirements which are - to some extent - relevant for aggressive tax planning

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<sup>25</sup> Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, COM(2016) 452 final, 5.7.2016.

<sup>26</sup> 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 (Text with EEA relevance), OJ L 141, 5.6.2015, p. 73–117.

<sup>27</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, COM(2016) 450 final, 5.7.2016.

<sup>28</sup> [https://ec.europa.eu/taxation\\_customs/tax-common-eu-list\\_en](https://ec.europa.eu/taxation_customs/tax-common-eu-list_en)

structures. This includes the Market Abuse Regulation, the Prospectus Regulation and MiFID2<sup>29</sup>, which could result in reporting requirements regarding tax planning. However, they only apply in precise circumstances and could be usefully completed by a more horizontal legislation.

Public country-by-country reporting (public CbCR), a proposed amendment to the **Accounting Directive**<sup>30</sup>, may be seen as a deterrent to aggressive tax planning schemes. It is thus likely to create a disincentive for intermediaries. So far, public CbCR is mandatory for EU banks and the extractive and logging industry. In April 2016, the Commission proposed to expand it to very large companies in all the other sectors<sup>31</sup>. However, like for DAC4, such reporting is unlikely to bear direct effects on intermediaries as long as the ultimate responsibility for tax liabilities remains with the taxpayers.

The **Audit Regulation**<sup>32</sup> ensures that auditors do not provide tax services during their audit mandate. It does not lay down any obligations for auditors to identify aggressive tax planning schemes and does not regulate auditors when they provide services such as tax advice to non-audit clients.

Overall, the EU has made great progress on tax transparency in recent years. With those measures in place, Member States should be in a better position to increase the collection of revenues where taxpayers try to avoid or evade taxes. However, the tax instruments available in the EU are not sufficient. In particular, they do not explicitly require that Member States collect **timely** information on tax avoidance and evasion schemes from intermediaries. Neither is there an obligation to exchange that information, where relevant, with other Member States. The DAC contains a general obligation for tax authorities in EU Member States to spontaneously communicate information to the other EU tax authorities in certain circumstances. This would include a loss of tax revenue in a Member State or savings of tax resulting from artificial transfers of profits within groups of companies. Yet, such exchange would only occur after aggressive tax planning schemes have been implemented. At present, Member States do not hold this information *a priori*.

Having said this, if the relevant information were received prior to the implementation of aggressive tax schemes, it would enable Member States to take appropriate measures timely. The current legislative framework (both in the EU and within the national context) is not designed to ensure that tax administrations receive timely information about potentially aggressive tax planning schemes which are readily available for implementation or already in use by taxpayers. This is critical regardless of whether a scheme is purely national or of a cross-border dimension. It is therefore necessary to complement the current framework with an additional tool, to ensure the *ex-ante* flow of information.

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<sup>29</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

<sup>30</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19–76.

<sup>31</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM(2016) 198 final, 12.4.2016.

<sup>32</sup> Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, OJ L 158, 27.5.2014, p. 77–112.

### *2.1.10. Initiatives taken by the OECD*

In July 2013 the OECD published its Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan)<sup>33</sup> identifying fifteen actions to counter against base erosion and profit shifting in a comprehensive manner. The Action Plan set deadlines to implement these actions. One of the proposed actions is BEPS Action 12 on mandatory disclosure rules.<sup>34</sup>

Based on the final report on BEPS Action 12, mandatory disclosure offers tax administrations a number of advantages over other forms of disclosure, as it requires both taxpayers and promoters to report information early in the tax compliance process. In addition, the OECD report points out that *"countries that have introduced mandatory disclosure rules indicate that they both deter aggressive tax planning behaviour and improve the quality, timeliness and efficiency in gathering information on tax planning schemes allowing for more effective compliance, legislative and regulatory responses"*<sup>35</sup>.

BEPS Action 12 is not a minimum standard like some other elements of the OECD Action Plan. Instead, it allows countries the freedom to introduce elements from amongst the options given in the final report. A minimum standard could result in a more consistent application in the EU or worldwide. Furthermore, mandatory disclosure is not included in the scope of the multilateral instrument (i.e. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS<sup>36</sup> - more than 100 jurisdictions committed to it in November 2016, for the purpose of swiftly implementing a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises). Finally, BEPS Action 12 is not part of the BEPS Inclusive Framework either. As such, it is not subject to a review process looking at its implementation by member countries.

## **2.2. Initiatives taken by EU Member States and third countries**

Ireland, the UK and Portugal operate mandatory disclosure regimes<sup>37</sup> in response to existing practices of aggressive tax planning which are enabled and promoted by intermediaries.

### *2.2.1. The system in Ireland*

Ireland's mandatory disclosure regime was first introduced in 2011, with some amendments made subsequently. The regime is intended to act as an early warning mechanism for "aggressive tax avoidance schemes". The regime provides that promoters or taxpayers, either in contemplation or implementation of certain transactions, shall give information, as specified by the Irish Revenue relating to any transactions that give rise to a 'tax advantage' where one of the main benefits of the transaction is such tax advantage.

### *2.2.2. The system in the UK*

The disclosure of tax avoidance schemes (DOTAS) regime introduced in 2004 essentially requires promoters of certain types of tax avoidance schemes, or in some cases users of such

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<sup>33</sup> OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013, available [here](#).

<sup>34</sup> For a detailed description of BEPS Action 12 see Annex 6.

<sup>35</sup> OECD/G20 Base Erosion and Profit Shifting Project, Mandatory Disclosure Rules, Action 12: 2015 Final Report, pp. 22-23.

<sup>36</sup> OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, OECD Publishing, 2016, available [here](#).

<sup>37</sup> See Annex 8.

schemes, to disclose them to HMRC. The regime has been subject to several changes over the time that it exists. Its scope has gradually been broadened and so, it now covers the whole of Income Tax, Corporation Tax, Capital Gains Tax, and certain arrangements relating to Stamp Duty, Land Tax and Inheritance Tax. The regime also applies, with necessary modifications, to National Insurance contributions and Value Added Tax. In the Budget of March 2015, the Government announced a package of measures to ensure that the DOTAS regime keeps pace with the current avoidance market. As part of this, the Government launched a consultation on the detail of changes to strengthen the DOTAS hallmarks and the results were published in February 2016. New changes are expected in regard to the Indirect Tax Avoidance Disclosure Regime and penalties for enablers of abusive tax planning arrangements in line with measures recently published on 5 December 2016.

Her Majesty's Revenue and Customs (HMRC) found that additional revenue of between GBP 225 million and GBP 650 million a year had been collected against what would have been achieved without disclosures made under DOTAS<sup>38</sup>.

### 2.2.3. *The system in Portugal*

The Portuguese Mandatory Disclosure Regime is based on the UK regime and was put in place in 2008. The Portuguese authorities have received almost 100 reports on tax schemes from intermediaries (promoters) since their mandatory disclosure regime was introduced. They reached a peak between 2009 and 2011. Around 25% of reports came from users, who are obliged to report where the promoter is not resident in Portugal or is prevented by the rules of profession (e.g. lawyers), or the tax planning scheme is developed in-house. The definition of intermediaries is broad and covers corporations and individuals. *Schemes under discussion* are those, where 1) achieving a tax advantage (relating to income taxes) is a sole or main purpose, and 2) one of the following hallmarks applies: i) the participating entity is subject to a special regime or is tax exempt, ii) (hybrid) financial instruments and derivatives are involved, iii) there is a use of tax losses. If a reported scheme is considered abusive, it is published together with the provision of the law based on which it should be defeated. Some reported schemes were outside of the scope and others were not seen as problematic.

Outside the EU, a number of countries have introduced national mandatory disclosure regimes, such as the USA, Canada, South Africa, India and Israel. Each of them has chosen a slightly different approach, which is yet in line with the objectives of BEPS Action 12.

Existing national regimes for disclosure are confined to national tax bases. The obligation to report is therefore triggered by the question of whether a certain scheme could have an impact on the domestic tax base. Hence, for the time being, these national regimes do not cover cross-border schemes, which would potentially affect residents and the tax bases of other Member States.

In France and Germany, there have been initiatives to introduce mandatory disclosure, but legislation has not (yet) been adopted for various legal reasons. Alternative disclosure instruments can be found in other Member States such as co-operative compliance or horizontal monitoring.

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<sup>38</sup> National Audit Office, HMRC, Report by the Controller and Auditor General, *Tax Avoidance: Tackling Marketed Avoidance Schemes*, HC 730, Session 2012-13, 21.11.2012, p. 26.

Member States naturally endeavour to defend their own tax base and as a result look for information on schemes which seek to reduce the domestic base. However, from a cross-border perspective, there are loopholes in national regulations. A potential legislative initiative at EU level should not discourage or even substitute existing national systems, but rather build upon them and also consider the cross-border dimension of potentially aggressive tax planning structures. Thus, the EU internal market requires a greater degree of cooperation and therefore there is a need for monitoring cross-border schemes. Currently, Member States do not receive such information on a timely basis.

## **2.3. Scope of the envisaged initiative**

### *2.3.1. Framework and aims*

This initiative complements the series of legislative acts that were passed at the level of the EU over the previous years in implementation of some of the conclusions in the context of the BEPS project of the OECD/G20 and the work of the Global Forum in the field of transparency. The main aim remains linked to curbing tax evasion and avoidance through capturing aggressive tax planning schemes. These schemes may have escaped the framework of anti-tax avoidance and transparency rules that the Member States adopted through Union legislation in the context of implementing BEPS and the CRS over the last couple of years.

The initiative generally envisages that potentially aggressive cross-border tax planning schemes be disclosed to the authorities. The proposed rules do not presume the existence of tax avoidance. It is also considered whether the disclosure should be coupled with exchange of information.

The disclosure should give the authorities the opportunity to investigate into these schemes and reach a conclusion on whether those should be acceptable or not. In return, the authorities would be expected to legislate in order to render the disclosed schemes that they have found to be unacceptable illegitimate.

The ultimate aim of the proposed rules is to discourage the availability of such schemes for taxpayers altogether.

### *2.3.2. Link to OECD/G20 Action 12 of the BEPS Project*

The envisaged initiative follows the recommended options of the OECD report on Action 12 but goes beyond a mere implementation of EU commitments under Action 12. The OECD report on mandatory disclosure does not lay down any minimum standard. In addition, the recommended actions are drafted as alternatives without pointing to preferred options. Therefore, only the fact that the proposed initiative lays down binding rules (in the form of a Directive) is a step further than the OECD Action 12.

In addition, the disclosure is coupled with a proposed system for the automatic exchange of the disclosed data amongst tax authorities. This element comes on top of the OECD Action 12, which is limited to the disclosure of data.

It is also worth mentioning that this initiative is meant to cover gaps in the CRS of the Global Forum, as it broadly applies within the Union under the Administrative Cooperation Directive.

### 2.3.3. *Penalties*

On the consequences of non-reporting/penalties, the envisaged initiative treats this area as falling within the sovereign control of Member States. As the delineation of penalties remains outside the ambit of EU legislation, there will not be any detailed assessment of options in this respect. Member States would only undertake to ensure that effective and dissuasive penalties be put in place. However, in addition to penalties posed at national level, due to the increased transparency the initiative creates disincentives for intermediaries to design and market new schemes plus reputational risks in case of non-compliance with a reporting obligation. It also creates disincentives for taxpayers to use potentially aggressive tax planning schemes that would have to be reported as well as disincentives to engage with intermediaries that carry a reputational risk triggered by non-compliance with the rules.

## **3. PROBLEM DEFINITION, DRIVERS AND CONSEQUENCES**

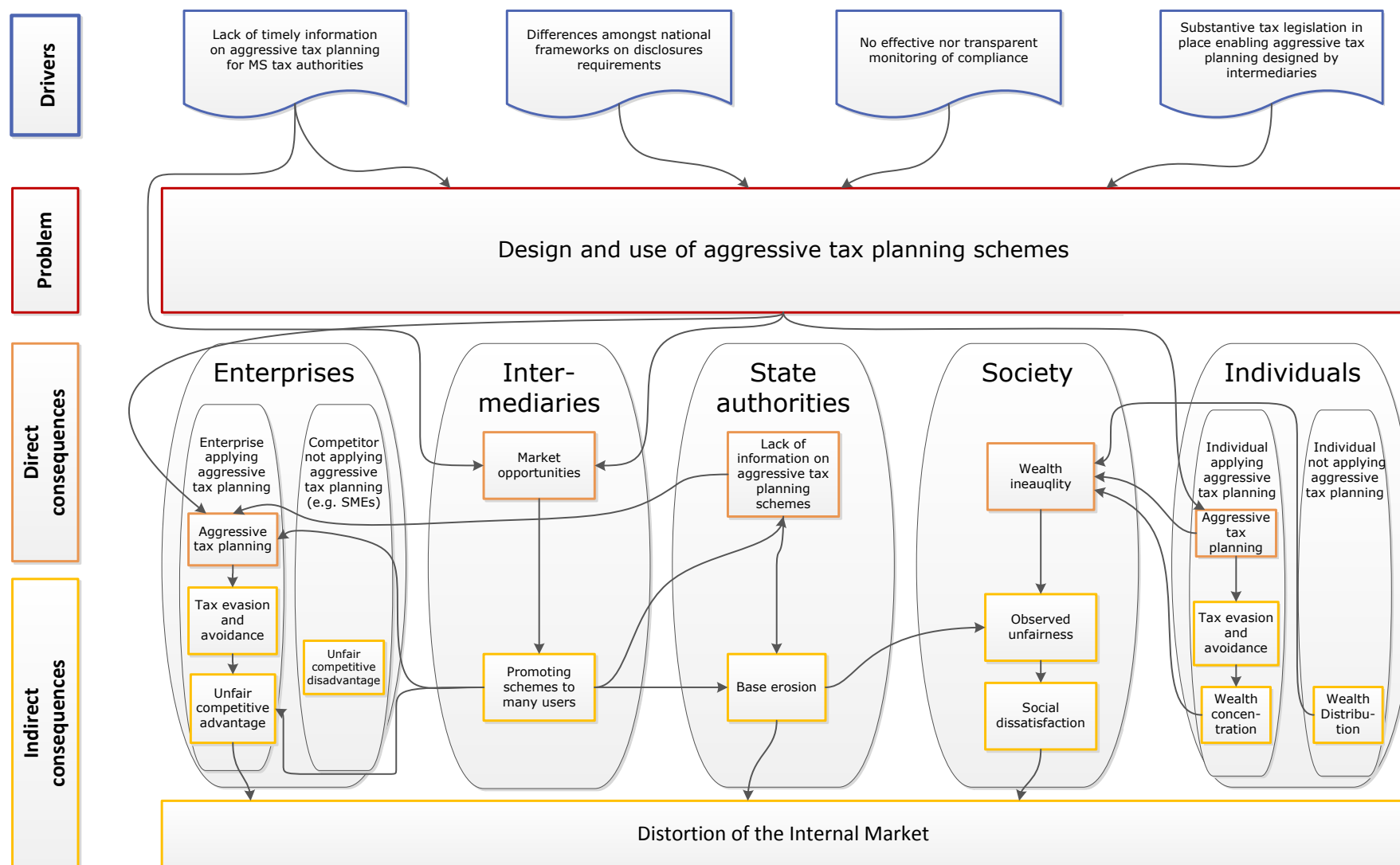
### **3.1. Problem Definition**

The detected underlying problem is that certain tax planning schemes are being designed and promoted by intermediaries and used by taxpayers for the purpose of avoiding or evading taxes. Most services provided by intermediaries are legal and legitimate, but recent scandals have demonstrated that in many cases intermediaries design structures that play a significant role in devising and using aggressive tax planning schemes. According to one of the findings in a recent study issued by the European Parliament<sup>39</sup>, the offshore structures cited in the Panama Papers were set-up for a broad range of motives, including: undesirable but legal tax planning, aggressive tax avoidance, illegal tax evasion, hiding and shielding assets, money laundering and crime financing.

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<sup>39</sup> European Parliament (2017) [IP/A/PANA/2016-05 PE 602.030](#) "Role of advisors and intermediaries in the schemes revealed in the Panama Papers – Study for the PANA Committee, p. 15.

**Figure 1: Problem Tree**



Source: European Commission (2017)



### *3.1.1. Design and use of aggressive tax planning schemes*

Aggressive tax planning is a major concern for the EU and internationally, given that it leads to losses of tax revenues for countries; for example, through schemes leading to double non-taxation. Aggressive tax planning is facilitated by disparities amongst national tax systems which, in their interaction, often suffer mismatches that lead to double non-taxation. In addition, taxpayers may also work out arrangements that take advantage of preferential tax regimes within a Member State, or beyond a single jurisdiction, and reduce their overall tax bills. Lack of transparency and the absence of an obligation to disclose potentially aggressive tax planning schemes create incentives, in particular for taxpayers engaged in cross-border activities, to set up structures that channel taxable profits towards low tax countries. The result is that certain – usually high-tax countries - see their tax bases being eroded. From an EU point of view, such a situation creates distortions in the internal market and jeopardizes its proper functioning as well as hampers the application of more growth-friendly tax policies at national level. Furthermore, it threatens the social contract at large, as honest taxpayers (individuals and companies) might become less inclined to comply with the rules.

### *3.1.2. Role of Intermediaries*

Taxpayers are rarely experts in the company or tax law of all jurisdictions which they use in structuring their business in a tax efficient way. They usually rely on intermediaries who assist them in the design of the most appropriate structure. These intermediaries include, amongst others, consultants, lawyers, financial (investment) advisors, accountants, solicitors, financial institutions, insurance intermediaries, and company-formation agents. Intermediaries advise clients on structuring their business, to reduce tax-related costs and they receive a premium fee as remuneration. It is also common that intermediaries design and/or market certain standard schemes to more users/clients. In this way, they make a profitable business out of facilitating tax optimisation, which sometimes may carry the characteristics of aggressive tax planning and lead to the avoidance of tax. The role of intermediaries in this process is of primary importance and the lack of disincentives only facilitates their behaviour.

Aggressive tax planning schemes usually involve complex structures which are deployed across multiple jurisdictions and in particular, use offshore centres. These schemes take advantage not only of differences in the tax systems between jurisdictions but also of regulatory disparities. Furthermore, taxpayers may exploit the fact that jurisdictions often require divergent degrees of transparency, for example limited commitment to the international exchange of information through agreements for tax purposes. Planning these schemes therefore involves intermediaries with a wide knowledge that covers more than one tax system and several tax-related domains.

### *3.1.3. Evidence of the involvement of intermediaries in aggressive tax planning schemes*

There is a wide range of different types of intermediaries and geographic locations which intermediaries commonly use to set up opaque structures. These locations involve a number of jurisdictions, including offshore centres which are identified as hallmarks for tax evasion and avoidance. A current study<sup>40</sup> seeks to analyse the main characteristics of the "go-

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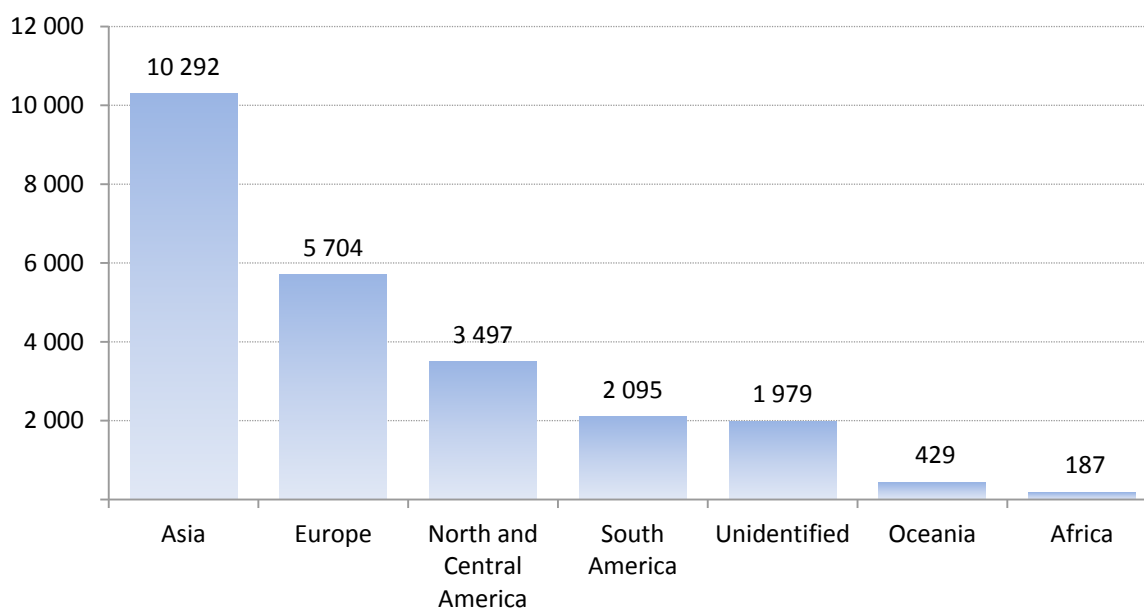
<sup>40</sup> The Greens/EFA Group (2017): [\*"Usual suspects? Co-conspirators in the business of tax dodging"\*](#).

betweeners". These are the 'intermediaries', who advise clients to contact offshore service providers for setting up an offshore entity.<sup>41</sup> The definition in the study for intermediaries is the following:

"We understand intermediaries as a go-between for a client seeking an ultimate offshore service provider in order to create (and sometimes run) one or several offshore entities. These intermediaries are often unknown to the public but play a key role in the existence of shell companies in tax havens".<sup>42</sup>

The study provides data on where intermediaries are located by continent and also gives more details for Europe.

**Figure 2: Global distribution of intermediaries**

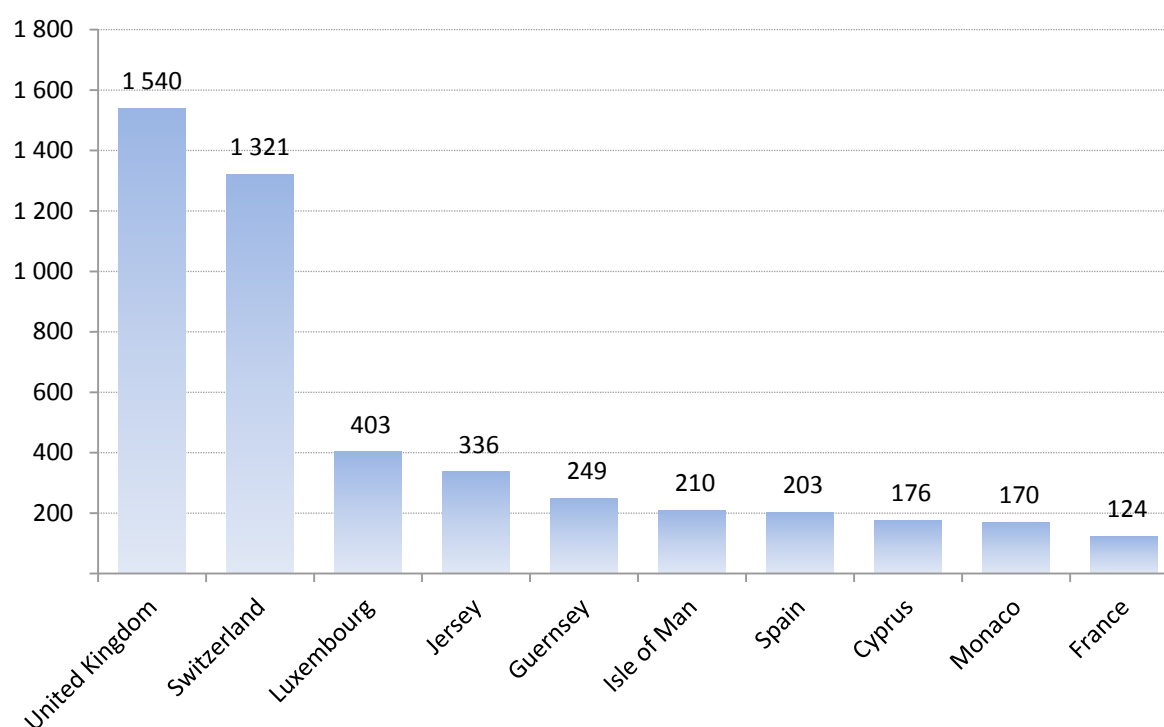


Source: Study by the Greens/EFA Group (2017): *"Usual Suspects? Co-conspirators in the business of tax dodging"*, p.9

<sup>41</sup> The data used in the study is from the following three datasets: Panama Papers, Offshore Leaks and the Bahamas Leak.

<sup>42</sup> The Greens/EFA Group (2017): [\*"Usual suspects? Co-conspirators in the business of tax dodging"\*](#), p5.

**Figure 3: Top 10 European countries where intermediaries operate**



Source: Study by the Greens/EFA Group (2017): "Usual Suspects? Co-conspirators in the business of tax dodging", p.10

The wide range of categories of intermediaries which vary from banks and company service providers to consultancies is outlined in the table below:

**Table 1: International intermediaries and the countries they operate in (top 10 of 144 intermediaries)**

Position	Name	Countries	Number of offshore companies requested
1	United Bank of Switzerland	Bahamas, Cayman Islands, France, Germany, Hong Kong, Jersey, Luxembourg, Monaco, Singapore, Switzerland, Taiwan, UK, US, Indonesia, Canada	13 285

Position	Name	Countries	Number of offshore companies requested
2	Crédit Suisse	Singapore, Switzerland, Taiwan, UAE, UK, US, Bahamas, China, Gibraltar, Guernsey, Liechtenstein, Monaco	11 347
3	Trident Corporate Services	Bahamas, BVI, Guernsey, Jersey, Isle of Man	8 507
4	Offshore Business Consultant Ltd.	Hong Kong, China, Unidentified	7 515
5	Orion House Services	Belize, Hong Kong, Jersey	7 061
6	Prime Corporate Solutions	Hong Kong, Luxembourg, Gibraltar	4 300
7	Citibank	UK, Singapore, Jersey, Switzerland, Hong Kong, Indonesia, US, Bahamas, Jersey	3 393
8	G.S.L. Law & Consulting	Russia, Cyprus, Unidentified	2 909
9	HSBC	Singapore, Guernsey, Hong Kong, Isle of Man, Israel, Jersey, Lebanon, Luxembourg, Singapore, Switzerland, Taiwan, UK, US, Guernsey, Bahamas, Switzerland	2 882
10	Ansbacher	Bahamas, Switzerland, British Virgin Islands	2 262

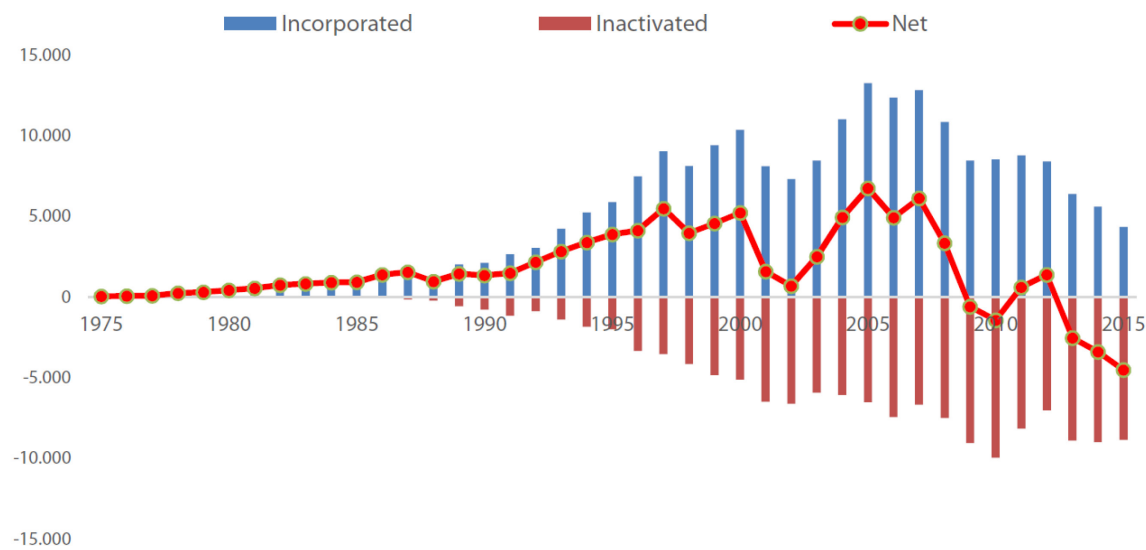
Source: Study by the Greens/EFA Group (2017): "Usual Suspects? Co-conspirators in the business of tax dodging", p.21

The increasing use of entities in offshore jurisdictions since 2000 is demonstrated in the recently published study by the European Parliament<sup>43</sup>. Since 2000 there has been a surge in the number of entities registered in offshore jurisdictions which may be explained by increasing globalisation and digitalisation, which make it easier to establish and maintain offshore structures. Although this trend has decreased in recent years due to the financial and economic crisis and as result of several policy measures, including the adoption of more stringent anti-money laundering standards, global private wealth of high net value individuals is projected to rise at a compound annual rate of 6% over the next five years to reach United States Dollar (USD) 224 trillion in 2020<sup>44</sup> with accelerating digital innovation leading to new investment products in a wide range of geographic locations.

<sup>43</sup> European Parliament (2017) [IP/A/PANA/2016-05 PE 602.030](#) "Role of advisors and intermediaries in the schemes revealed in the Panama Papers – Study for the PANA Committee".

<sup>44</sup> Boston Wealth Management Report 2016: [http://www.fondstrends.ch/fileadmin/pdf/BCG-Navigating-the-New-Client-Landscape\\_June\\_2016.pdf](http://www.fondstrends.ch/fileadmin/pdf/BCG-Navigating-the-New-Client-Landscape_June_2016.pdf)

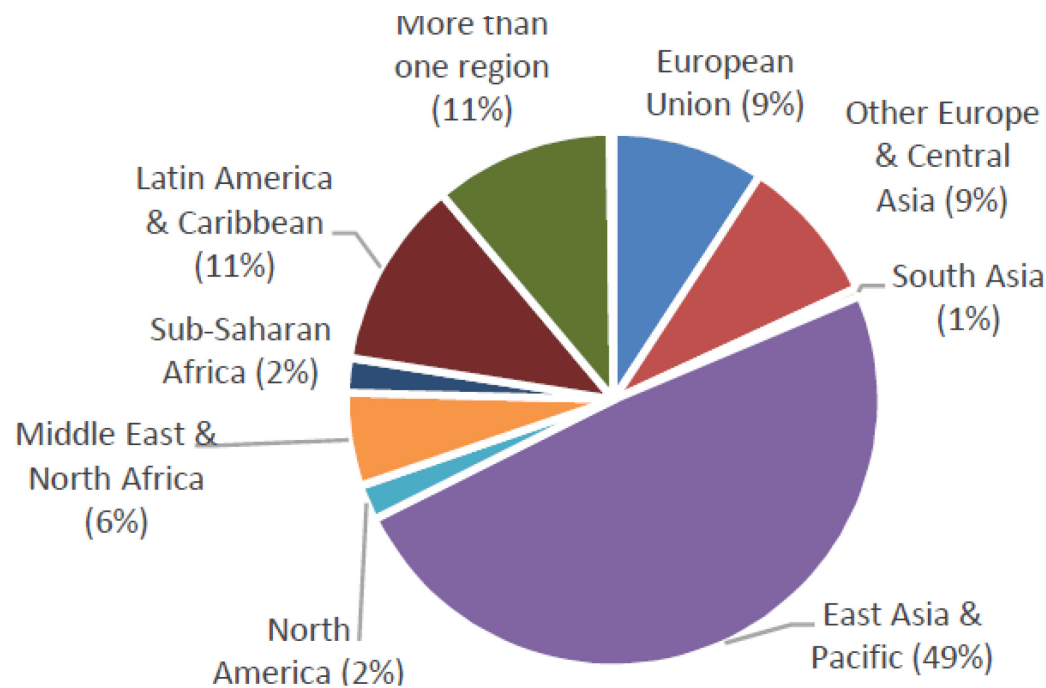
Figure 4: Establishment of entities across time



Source: International Consortium of Investigative Journalists (2016).

According to this study the amounts of unpaid taxes and fines can be substantial: for France alone taxpayers involved in the Panama Papers already owed tax authorities EUR 1.2 billion in taxes and fines. The study underlined the broad range of intermediaries involved in the Panama Papers:

Figure 5: Type of intermediary (share of entities) in Panama Paper



Source: International Consortium of Investigative Journalists (2016).

In order to create aggressive tax planning schemes, intermediaries propose complex structures involving many jurisdictions which often include offshore financial centres. The Second Review of the Savings Directive<sup>45</sup> reflects the involvement of offshore centres as suitable locations for setting up intermediary entities within structures that involve legal entities and/or arrangements, like trusts, often using onshore financial centres. The analysis in the review on publically available statistics by the Swiss National Bank and aggregate statistics of the Bank of International Settlements (BIS), supplemented at the time with bilateral statistics from the BIS, obtained on a non-disclosure basis. Although the statistical data is no proof of facilitating tax evasion, the complexity of structures and indeed the evidence leaked in the Panama Papers show that the creation of such structures largely relies on the knowledge and skills of intermediaries.

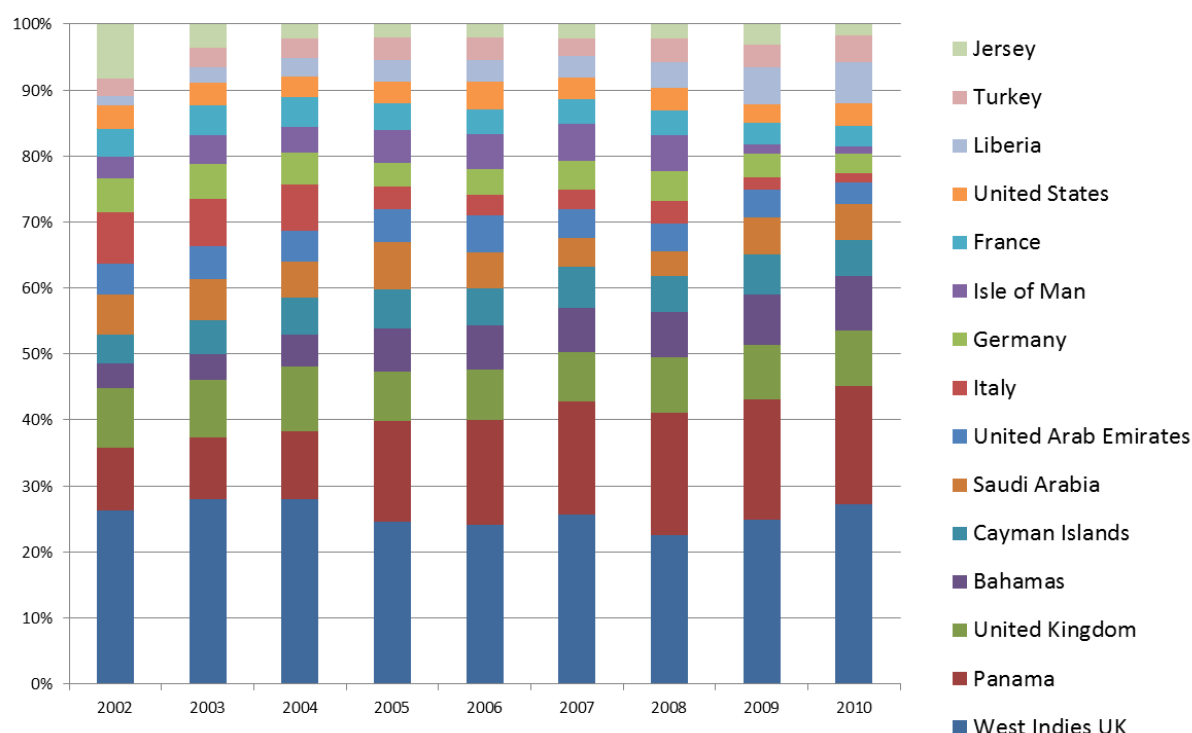
In its issue for 2010, the annual publication *Banks in Switzerland* by the Swiss National Bank encompasses some very detailed geographical and/or client breakdowns in 'Table 38 Fiduciary business, by country'. The definition of a fiduciary business, for the purposes of the report on *Banks in Switzerland*, can be found in the 1997 edition of the publication, which is not available in English. It follows that the definition is an unofficial translation.<sup>46</sup> It is clear that a fiduciary business primarily consists of **deposits from non-residents (fiduciary liabilities)** which are afterwards re-deposited abroad in the name of the bank, but for the account of the depositor. Fiduciary liabilities are heavily represented in offshore centres. Eight countries which may be considered to be offshore centres list amongst the first 15 countries that represent an average of **67% of the fiduciary liabilities**.

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<sup>45</sup> European Commission (2012) [SWD\(2012\)16 final](#), "Commission Staff Working Document presenting an evaluation for the second review of the effects of the Council Directive 2003/48/EC"

<sup>46</sup> Fiduciary transactions include investments, loans and equity interests which the bank holds or grants in its own name, but for the account and at the risk of the customer, on the basis of a written agreement. The instructing customer bears the full currency, transfer, price and collection risks and is the exclusive beneficiary of all accruals from such transactions; the bank only charges a commission. Fiduciary funds received by the banks mainly come from abroad and are almost exclusively invested abroad. They essentially consist of short term foreign investments in third banks or in branches legally dependent on Swiss banks. In the latter case, these transactions must appear in the balance-sheet, since they involve a commitment from the branch towards the head office in Switzerland.

**Figure 4: Geographical breakdown of fiduciary liabilities 2002 - 2010**



Source: Swiss National Bank ("Banks in Switzerland 2010")

The same order and similar shares regarding the BVI, Panama and the Bahamas emerge from the data that features in the Panama Papers. Specifically, it appears that more than 113 000 offshore trusts and companies have been created in the BVI with almost 50 000 in Panama and around 17 000 in Bahamas.

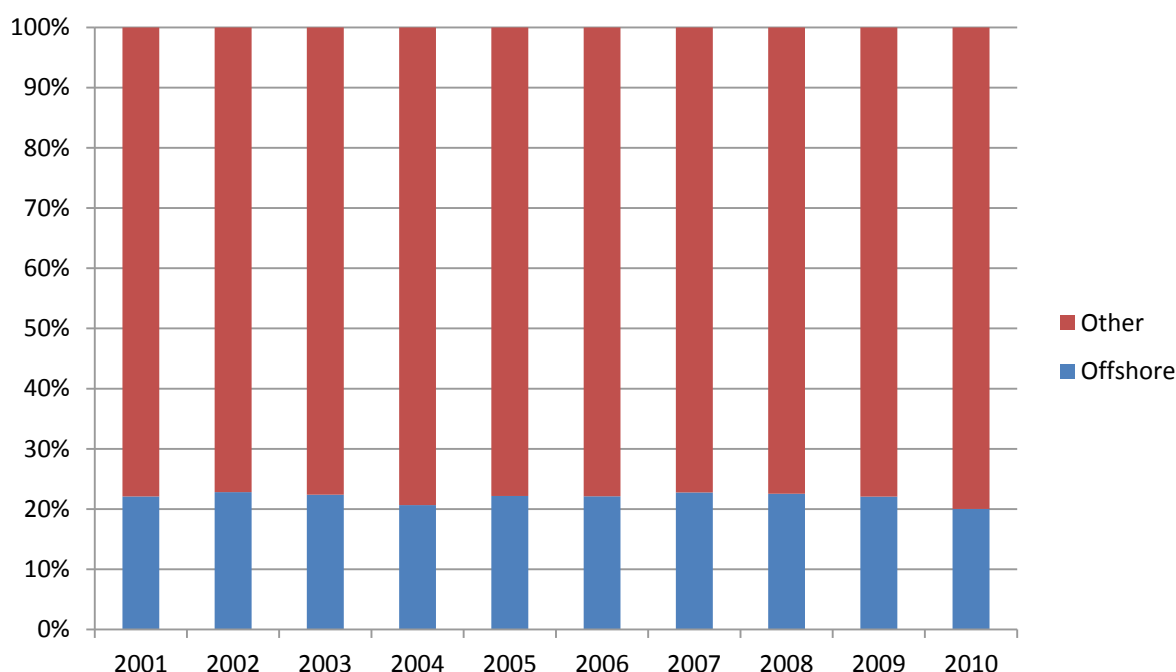
The International Locational Banking Statistics of the BIS includes quarterly data on assets and liabilities of domestic banks and branches of foreign banks in the 43 reporting countries. This is broken down on a bilateral basis per country of each counterparty<sup>47</sup>. Nevertheless, it is not possible to differentiate between deposits from individuals, non-bank financial entities and commercial entities or other structures within the total amount of the non-bank balances<sup>48</sup>.

The analysis in the Second Review of the Savings Directive, based on a breakdown per counterparty jurisdiction, showed that the **share of accounts of offshore non-banks in EU banks is around 20%**. This amounts to **around USD 1 trillion for 2007**.

<sup>47</sup> There is also a breakdown of the data by sector and the country of residence of the counterparty, as well as according to the country of the reporting banks. The sectorial breakdown includes liabilities to non-banks.

<sup>48</sup> The latest BIS data have some non-country-specific aggregates for a breakdown of the non-banks share into other financial corporations and non-financial corporations, but no country-specific data.

**Figure 5: Share of accounts of offshore non-banks in EU banks**



Source: Bank for International Settlements – 2001-2010 Quarterly data supplied by BIS on liabilities per offshore/onshore jurisdictions per domestic banks and foreign bank branches of reporting jurisdictions

Some of those accounts would also be attributable to non-bank financial entities. BIS statistics<sup>49</sup> on cross-border positions show that, based on aggregate data for all jurisdictions, broadly **50% of the liabilities are towards non-bank non-financial entities**.

### 3.2. Drivers

#### 3.2.1. Lack of timely information on aggressive tax planning schemes for Member States' tax authorities

Countries around the world have been developing tax compliance strategies in order to be able to deal more effectively with aggressive tax planning. Usual tax compliance strategies based on the analysis of tax returns and conventional tax audits are not sufficient to ensure timely access to relevant information on the tax planning.<sup>50</sup>

The absence of a mandatory disclosure regime in most Member States presents no disincentive for intermediaries and users who remain enabled to design, market and use aggressive tax planning schemes. While some Member States provide for voluntary disclosure regimes at the domestic level, no similar instrument is envisaged for cross-border schemes.

Furthermore, the entire BEPS Action Plan lacks a binding legal effect on the OECD member countries. It follows that OECD countries have to take measures to implement these actions through their domestic law, bilateral treaties, or a multilateral instrument. While the OECD has set up an Inclusive Framework to monitor BEPS implementation and participating countries have committed to implement the comprehensive BEPS Package, the peer review

<sup>49</sup> Bank for International Settlements – BIS (2016): "[Cross-border positions, by residents and sector of counterpart](#)"

<sup>50</sup> OECD (2011) Report: *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure*



and monitoring process concerns only the four BEPS minimum standards<sup>51</sup>. Action 12 does not constitute a minimum standard.<sup>52</sup> It only takes the form of recommendations that allow for several options and approaches which may lead to substantially divergent disclosure regimes in different countries.

Only 3 out of 28 Member States operate a mandatory disclosure regime. The analysis of their statistics reveals that the number of disclosures drastically decreased after the first years of introduction in the domestic context.

UK HMRC DOTAS Direct Tax Disclosure was first launched in 2004 and received 503 direct tax disclosures for the 8-month period from 1 August 2004 to 31 March 2005. The number of notifications decreased to fewer than 10 in the 6-month period from 1 April 2014 to 30 September 2014<sup>53</sup>.

The reason for this decrease of disclosures has not been identified in detail by national authorities. This could be due to (i) fewer schemes being devised and used, which would be a success; or (ii) intermediaries engage in illegal activities, i.e. non-reporting is illegal; or (iii) intermediaries re-design the schemes that they market so that those are no longer subject to a mandatory disclosure.

The remaining 25 Member States do not accommodate a mandatory disclosure regime and the OECD framework in connection with Action 12 does not create an obligation upon them to enact one. However, such circumstances lead to lack of transparency on the applied administrative practice. For instance, without receiving information on the elements of potentially aggressive tax schemes relevant to a particular multinational enterprise, activity or business, the affected Member States are unlikely to be aware of the impact that such schemes can have on their tax revenues. Consequently, they cannot react to them.

### *3.2.2. Differences amongst national frameworks on disclosure requirements*

A mandatory disclosure regime is only established in three EU Member States and while the main characteristics are rather similar, there are some differences between these three systems. In other areas, e.g. automatic exchange of tax rulings and CbCR, the adopted legislation is about to be transposed and enter into force but these areas capture a different type of information. The existing differences amongst national frameworks on disclosure prevent an efficient and coherent collection of information on aggressive tax planning schemes across the EU.

### *3.2.3. Neither effective nor transparent monitoring of compliance with existing law*

The complexity of existing tax laws contributes to ineffective and non-transparent monitoring. The lack of transparency facilitates aggressive tax planning and prevents the national authorities from gathering information on aggressive tax planning schemes and consequently, from levying tax on income taxable in their country.

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<sup>51</sup> See BEPS Actions 5, 6, 13 and 14 in OECD (2013), "[Action Plan on Base Erosion and Profit Shifting](#)", OECD Publishing.

<sup>52</sup> OECD (2015), "Mandatory Disclosure Rules, Action 12 - 2015 Final Report", Executive Summary, p. 9.

<sup>53</sup> Last period for which figures are publically available are provisional. See HM Revenue & Customs (2014), "[Tax avoidance and disclosure statistics](#)"

#### 3.2.4. *Existing tax legislation may enable aggressive tax planning*

Aggressive tax planning consists in taking advantage of the technical features of a tax system or of mismatches in the interaction between two or more tax systems for the purpose of reducing the overall tax liability of a taxpayer or group of companies. A key characteristic of these practices is that they usually involve strictly legal arrangements which however contradict the intent of the law. Aggressive tax planning may also benefit from weaknesses in the compliance frameworks. A study published by the European Commission on Structures of Aggressive Tax Planning and Indicators<sup>54</sup> has identified and examined seven common model aggressive tax planning structures in the EU:

- A hybrid finance structure
- A two-tiered intellectual property structure with a cost-contribution arrangement
- A one-tiered intellectual property structure with a cost-contribution arrangement
- An offshore loan structure
- A hybrid entity structure
- An interest-free-loan structure
- A patent-box aggressive tax planning structure

As a matter of principle, these structures would fall within the definition laid down in the Commission's Recommendation on Aggressive Tax Planning.<sup>55</sup> Since 2016, Member States have agreed to coordinate their policies in clamping down on aggressive tax planning. They thus adopted a set of anti-tax avoidance measures in the form of minimum standards (ATAD). This framework was complemented with more comprehensive rules on hybrid mismatches in 2017 (ATAD 2). Yet still, other features remain available at least for the foreseeable future and new ones may be developed in the meantime.

#### 3.2.5. *Insufficient beneficial ownership information (external factor)*

An entity with an anonymous beneficial owner enables aggressive tax planning schemes to be established in a way that they take advantage of mismatches between two or more tax and/or regulatory systems. Although measures have been taken in the meantime to allow national tax administrations access to information on the beneficial owner, this remains a weak point. Namely, intermediaries use their expertise to exploit the rules by setting up structures that make it burdensome or even impossible to identify the ultimate beneficial owner(s). In particular, aggressive tax planning schemes often use third-country jurisdictions and especially offshore centres where the regulatory framework on the identification of beneficial ownership and its enforcement are inadequate.

### 3.3. **Consequences**

#### 3.3.1. *Effects on Taxpayers (individuals and companies)*

Aggressive tax schemes disrupt the functioning of the internal market. Notably, the lack of transparency grants certain taxpayers a competitive advantage. This is, in particular, true for those companies and individuals that have the resources to make use of professional advice

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<sup>54</sup> European Commission (2015) Taxation Papers Working Paper N.61, "Study on Structures of Aggressive Tax Planning and Indicators Final Report"

<sup>55</sup> Commission Recommendation of 6 December 2012 on aggressive tax planning, [C\(2012\) 8806 final](#).

from experts that act as intermediaries in proposing aggressive tax optimisation schemes. On the other hand, companies that do not engage in aggressive tax planning schemes or shift profits to low-tax jurisdictions tend to suffer higher costs, as compared to those who benefit from aggressive tax planning schemes.

The situation looks similar in the field of individuals. Those who can afford to lower their tax liability through expert tax advice tend to be wealthier than those who pay their fair share of tax.

#### *3.3.2. Effects on intermediaries*

The absence of an obligation to disclose advice on aggressive tax planning schemes results in the creation of business and market opportunities for certain intermediaries. Whereas the large majority of intermediaries is engaged in business as usual, some of them are fully specialised and/or engaged in the design and promotion of aggressive tax planning schemes and offer their services on the market to taxpayers.

#### *3.3.3. Effects on Member States and national tax administrations*

The tax administrations of Member States seek to prevent losses of tax revenue that result from aggressive tax planning schemes. However, with only insufficient information on the structure of such schemes, Member States end up in a position whereby they cannot respond effectively to the challenges in a globalised world and become less able to defend their tax base. Otherwise, attempts by tax administrations to improve tax collection may result in increasing administrative costs (e.g. introduction of complex anti-abuse measures). Thus, to enhance their tax revenues, Member States may engage in the design of complex counter-measures (such as special tax regimes to incentivise enterprises to shift profits towards their jurisdictions etc.).

#### *3.3.4. Effects on citizens and society*

Citizens are indirectly affected, mainly in their capacity as individual taxpayers. Given that Member States lose tax revenues if multinational enterprises or wealthy individuals escape from paying their fair share of tax, States are inclined to make up for this loss by raising taxes through the least mobile tax bases; for example, income from employment. This results in unfairness.

Recent press reports on the Panama Papers, but also on the use of aggressive tax planning structures by big multinational enterprises, have led to public criticism. There is a widely held perception that companies, in particular multinational enterprises, avoid contributing their fair share to the funding of public goods by artificially lowering their taxable income. This is made more acute in the context of the current austerity measures being imposed on countries that need to engage in fiscal consolidation. Many citizens feel that companies avoid taxes while they see themselves faced with increasing tax burdens.

### **3.4. Examples on income flows that leave the internal market untaxed**

#### **Example 1 – No Withholding Tax – Zero Rate at Destination**

*Company A, a franchisee of an MNE headquartered in a major trade partner of the EU, is tax resident in MS A which is a high-tax jurisdiction.*

*Company A is licensed to use intellectual property (IP) of the MNE group via the group's IP centre on an island in the Caribbean where corporate tax is at zero rate.*

*To avoid paying the high withholding tax (WHT) of 15% on royalties from Company A to the group's IP centre in the Caribbean (due to the absence of a tax treaty), the group sets up a NewCo in an EU MS where outflows in the form of dividends, interest and royalties are subject to no WHT.*

*Company A is no longer directly licensed for the use of IP from the Caribbean entity but instead via NewCo, which is given the function of sub-licensing the group IP across the EU.*

*Company A pays royalties to NewCo. The Interest & Royalties Directive does not apply to the transfer between Company A and NewCo but there is a tax treaty which follows the OECD Model and provides for no WHT on royalties.*

*Further, when NewCo passes the royalties to the Caribbean affiliate, there is no WHT because the MS where NewCo is tax resident has unilaterally abolished WHT on outflows.*

*NewCo is taxable on the royalties that it receives from Company A but its tax base is significantly reduced by the fact that it pays out most of these amounts to its Caribbean affiliate.*

*NewCo passes royalties tax-free to its Caribbean parent company where this income is taxable at zero rate.*

### **Who is liable to disclose**

*Under a scheme of mandatory disclosure, the law firm which advised and possibly carried out the formalities for setting up NewCo would need to inform on the specifics of this scheme. The disclosure of the arrangement would have to be done in the Member State of NewCo if the intermediary has a presence (e.g. at least an office) there.*

*If the intermediary advised from outside the EU (e.g. the third country where the MNE is headquartered) and collaborated with a local firm for the formation of NewCo, it would be for the local firm to report. In the event that the third-country intermediary only gave tax advice and sold the scheme to the MNE group but NewCo was set up by in-house lawyers, the obligation to disclose would be shifted to the taxpayer, i.e. NewCo.*

### **Relevant hallmarks**

**Generic: the scheme above could be a massively marketed scheme**

*A massively marketed scheme would be designed by promoters/ tax experts with the aim to generally address situations whereby a third-country taxpayer wishes to mitigate/ eliminate its liability to withholding tax on royalty income in the EU. It would not look at the specific details of the corporate and business structure of the taxpayer.*

*The scheme would be sold for a fee, which would vary depending on the services supplied by intermediary. For instance, the intermediary may only sell the scheme or may also be involved in its implementation.*

*The intermediary/ (taxpayer) may be in a position to prove that the creation of NewCo has a main aim other than obtaining a tax advantage, e.g. there is a need to centrally manage all EU franchise contracts for the MNE group and the actual activity of NewCo proves that it is actively involved in doing this. In such case, the scheme is not captured by the hallmark and does not need to be reported. In the opposite case, the fact that MNE group benefits from no or minimal withholding tax on the royalties that NewCo pays out of the EU is a clear tax benefit and should be sufficient to bring the scheme within the scope of the hallmark.*

*Specific: zero taxation in the Caribbean.*

*If the outbound royalty payments are subject to zero rate tax in the Caribbean, the scheme would be captured by hallmark **C.1.b).ii***

*It would suffice that one of these two hallmarks captures the scheme, for the purpose of making it reportable.*

## **Example 2 – Mismatch - Transparency/Non-Transparency of an Entity**

*Company A is resident for tax purposes in third country A and licenses IP to entity B, a wholly-owned subsidiary, in EU MS B.*

*Entity B is treated as transparent under the law of MS B but has opted to be considered as non-transparent for tax purposes from the viewpoint of third country A.*

*Entity B sub-licenses the use of its IP to subsidiaries of the group in several MS.*

*The subsidiaries pay royalties for the use of the IP back to entity B.*

*MS B does not see a taxable presence of entity B in its territory (not even a permanent establishment, as most of the management of the licences takes place from abroad).*

*Given the fact that MS B would not supply a tax residence certificate for transparent entity B, the franchisees will need to apply the tax treaty with third country A. It is assumed that all these applicable tax treaties follow the OECD Model and so provide for no WHT on royalties.*

*From the point of view of MS B, the royalty payments are deemed to be paid to Company A, which is the only shareholder/partner of entity B.*

*Third country A treats entity B as non-transparent, i.e. a company resident for tax purposes in MS B.*

*Third country A would therefore not tax the royalties paid to B (unless it decided to apply controlled foreign company legislation on company A).*

***Who is liable to disclose***

*Under a scheme of mandatory disclosure, the law firm which advised and possibly carried out the formalities for setting up entity B would need to inform on the specifics of this scheme. The disclosure of the arrangement would have to be done in the Member State of entity B if the intermediary has a presence (e.g. at least an office) there.*

*If the intermediary advised from outside the EU (e.g. the third country where company A is resident for tax purposes) and collaborated with a local firm in MS B, it would be for the local firm to report. In the event that the third-country intermediary only gave tax advice and sold the scheme to company A but entity B was set up by in-house lawyers, the obligation to disclose would be shifted to the taxpayer, i.e. entity B.*

### **Relevant hallmarks**

*Generic: the scheme above could be a massively marketed scheme; it would be sold for a fee.*

*The observations made on generic schemes under Example 1 would also apply to the facts of this example.*

*Specific: not subject to tax in the third country of destination.*

*Considering that third country A treats entity B as non-transparent, it assumes that it is resident for tax purposes in MS B and has been subject to corporate tax there. Consequently, If the royalty payments are not taxable in the third country of destination, the scheme would be captured by hallmark **C.1.b).i**.*

*In addition, there would be a mismatch as the same entity would be treated as transparent in the EU MS and non-transparent by the third country. Even if the scheme were not captured by the hallmark above referring to the level/ existence of tax liability, it would still fall within the scope of **C.1.e**) due to the mismatch.*

*It would suffice that one of these two hallmarks captures the scheme, for the purpose of making it reportable.*

It should be clarified that reporting a scheme under the proposed Directive does not imply that the scheme(s) necessarily involve(s) arrangements of tax avoidance. The tax authorities will have to assess the disclosed details in combination with the tax file of the taxpayer concerned. The aim is that the tax authorities receive information about potentially aggressive tax planning schemes before these schemes are implemented and that this enhances their effectiveness in clamping down on tax avoidance.

## **4. WHY THE EUROPEAN UNION SHOULD ACT**

Article 115 of the Treaty on the Functioning of the European Union (TFEU) is the legal base for legislative initiatives in the field of direct taxation. Although no explicit reference to direct taxation is made, Article 115 refers to directives for the approximation of national laws as those directly affect the establishment or functioning of the internal market. It follows that, under Article 115 TFEU, directives are the only available legal instrument for the Union.

Based on Article 288 TFEU, directives shall be binding as to the result to be achieved upon Member States but leave the choice of form and methods to the national authorities.

Given that the scope of the proposed rules is limited to direct taxes, it would not have been possible to refer to Article 113 TFEU on the harmonisation of legislation in turnover taxes.

The lack of transparency facilitates activities of certain intermediaries involved in promoting and selling aggressive tax planning schemes. As a consequence of this, Member States suffer from the shifting of profits, which would otherwise be generated and become taxable in their territory, towards low-tax jurisdictions and often experience an erosion of their tax bases. In addition, such a situation should be expected to give rise to conditions of unfair tax competition against businesses that refuse to engage in these illegitimate activities. The ultimate outcome is to distort the operation of the internal market.

Experience shows that national provisions against aggressive tax planning cannot be fully effective. The disclosure requirements under national rules would be limited to the domestic territory and therefore only deal with a single fragment of a cross-border scheme. In fact, such schemes usually involve numerous companies with tax residence in a variety of jurisdictions. Sometimes, when it comes to multinational groups, the taxpayer in a single jurisdiction may not even be fully informed of the structure of a scheme that stretches across the group. It would therefore be unrealistic to expect to receive the full picture of a cross-border scheme applying to a multinational group through placing an obligation of disclosure to a local subsidiary. In addition, if only part of a scheme becomes known to the authorities, it is very possible that the potentially harmful elements of the scheme escape.

Many of the structures devised to avoid taxes have a cross-border dimension while also capital and persons are increasingly mobile, especially within an integrated market, such as the internal market of the EU. The need for collective action at EU level to improve the current state of play has become apparent and can usefully complement existing initiatives in this area, in particular within the context of the DAC. This is all the more so, as existing instruments at national level have shown to be only partially effective in increasing transparency.

### ***Typical structure of aggressive tax planning arrangements***

A typical cross-border tax planning arrangement or a series of arrangements would involve a structure that engages more than one jurisdiction within the EU (and that possibly stretches even to third countries). In accordance with the proposed rules, the intermediary who carries the responsibility vis-à-vis the taxpayer(s) for designing and implementing the arrangement(s) shall file the requisite information with the tax authorities. In the business practice, it is usually the case that the intermediary exclusively deals with one taxpayer within a group; that is, the top company in the shareholding tree. It follows that in such cases, individual national measures oriented towards disclosing the domestically-focussed individual bits of a broader arrangement or series of arrangements would be impossible to apply. This is because there would be no presence of an intermediary in most of the subsidiary jurisdictions. Inevitably, it would be the intermediary who signed with the taxpayer that would have to disclose the EU-wide dimension of an arrangement(s).

It can also occur that, depending on the specifics of a tax planning arrangement, lower-tier group companies with a predominantly domestic focus sign a contract with intermediaries. This would often refer to the local aspects of a broader cross-border scheme for a corporate

group. In this context, although it could be possible to identify the intermediary related to the local aspect of the overall arrangement, one would normally need to have a global picture, in order to identify the contrived steps that make such a scheme illegitimate. Namely, if seen in isolation (e.g. State by State), the domestic dimension of a scheme is often unlikely to provide the authorities with sufficient input for assessing whether a part of a certain scheme should be acceptable or not. It therefore follows that a country-by-country notification of pieces in the puzzle, without knowledge of the full picture, would not fulfil the ultimate objective of this initiative, i.e. to clamp down on tax avoidance and evasion and consequently, improve the functioning of the internal market. On the contrary, a localised approach would exacerbate the fragmentation of the market.

### Example 1

In Example 1 under section 3.4, the intermediary (e.g. law firm which advised and possibly carried out the formalities for setting up NewCo) would need to inform the authorities about the specifics of this scheme, including by providing a summary of the facts. The disclosure of the arrangement will have to be done in the Member State of NewCo if the intermediary has a presence (e.g. at least an office) there. If the intermediary is not identifiable, in terms of physical presence in the EU, the responsibility for disclosure will shift to the taxpayer, i.e. the group member which signed the contract with the intermediary.

In this example, it becomes obvious that a disclosure of solely the local aspects of the scheme (e.g. the situation in Member State A) would not suffice for identifying the tax-related motive behind the creation of New Co.

### Example 2

In Example 2 under section 3.4, the intermediary (e.g. law firm which advised and possibly set up the hybrid entity B) is most likely to carry the obligation of disclosing the relevant data of the entire scheme to the authorities. Assuming that the intermediary is based, or maintains a presence, in Member State B, the intermediary will need to notify the full picture to the tax authorities of that State. Thus, it will not be enough to disclose only the local aspects that solely pertain to Member State B. In fact, in such case, the authorities would be unlikely to trace the element of hybridity which is inherent in this scheme and leads to double non-taxation.

### ***Subsidiarity***

Both examples demonstrate that a country-by-country disclosure of fragments of the overall schemes would not supply the authorities with the necessary minimum of knowledge to identify an arrangement or a series of arrangements in their entirety and assess whether it is legitimate or not. Considering that the mandatory disclosure is aimed to inform tax authorities about schemes with a dimension beyond a single State, it would be necessary to embark on any such initiative through action at the level of the EU, in order to ensure a uniform approach to the identified problem. Thus, the internal market needs a robust mechanism to address loopholes in a uniform fashion and rectify existing distortions by ensuring that tax authorities receive appropriate information, on a timely basis, about aggressive tax planning schemes with cross-border implications.



Uncoordinated action undertaken by Member States based on own initiative would create a patchwork of rules on the disclosure of schemes by intermediaries while it would perpetuate unfair tax competition between States.

What is more, action on disclosure at the level of the EU would bring an added value, as compared to individual Member State initiatives in the field. This is because the proposal exclusively deals with cross-border situations, which is not the focus of the existing national regimes on mandatory disclosure. In fact, most of the aggressive tax planning schemes are structured to have a cross-border dimension or impact, as they have the aim of shifting taxable income towards low-tax jurisdictions. In this light, the EU is in a better position than any Member State individually to ensure the effectiveness and completeness of the system for this exchange of information.

On this point, stakeholders confirmed at the consultation stage that the most interesting tax planning schemes for them are those with a cross-border element. It follows that the disclosure of potentially aggressive tax planning schemes at the level of the Union brings a definitive advantage into the equation: it allows tax administrations to obtain the full picture of a structure of cross-border transactions and its impact on the overall tax base. In addition, the automatic exchange of information among tax authorities increases the chances of identifying potentially aggressive tax schemes, as reportable information will be available to all Member States. It should also be considered that a common cross-border system for the internal market should be expected to gradually fix as a level-playing field which could complement national systems of disclosure. It is thus true that national rules of a purely domestic dimension may be circumvented if taxpayers moved activities and wealth to a jurisdiction without rules of disclosure.

### ***Proportionality***

The assessed policy response represents a proportionate answer to the identified problem since it does not exceed what is necessary to achieve the objective of the Treaties for a better functioning of the internal market without distortions. Indeed, the common rules will be limited to creating the minimum necessary common framework for the disclosure of potentially harmful arrangements:

- (i) The common rules are limited to addressing potentially aggressive tax planning schemes with a cross-border element.
- (ii) The imposition of penalties for non-compliance with the national provisions that implement the Directive into national law will remain under the sovereign control of Member States.

Leaving the decision on this element exclusively to individual national initiatives, or relying on the effectiveness of a soft-law initiative, would mean that some States could decide to act, while others not. This is notably so, given that BEPS Action 12 is not a minimum standard and implementation in the EU could therefore diverge substantially. Indeed, 39 out of 131 stakeholders replied in the public consultation that, in case there was no EU action, no transparency requirements would be introduced and 107 stakeholders stated that it is likely or very likely that differing transparency requirements would be introduced. Furthermore, the exchange of information on disclosed cross-border schemes would not be ensured if it were

left to individual action by Member States. For all these reasons, introducing a reporting requirement at EU level linked with exchange of information could resolve the identified problems and contribute to improving the functioning of the internal market.

This impact assessment evaluates whether there is a need for action at EU level and to what extent a harmonised approach is needed for the EU internal market. Like for other recent EU initiatives in this field, there are strong indications that if action is eventually taken, aggressive tax planning arrangements cannot be efficiently addressed within domestic legislation or through bilateral tax treaties.

## 5. SCOPE OF THIS IMPACT ASSESSMENT

This assessment looks into the possibilities of introducing mandatory disclosure rules with the objective to enhance transparency in the design and promotion of aggressive tax planning schemes.

The term 'intermediaries' refers to any natural or legal person who is sufficiently linked to an EU Member State and is responsible for the design, marketing, organisation or management of a potentially aggressive tax planning scheme. The concept also includes those who provide assistance or advice in creating, developing, planning, organizing, marketing or implementing such a scheme. The term comprises consultants, lawyers, financial (investment) advisors, accountants, solicitors, insurance intermediaries, financial institutions, and company-information agents known as Trust and Company Service Providers.

The assessment discusses **who** should report to tax administrations and **which types of taxes** should be covered. Regarding the **reportable schemes**, the focus is on **potentially** aggressive tax planning structures, which implies that a reportable scheme may not necessarily be illegitimate or illegal. Whether a scheme is reportable depends on certain criteria referred to as 'hallmarks'. The **composition of hallmarks** is also under assessment.

Another topic of analysis concerns the **form and frequency of the exchange of information** on disclosed schemes between Member States, i.e. whether the exchange should be **spontaneous or automatic**. Finally, the text discusses **how** this information should be **exchanged**.

## 6. OBJECTIVES

**Figure 6: Objectives of the policy intervention**

General objective	Proper functioning of the Internal Market
Specific indirect objective	Fight tax evasion and avoidance through identifying aggressive cross-border tax planning schemes
Specific direct objective	Improve transparency and timely access to information on aggressive cross-border tax planning schemes
	Create a deterrent for the design and use of aggressive cross-border tax planning schemes

Source: European Commission (2017)

### 6.1. General Objectives

The general objective of a potential initiative would be to improve the proper functioning of the internal market, which is currently undermined by the use of aggressive tax planning schemes, as these schemes result in market distortions and cause a lack of fairness. It is true that national corporate tax systems in the EU are not fully harmonised and Member States are – to some extent – free to provide exemptions and incentives for taxpayers. Yet, at the same time, it is widely agreed that there is an urgent need for curbing tax planning practices which take advantage of mismatches in the interaction between corporate tax systems, exploit beneficial tax regimes, or interpret the law in a way that was not envisaged by the legislators. In this context, it would be crucial to stand against the lack of transparency or uncertainty over beneficial ownership. If tax authorities receive more timely information about potentially aggressive tax planning schemes with a cross-border element, they should be able to take appropriate measures.

### 6.2. Specific Objectives

#### 6.2.1. *Fighting tax evasion and avoidance through identifying aggressive cross-order tax planning schemes*

In order to efficiently fight against tax evasion and avoidance, it is necessary to track potentially aggressive tax planning schemes and to respond to the tax risks they pose. The national authorities need to receive information on a timely basis – ideally, already before a scheme is implemented – and it is also crucial to identify the users and promoters of such schemes. It is then up to them to take immediate action such as changing the law in order to prevent the implementation of certain arrangements or to focus on certain arrangements in the context of upcoming audits.

#### 6.2.2. *Improving transparency and timely access to information on aggressive cross-border tax planning schemes*

Transparency and access to the right information at an early stage should allow the authorities to improve the speed and accuracy of their risk assessment and make timely and informed decisions on how to protect their tax revenues. Ideally, information about a certain scheme should be obtained before this is implemented and/or used. Disclosure within a strict deadline would maximize the tax administration's ability to assess the risk of schemes at an early stage and, if necessary, take appropriate actions to prevent a loss of tax revenue and/or increase the deterrent effect.

### 6.2.3. *Creating a deterrent to the design and use of aggressive cross-border tax planning schemes*

It should be expected that the mandatory disclosure of potentially aggressive tax planning schemes would dissuade intermediaries from designing and marketing such schemes. When the national tax authorities receive information, they can take appropriate action to ensure that their tax legislation is sufficiently developed to tackle the disclosed schemes. Furthermore, dissuasive penalties in case of non-compliance are of high importance in ensuring an effective mechanism. Monetary sanctions are the most common, while some countries combine this with non-monetary sanctions. The main purpose of setting penalties is as deterrence. As far as more material sanctions for intermediaries involved in aggressive tax planning schemes, such as sanctions within professional regulation or increased publicity, are concerned, it should be left to the national level to deal with.

## 7. POLICY OPTIONS

An initiative that addresses the identified problems would need to delineate the objectives it seeks to achieve and the mechanisms that can best bring these objectives into fruition. The challenge is how to design a proportionate system which would target the most aggressive forms of tax planning. The OECD report on BEPS Action 12 gives examples of the approaches taken by tax authorities in a number of jurisdictions around the world, including the three national mandatory disclosure regimes that exist in the EU, namely in Ireland, Portugal and the UK.

The policy choices can in practice be drawn between a context where there is a (mandatory) disclosure of information on potentially aggressive tax planning arrangements to tax authorities and a context where there is no such obligation, i.e. the so-called *status quo*.

The public consultation set out a list of policy options for stakeholders. Some of these options concerned the type of appropriate legal instrument for the proposed initiative. That is, whether legislation or a soft law act in the form of a Recommendation or Code of Conduct presents the optimal solution. Amongst the options that built on binding rules, the stakeholders were invited to mainly consider the possibility of agreeing a common framework for disclosing information to tax authorities or alternatively, of coupling the disclosure with an automatic exchange of the disclosed data across tax authorities in the EU.

Following the consultations with stakeholders, it became clear that all of the available policy choices which involved binding rules would lead to a similar outcome. Thus, if there is a (mandatory) disclosure of data to the tax authorities, it always enables some form of exchange of information. This is because spontaneous exchanges form part of the general framework of the Directive on Administrative Cooperation. Therefore the exchange of information is present in distinct forms under all policy options that involve a disclosure of data.

It was further considered that the only real comparison between policy choices could in practice be drawn between a context where there is an obligation to disclose information on potentially aggressive tax planning arrangements (coupled with exchange of information) and a context where there is no such obligation, i.e. the so-called *status quo*. In addition, the prospect for limiting the exchange of information to spontaneous exchanges would not appear consistent with the series of initiatives that the Commission has lately undertaken in the field of Transparency. Thus, the framework for information exchange, both in the rules that

implement the common reporting standard in the EU and in advance cross-border rulings, involves automatic exchanges. In this context, it is necessary to assess the constituent elements of a policy choice consisting of a mandatory disclosure of reportable cross-border arrangements coupled with automatic exchange of information. The following questions appear mostly relevant:

- Who has to report?
- Which type of taxes is covered?
- What types of schemes should be disclosed, i.e. what is a reportable scheme?
- Which hallmarks should be used to identify reportable schemes?
- Should only new or also existing schemes be included?
- Should there be an exchange of information on disclosed schemes?
- What form and which means should be used for information exchange?

Some questions will not be tackled by this impact assessment, as they precisely pertain to the way that Member States have organised their public administration and judiciary. These matters can be dealt with more effectively at national level:

- What should be the consequences of non-compliance by intermediaries or taxpayers?
- What should be the follow up by Member States after receiving reports?
- How should collected information be used?

**Table 2: Overview of Options**

Policy options concerning disclosure regime	
Baseline scenario	No action
Specific features	Description of options
Personal scope	
Subject of reporting obligation	1. Single requirement (only intermediaries or only users)
	2. Double requirement (intermediaries and users)
	3. Primary and secondary requirement (intermediaries or users)
Material scope	
Type of taxes covered	1. All taxes
	2. Direct taxes only
Composition of hallmarks	1. Generic hallmarks
	2. Specific hallmarks
	3. Generic and specific hallmarks
Timeframe	1. Only new schemes
	2. New and existing schemes
Exchange of information	
Form and frequency of exchange of information	1. Spontaneous exchange
	2. Automatic exchange
Means for exchange of information	1. Compulsory publication in the Member State of disclosure
	2. Direct exchange between Member States
	3. Indirect exchange through a central directory

Source: European Commission (2017)

Under the **baseline scenario**, Member States that have a mandatory disclosure scheme (three Member States currently) could exchange information in the framework of the DAC if they considered that the information is relevant to other Member States (spontaneous exchange).

As far as the alternatives to the baseline scenario are concerned, the assessment identifies a number of features relevant to the scope and content of the disclosure as well as to the possibility of information exchange. The available options for shaping each feature of a possible disclosure scheme are mutually exclusive, which implies that for each feature only one of the options can be chosen. Hence, the approach is to choose the preferred option for each feature individually.

## **7.1. Personal scope**

Two key players are involved in the implementation of tax planning schemes: (i) intermediaries, who design and promote the schemes and (ii) taxpayers, who use the schemes. There are different options regarding who should be required to report. For each of the key players, there can be three basic situations: they are never liable to report; or, they are always liable to report; or, they have to report under certain circumstances.

According to the OECD report on BEPS Action 12 recommendation, countries adopting mandatory disclosure rules will need to decide whether or not they introduce a dual reporting requirement that applies to the intermediary and taxpayer (see the option under 7.1.2) or a reporting obligation that falls primarily on the promoter (see the option under 7.1.3). However, where the primary reporting obligation falls on the promoter it is recommended that the reporting obligation switches to the taxpayer where:

- The promoter is offshore;
- There is no intermediary;
- The intermediary asserts legal professional privilege.

Mandatory disclosure regimes, which exist in practice, usually rely on the role of both intermediaries and taxpayers. Nevertheless, a mandatory regime can be built around the role of only one key player, either the taxpayer or intermediary (see the option under 7.1.1)

### *7.1.1. Single requirement (only intermediaries or only users)*

Under this option, either only intermediaries or only users are subject to a reporting obligation. Intermediaries are identified through the activity they conduct regarding the tax planning, rather than through their affiliation to a certain professional group. Therefore, the concept of an intermediary should include a non-exhaustive list of certain professions, such as lawyers, tax advisers, accountants, wealth managers, bankers, company and trust service providers etc. At the same time, it should extend to anybody who is involved in the design, promotion and marketing of potentially aggressive tax planning schemes.

Users are taxpayers who accept the advice received from intermediaries, in cases where an intermediary is involved, and implement such schemes. Users, in certain circumstances, develop potentially aggressive tax planning schemes without the involvement of intermediaries.

Under this option, there would only be a single reporting requirement, either for the intermediaries, who design and market schemes, or for the users, who implement schemes.

### 7.1.2. *Double requirement (intermediaries and users)*

According to this option, the reporting obligation is jointly placed on both the intermediary and the user. This means that intermediaries have to report on schemes within the scope of the obligation and, in addition, taxpayers have to provide information about specific transactions (e.g. in their tax declarations), regardless of whether the intermediary has already disclosed these transactions. Accordingly, the intermediary's obligation to disclose would not be waived by the fact that the user will provide information on the same scheme.

### 7.1.3. *Primary and secondary requirement (intermediaries and/or users)*

Under this option, a primary reporting obligation is put on intermediaries. However, in order to ensure that the schemes under discussion are reported in all situations, the reporting obligation should be shifted to the user of the scheme in one of the following scenarios:

**a) *Non-EU intermediary:*** Where an intermediary of the scheme is not located in the EU, it may become impossible to ensure the intermediary's compliance. Therefore, the obligation to disclose potentially aggressive tax planning schemes would capture intermediaries who market, promote, sell, enable the set-up of such schemes and fulfil one of the following conditions:

- (i) they are incorporated or organised in a non-incorporated legal form in an EU Member State;
- (ii) they are registered with a professional association in an EU Member State;
- (iii) they maintain premises in an EU Member State from where they habitually exercise their activity related to tax planning.

**b) *No intermediary:*** It may be that a scheme is developed by the user for internal use, for example an "in-house" scheme. This may be the case, for example, for large multinational corporations which have the necessary internal resources to devise such schemes.

**c) *Intermediary bound with legal professional privilege or secrecy rules:*** Some intermediaries may not be in a situation to make a disclosure legally, due to specific legal constraints related to the domestic regulation of their profession. These issues commonly involve legal professional privilege and secrecy rules. In their contributions to the proposal a number of stakeholders noted the need for any proposal to uphold the professional secrecy/legal professional privilege to facilitate full and frank disclosure between those who need legal advice and their lawyers and safeguarding this in the public interests and also for taxpayers. It is also worthwhile mentioning that the clients have may have the choice to waive the right to legal privilege or secrecy. In such a case, disclosure may still be provided by the intermediary. Only in case of no waiver would the obligation to report be shifted to the user. Both scenarios ensure that the legal privilege or secrecy is not infringed upon and the reporting is secured at the same time.

If none of the conditions in a) is fulfilled and in cases b) and c), the obligation to disclose should be shifted to the user of a potentially aggressive tax planning scheme. The user of the scheme should remain legally responsible for the disclosure obligations, including any default, regardless of whether the intermediary fulfils the necessary disclosure requirements.

## 7.2. Material scope

### 7.2.1. Type of taxes covered

#### 7.2.1.1. All taxes

A reporting requirement may concern schemes that relate to any type of tax. The OECD report on BEPS Action 12 indicated that jurisdictions which have introduced mandatory disclosure regimes have included a broad range of taxes; amongst them, income taxes and value added taxes. The sub option to cover all taxes will be discarded and not retained for the comparison of options later on. The prospect for covering all taxes would not seem justified as the exchange of information on VAT, customs duties, excise duties, as well as on social security contributions, is already covered by other legislative instruments on administrative cooperation, which specifically focus on these types of taxes.

In theory, any type of tax or duty may suffer from aggressive tax planning. However, the problem definition shows that the concerns are related to international tax issues which are precisely linked to income taxes. On this premise, it is justified to focus on direct taxation.

#### 7.2.1.2. Direct taxes

This option excludes certain types of taxes and instead concentrates on direct taxation, notably personal and corporate income tax.

### 7.2.2. Object of reporting (hallmarks)

When it comes to the object of reporting, there are two aspects to be considered. The first question is which tax planning schemes should fall under the scope of the proposal and the second question is what information should be reported and exchanged. This chapter outlines which schemes should be reported.

Targeting the appropriate tax planning schemes lies at the heart of this transparency initiative. Tax authorities are likely to be interested in situations where loopholes or mismatches in the interaction of tax systems are exploited to obtain tax benefits. A disclosure regime needs to be designed in a way that there is legal certainty about the types of schemes or arrangements that should be disclosed to tax authorities. Here the question is which approach or which techniques could help target and capture the key information that tax administrations need in order to make informed policy decisions, while avoiding over-disclosure or undue compliance burdens on taxpayers and administrations. One crucial element in this exercise is the indicators or criteria which clearly identify the schemes that would have to be reported; these are the so-called hallmarks. It is sufficient that a tax planning scheme meets one of the hallmarks to be identified as potentially aggressive and become subject to reporting.

#### Definition of hallmarks in the BEPS Action 12 OECD report

Hallmarks act as tools to identify the features of schemes that tax administrations are interested in. They are generally divided into two categories: generic and specific hallmarks. Generic hallmarks target features that are common to promoted schemes, such as the requirement for confidentiality or the payment of a premium fee. Generic hallmarks can also be used to capture new and innovative tax planning arrangements that may be easily replicated and sold to a variety of taxpayers. Specific hallmarks are used to target known vulnerabilities in the tax system and techniques that are commonly used in tax avoidance arrangements such as the use of losses.



Existing national disclosure regimes use hallmarks (and sometimes also other filters) to target schemes in the tax authorities' interest. It should be stressed that the fact that a scheme is reportable does not automatically mean that it amounts to tax avoidance or tax evasion. Some of the hallmarks which have generally been linked to abusive tax transactions may also be found in legitimate transactions. Therefore, the disclosure regime seeks to identify **potentially** aggressive tax planning schemes and **does not judge** whether a scheme under disclosure is actually abusive or aggressive.

Another important observation is that existing disclosure regimes are not designed to pick up all tax avoidance schemes. For the purpose of designing the EU disclosure regime, the primary target should involve potentially aggressive tax planning schemes with a **cross-border element**. The cross-border element would generally imply that the user and/or any of the intermediaries and/or any of arrangements/transactions in the scheme are not all linked to the same Member State. Intermediaries would have to identify the cross-border element and include it to their report.

A key question is which hallmarks should be included in the EU disclosure regime. One approach could be to delineate them through major categories, i.e. generic and specific hallmarks. On that basis, one can identify three major options.

#### 7.2.2.1. Generic hallmarks

Under this option, the EU regime would include only generic hallmarks. These refer to the behaviour of intermediaries. They focus on marketing and the form in which advice on tax planning schemes is supplied. They target features which are common to mass marketed and standardised products, either existing or new and innovative. The following items include typical generic hallmarks used in a number of jurisdictions:

- "Premium fee" or "contingent fee" hallmarks: the amount that the client pays for the advice can be attributed to the value of the tax benefits obtained under the scheme.
- "Confidentiality" hallmarks where the promoter or adviser requires the client to keep the scheme confidential.
- "Standardized tax product" or "marketability" hallmarks intended to capture widely-marketed schemes.

Generic hallmarks only become relevant where they additionally fulfil a minimum standard requirement that relates to whether the relevant schemes point to tax avoidance or their main benefit is to obtain a tax advantage. According to the OECD report on BEPS Action 12, most generic hallmarks in national regimes (with the exception of the United States) are designed on this basis.

According to the OECD report on BEPS Action 12, it is recommended that generic hallmarks include a confidentiality and premium/contingent fee. A country may also wish to adopt additional generic hallmarks such as the one applying to standardised tax products.

#### 7.2.2.2. Specific hallmarks

Under this option, the EU regime would include only specific hallmarks. Specific hallmarks reflect the particular concerns of tax authorities, and target areas of perceived high risk, such as the use of losses, leasing contracts, the use of hybrid instruments and income conversion

schemes. Those concerns include situations of double non-taxation. Some hallmarks specifically target cross-border schemes e.g. schemes involving entities located in listed third countries. Some other specific hallmarks do not draw any such distinction. Other sets of hallmarks specifically look at schemes aimed at separating legal from beneficial ownership or concealing them. Specific hallmarks also refer to the possibility of exploiting mismatches that result from the interaction of disparate national tax systems and may lead to double non-taxation (e.g. different rules on depreciation between two Member States may result in having the same asset depreciated in two separate jurisdictions; i.e. the State of the economic owner and that of the legal owner).

The following set of specific hallmarks was listed for the purpose of the Commission's public consultation in November 2016.

**Set of specific hallmarks listed in the Commission's Public Consultation**

1. Use of jurisdictions included in the (future) EU list of third country jurisdictions that fail to comply with tax good governance standards.
2. Use of certain legal arrangements/entities (trusts and similar) in jurisdictions that pose difficulties in identifying the beneficial owner.
3. Use of entities subject to zero taxation or less than a certain % (to be defined), including hybrid entities (i.e. entities that are treated as transparent by one country but as non-transparent by another country).
4. Schemes designed to circumvent the Common Reporting Standard (CRS) for automatic exchanges of financial account information.
5. Use of a group company in a low tax jurisdiction for intra-group financing of other group companies in high tax jurisdictions.
6. Use of group companies with very little substance that are nevertheless entitled to tax treaty benefits and through which large amounts of money flow.
7. A general artificial arrangement or an artificial series of arrangements created for the essential purpose of avoiding or evading taxation and which leads to a tax benefit.
8. A transfer pricing arrangement not in conformity with the arm's length principle and/or the OECD transfer pricing guidelines.
9. A profit allocation between different parties of the same group that it is not in conformity with the arm's length principle and/or the OECD transfer pricing guidelines.
10. A preferential treatment under the application of the national tax law that is not in line with the general application or interpretation of the law.

The respondents to the public consultation ranked the hallmarks based on their relevance for classifying aggressive tax planning schemes in the following order:

- 7. A general artificial arrangement;
- 10. A preferential treatment under the application of national law;
- 4. Schemes designed to circumvent the CRS ; and
- 2. Difficulties *in identifying the beneficial owners*.

Hallmark 1. *Use of future EU list of third country jurisdictions that fail to comply with tax good governance standards* was considered by stakeholders to be less relevant.

A specific consideration would be required for the hallmarks related to the EU list of third countries because the procedure leading to the establishment of the list has not yet been finalised and so the final list and other details are not known for the time being.

There is also a group of specific hallmarks that targets arrangements which are designed to assist the evasion of tax by making it difficult to identify the beneficial owner of income and gains:

- The use of certain legal arrangement/entities (trusts and similar) in jurisdictions that pose difficulties in identifying the beneficial owner;
- Transactions designed to circumvent the Common Reporting Standard (CRS) for automatic exchanges of financial account information;
- Transactions that have the effect of obscuring or concealing the relation between legal and beneficial ownership, for example through the use of a power of attorney or nominees.

#### 7.2.2.3. Generic and specific hallmarks

Under this option, the EU regime would use a compilation of both generic and specific hallmarks and thus jointly cover both previous options. This option is the most comprehensive of the three available ones and combines the two basic concepts; that is, the effectiveness of broad generic hallmarks in capturing a large part of (massively) marketed schemes and the precision of the specific ones which can better reflect tailor-made schemes.

#### 7.2.3. *Timeframe for reporting*

If the main objective of a disclosure regime is to provide tax authorities with timely information on aggressive tax planning schemes, then an appropriate timeframe should be an important feature. The actual disclosure takes place normally within specific time limits (days or months) after the obligation to report has been triggered. Certain points in time may be of higher relevance than others. The timeframe could be linked to the availability of the scheme or its implementation. It may also depend on who is to make the reporting – i.e. the intermediary or the user. One option could be a combination of both.

In this regard, the OECD report makes the following recommendation, which could be followed in the EU regime:

*"156. It is recommended that where the promoter has the obligation to disclose then the timeframe for disclosure should be linked to the availability of the scheme and that the timescale for disclosure should aim to maximise the tax administration's ability to react to the scheme quickly and to influence taxpayers' behaviour. This would be achieved by setting a short timescale for reporting once a scheme is available.*

*157. Where a taxpayer is required to disclose it is recommended that the disclosure is triggered by implementation rather than availability of a scheme. In addition, if only the taxpayer discloses (i.e. because there is no promoter or the promoter is offshore) the timescale for reporting should be short to maximise the tax administration's ability to act against a scheme quickly."*

Consideration should be given as to whether schemes that pre-date the entry into force of a disclosure regime should be included or the disclosure obligation should be limited to the schemes created subsequently. It should be noted in this regard that many tax schemes are multi-annual and may well still be active after the disclosure obligation enters into force despite having been created prior thereto. Furthermore, these schemes may also have been modified after their creation and taken on different characteristics which would need to be assessed under the disclosure regime.

#### 7.2.3.1. Only schemes introduced after the legislation for mandatory disclosure has entered into force

Intermediaries will report information only on schemes that will be created after the EU disclosure regime enters into force. This option would not entail any retrospective elements and would cover schemes that have been implemented in the past but due to their life-cycle still have an impact on taxes paid.

#### 7.2.3.2. Both existing and new schemes

Intermediaries will report information on existing active schemes as well as schemes that will be created after the EU disclosure regime enters into force. This option ensures that all aggressive tax planning schemes in the scope of the initiative at the time of entry into force would be reported. Tax administrations may have an interest to receive information not only about new but also existing schemes.

### 7.3. Exchange of information

One of the key questions is whether information on potentially aggressive tax planning schemes which is reported to national tax administrations should stay with them or would be of interest to any other tax administration in the EU. Like in other areas, such as the automatic exchange of information on tax rulings, there seems to be an interest on the side of EU Member States to share information in so far as there is a potential impact on the tax base of other Member States. That is the core element of exchange of information triggered by the Directive on Administrative Cooperation. Both Member States and stakeholders appear willing to exchange information, at least when it comes to potentially aggressive tax planning schemes with a cross-border element.<sup>56</sup>

A mandatory disclosure regime for intermediaries brings most benefits if it is coupled with exchange of information between EU Member States. There are different options regarding the design of the exchange of information.

#### 7.3.1. *Form and frequency of exchange of information*

##### 7.3.1.1. Spontaneous exchange

Under this option, the release of information would be triggered by the fact that the national tax authorities become aware of a tax scheme the details of which it would be useful to share with other authorities. The exchange would take place on a case-by-case basis. Each Member State would have to send information within a specified timeframe. The information could be sent within a limited period (for instance, a month) following the date of disclosure. The

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<sup>56</sup> See feedback received from Member States in Annex 2.

Member State where the disclosure takes place would decide which other Member State(s) the information may be foreseeably relevant to.

#### 7.3.1.2. Automatic exchange

The release of information would take place at pre-established regular intervals. These intervals could be set freely, for instance, monthly or quarterly.<sup>57</sup> At the end of each interval, Member States would be required to either exchange the information on the disclosed tax planning schemes during this interval, or confirm that they have not received any relevant information during that period. Member States would share information with all other Member States and possibly also with the Commission. Automatic exchanges should not preclude spontaneous exchanges either.

#### 7.3.2. *Means for exchange of information*

##### 7.3.2.1. Compulsory publication in the Member State of disclosure

Under this option, each Member State would be required to make the information received publicly available. Not only tax authorities would receive information, but also a wider group of interested stakeholders would have access to what was disclosed.

##### 7.3.2.2. Direct exchange among Member States

Each Member State would exchange information directly with all other Member States and possibly also with the European Commission. Under this option, standard channels of communication in the field of administrative cooperation could be used.

##### 7.3.2.3. Indirect exchange through a central directory accessible to Member States

Each Member State receiving reports from intermediaries or users would send the information to a central directory which would be fully accessible to the other Member States and for a limited number of information items, to the European Commission. The Directory for the automatic exchange of information about potentially aggressive cross-border tax planning schemes between tax authorities will essentially be the same mechanism as the one that the Commission has set up for the automatic exchange of information on cross-border tax rulings (DAC3). This type of exchange would provide more options for the management of information, as compared to a simple bilateral exchange (for instance, access any time, management of information on follow-up). The Central Directory will be hosted by the Commission and its operation has been estimated to cost around EUR 480,000 over the first five years, including its set up and operation. In addition, there is an assessment of administrative expenditure (e.g. human resources, missions, seminars, etc.) of around EUR 206,000.

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<sup>57</sup> "Automatic" exchange should not be confused with "automated" exchange.

## **8. ANALYSIS OF IMPACT**

### **8.1. Baseline scenario: No EU policy**

Under the baseline scenario, there would be no EU policy on the mandatory disclosure and automatic exchange of information of potentially aggressive tax planning arrangements. By effect, the situation across the EU would be likely to present significant disparities. Some Member States would operate national schemes, as currently do Ireland, Portugal and the United Kingdom whilst others would decide not to go for any type of mandatory disclosure regime. In addition, amongst the States with disclosure regimes, a question would be whether a certain disclosure regime is limited to purely domestic schemes or extends to cover the domestic impact of cross-border schemes.

Only 30% of the respondents to the public consultation considered that Member States would be likely/very likely to introduce transparency requirements at all if the baseline scenario were kept. From the main stakeholder groups who replied to this question 38% of consultancy/tax advisors, 32% of private citizens, and 21% of NGO's thought this would be the case. What is more, 82% of respondents considered that if transparency requirements for disclosure were introduced at the national level, they would be likely/very likely to diverge significantly. All stakeholder categories provided high affirmative responses to this question.

Member States expressed general support in the meeting of Working Party IV on 2 March, 2017 on the proposal for the EU to address the issues raised in the Panama Papers and that a focus on the cross-border elements was regarded as proportionate.

#### **Impacts of the option on:**

##### Intermediaries:

- They would likely re-structure their business based on the overall picture of the market. They would be most likely to move their consulting, advertising, promoting and implementing activity towards the States that do not provide for the disclosure of potentially aggressive tax planning arrangements.
- As Member States would introduce regimes independently, the impact on intermediaries would diverge and the latter may be faced with legal uncertainty over the applicable framework in each Member State.
- The national obligations to disclose would create a compliance cost for intermediaries, although they would naturally shift this amount to their clients as part of their fees.

##### Taxpayers

- To the extent that this is possible under their business or wealth structure, as appropriate, taxpayers would try to avoid going through the disclosure obligations by switching their business or moving their wealth to another Member State (or third country).
- Disparate regimes across the EU would result in legal uncertainty for taxpayers, especially for those who operate across the border in more than one jurisdiction.

### Tax authorities

- Those Member States that decided to introduce a disclosure obligation would increase the administrative burden of the public sector, even though such information seems to be complementary to the main bulk of data that States already receive through tax returns.
- While Member States that decided to introduce a disclosure obligation will have a better overview of the tax affairs of their taxpayers, they may also face some loss of tax revenues if taxpayers move their wealth or business to another Member State in order to avoid the disclosure.

### General economic considerations

- Without a harmonised approach to mandatory disclosure and the automatic exchange of information, the internal market would suffer distortions and unfair tax competition, considering that States without rules on disclosure would clearly present an advantage, as compared to those where certain schemes would have to be reported.
- The fragmentation and differences of transparency requirements in the EU would risk leading to tax arbitrage in the EU. Such a situation could reduce the effectiveness of other (possibly) existing transparency requirements (e.g. common reporting standard, advance cross-border rulings).

### Society

- In the wake of a number of scandals in the field of tax avoidance, lack of further action vis-à-vis the promoters of aggressive tax planning schemes and their users could fuel discontent and distrust from the citizens and honest taxpayers.

## **8.2. Action is undertaken to enact the mandatory disclosure of potentially aggressive cross-border tax planning arrangements**

In analysing policy options available to address the issue of aggressive tax planning any solution must have a broad scope to include the wide range of intermediaries, both EU and non-EU, that are involved in creating aggressive tax planning schemes. Similarly, given the wide geographic range of schemes used in aggressive tax planning, as evidenced in section 3. - Problem Definition, any solution should include a cross-border element that may not only involve EU Member States but also third country jurisdictions, in particular off-shore financial centres. All the policy options are designed to satisfy these objectives. However, their design would have different impacts on the main groups who would be required to use, implement and administer these schemes.

## **8.3. Personal Scope**

The impact of the following three policy options is considered regarding who will have the responsibility for disclosure:

**(a) Single requirement (only intermediaries or only taxpayers)**

Intermediaries

- If the disclosure obligation were exclusively borne by intermediaries, those engaged in reportable tax planning schemes would have to undertake the cost of reporting in all cases. They would have to carry the costs of reporting on such schemes to the national authorities once those are made available to a specific taxpayer for implementation.
- Intermediaries should be expected to minimise the costs of compliance, e.g. by using the summary information sheet that they prepare for their clients as a basis for the notification form under the EU mandatory disclosure regime.
- They would be most likely to shift the compliance cost of the disclosure to their clients, i.e. the taxpayers.
- The existence of a mandatory disclosure regime can also enhance the reputation of intermediaries, especially where their disclosed regimes do not result in counter-measures by the authorities. It could lead to higher quality control standards in their work, including the possibility of gradually setting the blueprint for a profession-wide code of conduct.
- Such obligation should deter intermediaries from devising aggressive tax planning schemes, although some might also find ways to avoid this obligation (e.g. through professional privileges or secrecy rules).

Taxpayers

- If taxpayers had a disclosure obligation, it would act as a deterrent to engaging in aggressive tax planning, thereby contributing to the fairness of the tax system.
- To the extent that taxpayers do not design their own schemes, it would be very difficult for them to comply with an obligation to disclose such schemes ex ante, i.e. before at least the first steps of implementation were taken.
- Some large corporate taxpayers with in-house tax departments would not be likely to face particular difficulties in complying with their disclosure obligation.

Tax authorities

- Receiving information on the specific features of potentially aggressive tax planning schemes prior to their implementation or immediately after the first step has been accomplished should be great help in clamping down on tax avoidance and aggressive tax planning.

General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Considering that the intention of disclosing a potentially aggressive cross-border tax planning scheme will materialise, either through the intermediary or the taxpayer, this option does not seem to bring any particular impacts to the fore.

Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes in the field of direct taxes is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.



**(b) Double requirement (both intermediaries and taxpayers)**

Intermediaries

- Intermediaries would have to ensure that their client reported the same details about a scheme, since this could be double-checked. As reporting of the same schemes would in practice take place twice and originate in two separate sources (i.e. intermediaries and taxpayers), the authorities would be in a better informed position to scrutinise a case. Such a situation would contribute to establishing a level-playing field of fairness.
- Intermediaries would be most likely to shift the compliance cost of the disclosure to their clients, i.e. the taxpayers.
- There is a high risk of replication in the content of the disclosure, which would be likely to compromise business efficiency, especially considering the fact that intermediaries should be expected to be marketing various reportable schemes in parallel. In this sense, they are impacted by economies of scale.

Taxpayers

- If taxpayers had a disclosure obligation, it would act as a deterrent to engaging in aggressive tax planning
- Taxpayers could bear the cost of disclosing information twice, as the intermediary who would sell them a reportable tax planning scheme would possibly include its cost of disclosure in the price.
- There is a high risk of replication of data but, given that a taxpayer is commonly attached to one single scheme, the overall impact of this replication should remain minimal.

Tax authorities

- The double disclosure should allow the authorities to receive more comprehensive information and compare the accuracy of facts, as disclosed, in individual cases, which would contribute to a level-playing field of fairness. However, this also implied additional work on the side of the tax authorities (more information to process). Whether this dual reporting would produce benefits in excess of the costs of reporting twice is not known.

General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Considering that the intention of disclosing a potentially aggressive cross-border tax planning scheme will materialise, through a combination of data given by both the intermediary and the taxpayer, this option does not seem to bring any particular impacts to the fore.

Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes in the field of direct taxes is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.

### **(c) Primary and secondary requirement (intermediaries or taxpayers)**

#### Intermediaries

- Intermediaries would have to undertake the compliance cost of reporting in most cases; that is, they would always need to report unless they are entitled to a waiver based on professional secrecy rules, etc.
- Intermediaries would be most likely to shift the compliance cost of the disclosure to their clients, i.e. the taxpayers.
- The existence of a mandatory disclosure regime can also enhance the reputation of intermediaries, especially where their disclosed regimes do not result in counter-measures by the authorities. It could lead to higher quality control standards in their work, including the possibility of gradually setting the blueprint for a profession-wide code of conduct.
- Such obligation would act as a deterrent vis-à-vis the intermediaries from devising aggressive tax planning schemes.

#### Taxpayers

- Their engagement is secondary, which implies that they contribute to the need for transparency but only to the extent that there is a risk of reportable schemes remaining undisclosed due to the absence or other inability of an intermediary.
- They would need to bear the cost of disclosure but it should be expected that in the majority of cases, the compliance obligation would fall on the intermediary.

#### Tax authorities

- Given that most intermediaries would provide tax planning services on a regular basis, placing the primary obligation to inform on them would mean that the tax authorities are in a position to identify those liable to report.

#### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Considering that the intention of disclosing a potentially aggressive cross-border tax planning scheme will materialise, either through the intermediary or the taxpayer, this option does not seem to bring any particular impacts to the fore.

#### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes in the field of direct taxes is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.

With regard to the Public Consultation the most popular option for respondents at 36% was that both the taxpayer and the intermediary should report the scheme. From the main stakeholder groups there was a wide range of responses regarding this option: who replied to this question there was a wide range of preferences with 84% of NGO's (84%), 54% private citizens (54%), consultancy/tax advisors (11%) and Trade/business associations (8%).

## **8.4. Material Scope**

### **(i) Taxes covered**

The question is whether all taxes should be covered or the disclosure requirement should be limited to direct tax only.

### **(b) Direct taxes**

Given that direct and indirect taxation are structured in a fundamentally different fashion, a tax planning scheme would normally be aimed to reduce the tax liability in either of the two fields but not in both at the same time. It follows that, if the material scope of the envisaged initiative were limited to direct taxes, tax planning schemes involving indirect taxation would have to be looked at separately, possibly in the context of the VAT Directive.

#### Intermediaries

- Although intermediaries would benefit from economies of scale and so the obligation to disclose information in relation to all taxes should not create significant difficulty to them, the prospect for concentrating on the direct tax implications of their cross-border schemes would still allow them to process information in a more targeted manner and be more precise in the output that they pass to the tax authorities.

#### Taxpayers

- For taxpayers of a smaller size (e.g. Small and Medium Enterprises), limiting the disclosure obligation to direct taxes would obviously facilitate their compliance obligations significantly.
- Larger taxpayers should be less impacted by the broadness of the disclosure obligation. Still though, a disclosure limited to direct taxes could enhance legal certainty as it would allow taxpayers to develop a more targeted approach and concentrate on the details of the reportable schemes.

#### Tax authorities

- The fact that tax authorities would receive information limited to direct taxation would not compromise their prospects for monitoring compliance in the field of indirect taxation, as they could make use of other mechanisms to get access to information in that field (e.g. under VAT legislation).
- The majority of tax planning schemes with a cross-border dimension is structured to achieve income and capital tax savings. In indirect taxation, tax optimisation would be likely to follow different routes (primarily the VAT Directive or Customs).

#### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. On this premise and considering that most potentially aggressive cross-border tax schemes involve direct taxes, the prospect for limiting the obligation to disclose these schemes to direct taxation is unlikely to create issues.

### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes in the field of direct taxes is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.

With regard to the Public consultation there was no specific question regarding the material scope of the proposal. However, respondents did not propose including indirect taxes within the scope of the proposal.

## **(ii) Composition of Hallmarks**

### **(a) Generic hallmarks**

#### Intermediaries

- As the scope of these hallmarks would be broad and non-customised to address specific schemes, intermediaries would be in a position to easily identify and report to the authorities off-the-shelf products that they have sold to clients. This exercise should not involve any additional compliance cost.
- However, if all schemes that fall within generic hallmarks had to be reported, there would certainly be a degree of duplication, since essentially the same scheme may have been sold to more than one client.

#### Taxpayers

- Where taxpayers are called on to disclose their cross-border tax planning schemes to the authorities, they certainly bear a compliance burden. Yet, schemes falling within the concept of a generic hallmark should be relatively straightforward to report on. The taxpayer only needs to review its portfolio of schemes and pass the relevant information to the authorities.
- However, it is true that the smaller the taxpayer, the less its resources and the higher the cost of disclosure.

#### Tax authorities

- Potentially aggressive cross-border tax planning schemes become subject to disclosure if they fulfil some generally construed criteria; for example, if they involve the payment of a fee which is proportional to the tax benefit of the taxpayer. The fact that the "gateway" criteria are so general may require more effort by the authorities to prove that a certain disclosed scheme actually qualifies as tax avoidance.

#### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. On this premise and considering that generic hallmarks are sufficiently broad to capture most potentially aggressive cross-border tax schemes, the prospect for focussing the obligation to disclose on these schemes would be in line with the internal market related objective of this initiative.

### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes which fall within the generic hallmarks is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.

### **(b) Specific hallmarks**

#### Intermediaries

- Specific hallmarks usually address customised tax planning schemes which have been devised to meet the needs of specific clients. Intermediaries should be in a position to immediately identify which of this type of schemes they have provided clients with and report them to the tax authorities.
- Given that specific hallmarks essentially deal with customised schemes, there would be little risk of duplication in the disclosure.

#### Taxpayers

- Taking into account that schemes falling within the specific hallmarks can involve elaborate structures, taxpayers may need to process the details of these schemes in order to determine whether those are reportable.
- Although this can be a demanding exercise, it should also be considered that more complex schemes would normally relate to larger taxpayers. For this type of taxpayers, the compliance cost would remain low because they have the expertise.

#### Tax authorities

- Tax authorities should be expected to possess the expertise to deal with complex schemes. In fact, tax authorities should be expected to have the resources to process the disclosed information, match it with the file of the concerned taxpayer and determine whether the respective scheme actually qualifies as tax avoidance.
- Considering that specific schemes are not marketed massively, the tax authorities should not estimate to receive high numbers of such schemes.

#### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. On this premise and considering that some potentially aggressive cross-border tax schemes may be structured in particularly elaborate fashion, the prospect for focussing the obligation to disclose on these schemes would be in line with the internal market related objective of this initiative.

### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes which fall within the specific hallmarks is part of an initiative aimed to respond to the citizens' demand for more transparency in tax matters.

### **(c) Generic and specific hallmarks**

#### Intermediaries

- Generic and specific hallmarks would address both "off-the-shelf" and customised tax planning schemes. Intermediaries would need to identify which hallmark, i.e. generic or specific, the scheme that they operate corresponds to. This is a significant point because each type of hallmark requires that different criteria be fulfilled for its disclosure.
- Generic hallmarks run the risk of being reported twice if almost identical projects were sold to more than one client. Regarding specific hallmarks, they essentially deal with customised schemes, which imply that there would be little risk of duplication in the disclosure.

#### Taxpayers

- Where taxpayers are called on to disclose their cross-border tax planning schemes to the authorities, they certainly bear a compliance burden.
- Schemes falling within the concept of a generic hallmark should be relatively straightforward to report on. However, specific hallmarks are likely to involve elaborate structures and taxpayers may need to process the details of these schemes in order to determine whether they are reportable.
- Although this can be a demanding exercise, it should also be considered that more complex schemes would normally relate to larger taxpayers. For this type of taxpayers, the compliance cost would remain low because they have the expertise.

#### Tax authorities

- Tax authorities would be expected to possess the expertise to deal with complex schemes. In fact, the tax authorities would own the resources to process the disclosed information match it with the file of the concerned taxpayer and determine whether the respective scheme actually qualifies as tax avoidance.
- Considering that specific schemes are not marketed massively, the tax authorities should not estimate to receive high numbers of such schemes. On the other hand, generic schemes are more complicated to investigate the details of. This is because the disclosure may not give sufficient data on the features of a precise scheme which is under scrutiny.

#### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Although generic hallmarks are sufficiently broad to capture most potentially aggressive cross-border tax schemes, there are still certain such schemes which could escape the generic rule because they are structured in a particularly elaborate fashion. The obligation to disclose schemes that fall within both generic and specific hallmarks would be in line with the internal market related objective of this initiative.

### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes which fall within either the generic or specific or both hallmarks is part of an initiative aimed to respond to the citizens demand for more transparency in tax matters.

With regard to the Public consultation under Section 4.1 respondents were asked how useful a list of criteria were for classifying tax schemes as potentially aggressive. These criteria included both generic hallmarks like confidentiality clauses and premium fees, and specific hallmarks like artificial series of arrangements and schemes designed to circumvent the Common Reporting Standard. A large majority of respondents considered that these criteria would be of *limited use/very useful*. The criteria which was scored highest in the reply *Not useful at all* was the inclusion of a confidentiality clause at 15% of respondents. From the main respondent categories there was limited difference regarding whether this would be not useful at all: consultancies/tax advisors (25%), private citizens (21%), trade/business associations (11%), and NGO's (5%).

Member States expressed general support in the meeting of WPIV on 2 March, 2017 on the proposal for the EU to include a mixture of generic and specific hallmarks.

### **(iii) Timeframe**

#### **(a) Only new schemes**

### Intermediaries

- Intermediaries would be required to disclose only reportable schemes introduced after the entry into force of the regime on mandatory disclosure.
- This is a clear timeframe which would allow intermediaries to take account of the content of hallmarks in designing their tax planning schemes.
- Older schemes which are still in operation and would potentially fall within the hallmarks (if disclosed) would continue to apply without disclosure.

### Taxpayers

- Taxpayers would be required to disclose only the potentially aggressive cross-border tax planning schemes introduced after the entry into force of the regime on mandatory disclosure.
- Taxpayers would continue, without an obligation to disclose, with the implementation and/or operation of schemes that pre-date the entry into force of the regime on mandatory disclosure and that could otherwise have been captured by the hallmarks.

### Tax authorities

- Although the tax authorities may still benefit from the mandatory disclosure in terms of access to information relevant to the "new" schemes, they would not have the opportunity to review older schemes with potentially harmful features which remain in use within the internal market.

### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Disclosing "new" schemes would provide tax authorities with a good - although not fully complete - picture of the situation, and allow them to enact a comprehensive set of counter-measures. The disclosure of solely new schemes would contribute to the objective aimed to be achieved.

### Society

- The obligation to disclose potentially aggressive cross-border tax planning schemes, even where this is limited to exclusively "new" projects, is in line with citizens' demand for more transparency in tax matters.

## **(b) New and existing schemes**

### Intermediaries

- Intermediaries would be required to disclose all reportable schemes which are in operation, including those which pre-date the entry into force of the mandatory disclosure regime.
- Some of the "old" existing schemes could have been modified over time and consequently certain characteristics of the original scheme would no longer be there.
- In addition, it cannot be excluded that the intermediary who designed and sold the scheme be no longer identifiable.

### Taxpayers

- If the obligation to disclose reportable schemes shifts to taxpayers, it would be required to disclose all reportable schemes which are in operation, including those which pre-date the entry into force of the mandatory disclosure regime.
- Some of the "old" existing schemes could have been modified over time and consequently certain characteristics of the original scheme would no longer be there.
- Taxpayers would always be in a position to track, and report on, "old" schemes which are still in operation.

### Tax authorities

- Tax authorities would benefit from the mandatory disclosure in terms of access to information relevant to "old" and "new" schemes.
- However, since some of the "old" schemes may have been modified over time, tax authorities would need to ensure that the present state of schemes has also been reviewed.

### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. Disclosing both "old" and "new" schemes would provide tax authorities with a more complete picture of the situation in the market, so that these authorities can focus on enacting comprehensive counter-measures.



### Society

- The broader the obligation to disclose potentially aggressive cross-border tax planning schemes (i.e. it is not limited to "new" schemes but also includes "old" ones that are still in force), the closer our alignment with citizens' demand for more transparency in tax matters.

The Public Consultation did not include any question specifically asking about the timeframe for the proposal.

## **8.5. Exchange of information**

### **(i) Form and frequency of exchange of information**

#### **(a) Spontaneous exchange**

### Intermediaries

- Considering that the disclosure of information on potentially aggressive cross-border tax planning schemes is distinguished from the exchange of such information, the type of exchange, i.e. spontaneous, automatic or on request, would not impact on the intermediaries' obligation for disclosure.
- The exchange of information is a responsibility of the tax authorities – not of the intermediaries. It follows that the exchange of disclosed information and/or the method used for this exchange does not impact on the intermediaries as such.
- Even in the absence of a specific reference to spontaneous exchange in the text on the mandatory disclosure of reportable schemes, Member States' authorities would still bear this obligation under the general rules of the Directive on Administrative Cooperation.
- Taxpayers
- Considering that the disclosure of information on potentially aggressive cross-border tax planning schemes is distinguished from the exchange of such information, the type of exchange, i.e. spontaneous, automatic or on request, would not impact on the taxpayers' "fall-back" obligation for disclosure.
- The exchange of information is a responsibility of the tax authorities – not of the intermediaries. It follows that the exchange of disclosed information and/or the method used for this exchange does not impact on the taxpayers as such.
- Even in the absence of a specific reference to spontaneous exchange in the text on the mandatory disclosure of reportable schemes, Member States' authorities would still bear this obligation under the general rules of the Directive on Administrative Cooperation.

### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. The spontaneous exchange of information on disclosed potentially aggressive cross-border tax planning schemes would contribute to this objective. In fact, the tax authorities of other Member States would have the opportunity to learn, through the exchanged information, about distortions in the internal market and to enact measures to fix them.

### Society

- The exchange of information about disclosed potentially aggressive cross-border tax planning schemes, even where this exchange is only spontaneous, is in line with citizens' demand for more transparency in tax matters.

## **(b) Automatic exchange**

### Intermediaries

- Considering that the disclosure of information on potentially aggressive cross-border tax planning schemes is distinguished from the exchange of such information, the type of exchange, i.e. spontaneous, automatic or on request, would not impact on the intermediaries' obligation for disclosure.
- The exchange of information is a responsibility of the tax authorities – not of the intermediaries. It follows that the exchange of disclosed information and/or the method used for this exchange does not impact on the intermediaries as such.

### Taxpayers

- Considering that the disclosure of information on potentially aggressive cross-border tax planning schemes is distinguished from the exchange of such information, the type of exchange, i.e. spontaneous, automatic or on request, would not impact on the taxpayers' "fall-back" obligation for disclosure.
- The exchange of information is a responsibility of the tax authorities – not of the intermediaries. It follows that the exchange of disclosed information and/or the method used for this exchange does not impact on the taxpayers as such.

### General economic considerations

- The overarching objective of this initiative is to ensure the proper functioning of the internal market. The automatic exchange of information on disclosed potentially aggressive cross-border tax planning schemes would contribute to this objective. In fact, the tax authorities of other Member States would have the opportunity to learn, through the exchanged information, about distortions in the internal market and to enact measures to fix them.

### Society

- The automatic exchange of information about disclosed potentially aggressive cross-border tax planning schemes is in line with citizens' demand for more transparency in tax matters.

None of the options available under *Exchange of information* could be considered as having a measurable difference on the administrative burden placed on the taxpayer.

Regarding the Public Consultation there were no questions regarding the form and frequency of exchange of information. In the meeting of WPIV of 2 March, 2017 Member States expressed general support for automatic exchange of information as the form of exchange.

## **(ii) Means for exchange of information**

### **(a) Compulsory publication in the Member State of disclosure**

#### Intermediaries

- Intermediaries would be faced with publication of aggressive tax planning schemes. Such a situation would contribute to establishing a public scrutiny. There would be no cost involved for the intermediaries.
- There would be a reputational risk for the intermediary involved which could serve as a deterrent to the creation of aggressive tax planning schemes compared to non-publication.

#### Taxpayers

- Where the obligation to disclose potentially aggressive cross-border tax planning schemes is shifted to taxpayers, they would also be faced with publication of aggressive tax planning schemes. There would be no cost involved for the taxpayers.
- There is a reputational risk for the taxpayer involved which would serve as a deterrent to the use of aggressive tax planning schemes compared to non-publication.

#### Tax authorities

- Tax authorities would need to publish aggressive tax planning schemes and this would require additional resources.
- The increased deterrent effect that one hopes to achieve from the "threat" of publication would mean that taxpayers and intermediaries would be less likely to engage in schemes that would qualify as tax avoidance and tax evasion.
- How useful this information would be to tax authorities would depend on the timeliness of the publication of the aggressive tax planning schemes – if there is a long time period for publication after the regime has been notified then other Member States may not be able to react with counter-measures against such schemes in a timely manner.

#### General economic considerations

- An increase in transparency is expected to gradually change national tax practices;
- Tax authorities would pay for the publication of aggressive tax planning schemes and not the economy in general;
- The publication of aggressive tax planning schemes may discourage foreign investment by individuals and/or companies due to the potential harm that publication may do to their reputation if they used reportable schemes. This said, the publication may also limit situations of aggressive tax planning.

### Society

- Publication of aggressive tax planning schemes would lead to greater transparency than non-publication and contribute to better tax fairness and also contribute to a level playing field for taxpayers.
- Cost for publication of aggressive tax planning schemes would be incurred by the tax authorities and not society in general.

## **(b) Direct exchange between Member States (Option 1 Spontaneous exchange and Option 2 Automatic exchange)**

### Intermediaries

- Intermediaries would not be directly affected by this option as tax authorities of Member States would exchange the information with each other.

### Taxpayers

- Taxpayers would not be directly affected by this option as tax authorities of Member States would exchange the information with each other.

### Tax authorities

- Regarding spontaneous exchange of information (Option 1) Member States would be required to send information at their discretion to other Member States which would require additional resources.
- Regarding automatic exchange of information (Option 2) Member States would be required to send information at fixed intervals to other Member States requiring additional resources.
- In terms of comparison of Option 1 and Option 2, costs would be similar but may differ marginally due to the frequency of exchanges.
- Member States would benefit from receiving this information and be able to react in a timely manner to address aggressive tax planning schemes. Regarding Option 1 (spontaneous exchange) and Option 2 (automatic exchange) how timely Member States could react depends on the frequency of sending information under Option 1 compared to Option 2.
- A quantification of increased burden under Options 1 and 2 does not exist however current evaluations of the UK DOTAS schemes does not indicate that the mandatory disclosure regime has caused concerns about an increase in administrative burden for the UK authorities.

### General economic considerations

- Exchange of information occurs between the tax authorities of Member States therefore the means of exchange of information does not affect general economic considerations directly.

### Society

- Exchange of information occurs between the tax authorities of Member States therefore the means of exchange of information does not affect society in general directly.

### **(c) Indirect exchange through a central directory**

#### Intermediaries

- How tax authorities store and provide access to information for other Member States does not affect intermediaries directly.

#### Taxpayers

- How tax authorities store and provide access to information for other Member States does not affect taxpayers directly.

#### Tax authorities

- Member States would be required to update a central directory for aggressive tax planning schemes which would bring similar costs to that for direct exchange of information.
- A quantification of increased burden for a central directory does not exist however current evaluations of the UK DOTAS schemes does not indicate that the mandatory disclosure regime has caused concerns about an increase in administrative burden for the UK authorities.
- Member States would benefit from receiving this information and be able to react in a timely manner to address aggressive tax planning schemes. As with direct exchange of information, how timely Member States could react would depend on the frequency of update of the Directory by the Member State concerned to record aggressive tax planning schemes.

#### General economic considerations

- How tax authorities store and provide access to information for other Member States has no direct effect on general economic considerations.

#### Society

- How tax authorities store and provide access to information for other Member States has no direct effect on society.

With regard to the Public Consultation opinions on the extent of the disclosure was asked under section 7 policy options and their impacts. While the Public Consultation did not specifically cover the means for exchange of information respondents were asked about Option D which had a wide range of disclosure including publication which was not included under the other option categories. Overall 47% of respondents rated Option D as effective/very effective however there was a wide divergence in the main stakeholder categories with regard to whether this would be considered as effective/very effective: NGO's (89%), companies (75%), private citizens (60%), consultancies/tax advisors (25%), and trade/business associations (19%).

## **9. COMPARISON OF OPTIONS**

For assessing the policy options, the following criteria are used:

- *Effectiveness*: in terms of achieving the ultimate (indirect) objective of clamping down on tax evasion and avoidance; the analysis will also consider the direct specific objectives of creating an environment of transparency and allowing for the timely access to information as well as of creating a deterrent to the design and use of aggressive tax planning schemes
- *Efficiency*: the extent to which the objectives can be achieved for a given level of resources or least cost;
- *Coherence*: the degree to which this option would result in a consistent application across the EU.

The summary tables indicate how the various alternative features of the policy initiative compare to the baseline scenario, which is about taking no action and retaining the current status quo. If no initiative is taken, the current situation will persist. This would imply that tax authorities will not avail themselves of the opportunity to learn *ex ante* about potentially aggressive tax planning arrangements which may be found illegitimate following scrutiny. The objectives of enhancing transparency and allowing timely access to information by the authorities as a deterrent to aggressive tax planning practices will also be compromised. Otherwise, tax authorities will still be in a position to benefit from the results of recently enacted EU instruments against tax avoidance since these will remain available for Member States.

## 9.1. Personal scope

### Comparison

#### 9.1.1. Single requirement

**(i) Only intermediaries** – regardless of whether they qualify as EU or non-EU intermediaries under section 7.1.3:

Under this option, only intermediaries would bear the burden of the new obligations. Users would be given a full waiver. Although this option would allow tax authorities to derive the benefits of *ex ante* mandatory disclosure, it would run the risk of turning out to be of limited effectiveness. Namely, although the obligation would equally burden both the EU and non-EU intermediaries, it would be difficult to enforce compliance against the latter. Considering that users are given a waiver and so, there would be no fall-back solution to cater for the absence of an intermediary, it should be expected that those intermediaries who do not wish to disclose information would organise their business in such a way as to escape the reporting obligation. Another drawback is that schemes designed solely by taxpayers (in-house), without the assistance of any intermediary, would also escape the reporting obligation under this option.

It follows that this option can only partially meet the (direct and indirect) objectives of this initiative (see chapter 6).

**(ii) Only users**: although this option would allow tax authorities to derive the benefits of *ex ante* mandatory disclosure, it would also run the risk of limited effectiveness. This is because users may not have the expertise to provide details on how the scheme works. For this reason, it could be the case that a tax administration receives a larger amount of reports of inferior

quality. Such a prospect would compromise transparency and the timely access to information and as a result, would overall not contribute, as it is expected, to the fight against tax avoidance and evasion.

### 9.1.2. Double requirement

**Intermediaries and users:** if both intermediaries and users carry the onus of the disclosure obligation, the tax authorities should derive the maximum benefits of this exercise in terms of transparency and information access but the overall burden of compliance should be expected to increase. This would also be the case for tax administrations because they could receive information on the same scheme at least twice (one report from the intermediary and another from the user). In the case of mass-marketed schemes, there would even be a risk of multiplication. However, Member States may benefit from both intermediaries and users reporting such schemes as the risk of non-reporting or incomplete reporting would decline given that both parties would need to report and could act as a control on one another. It may be worth noting that this was the most favoured option in the responses to the public consultation with 36% of respondents indicating that both taxpayers and users should report a scheme.

### 9.1.3. Primary and secondary requirement

Under this option, the burden would mostly lie with the **intermediaries** as they would bear the primary reporting obligation. Users would be involved where there are no intermediaries or where intermediaries cannot be identified or forced to comply. Although the occasional involvement of the users (taxpayers) should be expected to add some more compliance burden, the tax authorities would still benefit from the information received as part of the *ex ante* mandatory disclosure. In addition, this option would be likely to generate significant gains in effectiveness. It thus combines the possibility of having a fall-back rule to cater for the cases where the intermediary is absent or does not exist with the prevention of duplication or multiplication of tasks. Therefore, there would be only one person encumbered with compliance each time.

Options 1(ii) and 2 where users have an obligation to report would mean a higher compliance burden for taxpayers and, given the complexity of such schemes, could lead to sub-optimal reporting. Placing the primary reporting obligation on intermediaries would improve the effectiveness of the rules in terms of enhancing transparency and timely information access and, in terms of results, further the fight against tax avoidance. This is because the intermediaries would have the expertise to ensure that the reporting of such schemes be carried out successfully. Furthermore, the overall burden for intermediaries would be reduced as they would report on the schemes of multiple clients and so they would be able to benefit from economies of scale.

**Table 3: Comparison – subject of reporting obligation**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Subject of reporting obligation</b>	0. Baseline scenario – no reporting	0	0	0
	1. Single requirement (only intermediaries or only users)	+	+	+
	2. Double requirement (intermediaries and users)	++	+	+

	3. Primary and secondary requirement (intermediaries or users)	++	++	++
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Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

### **Conclusion:**

Option 3 follows the approach used in existing schemes and, if well-designed, it would provide a balanced solution. It is indeed the intermediary who designs and sells the scheme that would fulfil the reporting obligations, except in some circumstances where it would fall on the taxpayers. In addition, if the primary obligation rest with the intermediary, it could also help avoid multiple reporting of the same scheme if this was implemented by a number of clients of the same intermediary. Therefore, option 3 would mitigate the risks of non-reporting whilst also create a contained overall compliance burden.

## **9.2. Material scope**

### *9.2.1. Types of taxes*

**Table 4: Comparison – type of taxes covered**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Type of taxes covered</b>	0. Baseline scenario – no coverage	0	0	0
	1. All taxes ( <i>discarded suboption</i> )			
	2. Direct taxes only	++	++	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

### **Conclusion:**

The option to cover all taxes has been discarded in section 7.2.1. Consequently, option 2, which covers, only direct taxes, has been chosen for the final design of the mandatory disclosure regime.

### *9.2.2. Object of reporting (composition of hallmarks)*

### **Comparison:**

The analysis identifies three options for choosing the hallmarks that should be included in the regime. First, the compilation of a list of hallmarks, as compared to the "status quo", where hallmarks are missing, is an improvement.

Generic hallmarks are designed to primarily target mass-marketed schemes or standardised products, provided that the scheme(s) under disclosure potentially promote(s) aggressive tax planning or award(s) tax benefits. It follows that generic hallmarks can easily capture large volumes of mainstream off-the-shelf schemes but would risk missing the customised ones which would be tailor-made to fit either the particular commercial structures of global multinationals or specific tax-oriented objectives of corporate clients or even of high net worth individuals. What is more, the effectiveness of generic hallmarks could be undermined



if the additional requirements of potential aggressive tax planning or aim to derive tax benefits are narrowly construed.

On the other hand, specific hallmarks would be effective in addressing the particular characteristics of schemes that differ from what is widely marketed as well as in ensuring that tax planning schemes do not take advantage of certain weak features in a national tax system such as features resulting in double non-taxation situations. Specific hallmarks cannot by nature effectively target large volumes of schemes as they are construed to serve a different function. This said, an inherent drawback of specific hallmarks relates to the fact that due to their narrow scope, intermediaries can usually find ways around these types of hallmarks and thus avoid reporting.

A combination of generic and specific hallmarks would be expected to capture the large numbers of mainstream off-the-shelf schemes and also extend to cover (otherwise missing) bespoke and tailored-made schemes. Intermediaries would be discouraged from designing their schemes around specific hallmarks because they would still be likely to fall within the scope of the generic ones. It therefore follows that the best way to create a robust set of rules that will ensure the widest possible transparency and timely access to information would be to bring together generic and specific hallmarks in a combined regime. This option would place a compliance burden on to intermediaries to proof-check their marketed tax planning schemes against a long list of hallmarks. Yet, in such cases, they would capitalise on increased legal certainty in operating their businesses.

**Table 5: Comparison –composition of hallmarks**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Composition of hallmarks</b>	0. Baseline scenario – no hallmarks	0	0	0
	1. Generic hallmarks	+	+	+
	2. Specific hallmarks	+	+	+
	3. Generic and specific hallmarks	++	++	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

### **Conclusion:**

The preferred option is 3, which consists in a combination of generic and specific hallmark.

This conclusion is also consistent with the OECD report on BEPS Action 12, which recommends that mandatory disclosure regimes include a combination of generic and specific hallmarks.

#### *9.2.3. Timeframe for reporting*

### **Comparison:**

Under the first option, the compliance burden of intermediaries would be relatively limited since they would need to report only schemes introduced after the entry into force of the

regime on mandatory disclosure. In such case, although the tax authorities may still benefit from the mandatory disclosure in terms of access to information, the policy effectiveness of this option could prove limited. This is because older schemes with potentially harmful features may go unreported while they remain in use within the internal market. In addition, the system could prove prone to manipulation in cases where a substantial number of schemes be introduced between the time that political agreement on the Directive is reached in Council and the entry into force of the act, in order to escape the new reporting obligation.

The second option requires to additionally report information about schemes that generally pre-date the introduction of the mandatory disclosure regime. In this regard, it is worth noting that some of the "old" existing schemes may have been modified over time and consequently certain characteristics of the original scheme may no longer be there. Considering this, it would be necessary to assess schemes against the hallmarks by referring to their features at present. Accordingly, it would not be excluded that the intermediary who designed and sold the scheme be no longer identifiable. This is why it may be disproportionate that the disclosure obligation captures all existing reportable regimes.

**Table 6: Comparison - timeframe**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Timeframe</b>	0. Baseline scenario – no schemes covered	0	0	0
	1. Only new schemes	+	++	+
	2. New and existing schemes	++	+	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

## **Conclusion:**

Given that the inclusion of existing arrangements can lead to severe complications, option 1 should be the preferred one as it offers a more proportionate solution towards achieving a high level of transparency. To reinforce the preferred regime, it should be proposed that the Directive develop a limited retrospective effect, confined to capturing schemes that were put in place after political agreement on this Directive in Council.

## **9.3. Exchange of information**

### *9.3.1. Form and frequency of exchange of information*

## **Comparison:**

There are two policy options for shaping the exchange of information: spontaneous and automatic exchange. Irrespective of which option is taken, the exchange brings forth some added value, as compared to the "status quo" scenario. It is envisaged to take place exclusively between national competent authorities.

Already now, tax authorities can exchange information spontaneously. However, spontaneous exchanges, although they are better than no exchange at all, are often irregular. They leave Member States with discretion to decide on the content of what they share as well as on the

States that they wish to share the disclosed information with. This could mean that aggressive tax planning information may not reach all Member States, which would compromise the effectiveness of the envisaged initiative and its objectives for establishing timely access to information that would deter future aggressive tax planning schemes. Past experience in a different tax field shows that the discretionary element was one of the reasons why the process proved ineffective. It follows that relying exclusively on spontaneous exchanges of information would not necessarily improve cooperation in the field of tax.

If, under an automatic exchange of information, Member States share data on reported schemes with all others, more national authorities would benefit from the communicated information. In addition, there would be no discretion as to whom the information should be addressed to and therefore States' authorities would not need to invest time in identifying the appropriate recipients. This approach would therefore provide for a higher degree of effectiveness and efficiency. It would also be consistent with the current international trends on the exchange of tax information, which are structured on the assumption that there is automatic exchange. Even reported information that no scheme was reported in a given period would add to transparency.

In all cases, the disclosed information would be shared with other Member States. Yet, the overall efficiency of the information exchange would also depend on the means used for the exchange (which are discussed in the next section). During the stakeholder's consultation, there was no particular preference for any of the specific forms for information exchange.

**Table 7: Comparison – form and frequency of exchange of information**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Form and frequency of exchange of information</b>	0. Baseline scenario – No exchange	0	0	0
	1. Spontaneous exchange	+	+	+
	2. Automatic exchange	++	++	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

### **Conclusion:**

Option 2, automatic exchange of information should be the preferred option because it effectively supports the objective for more extensive transparency and access to information.

#### *9.3.2. Means for exchange of information*

### **Comparison:**

Options 2 and 3 only pertain to Member States whilst option 1 also concerns the public and various groups of stakeholders.

As a matter of principle, Member States can decide whether and in what form they wish to publish information on a tax planning scheme. Indeed, they sometimes do so with regard to selected tax schemes, which they treat as aggressive, and explain why they consider this to be so. Member States may also wish to clarify how they envisage to clamp down on tax planning schemes or give an outline of the steps towards a necessary regulatory/legislative change in the tax field. Although the public could generally gain from receiving this information, it is questionable whether the compulsory publication would contribute to the primary objective of

the present initiative, i.e. giving the tax authorities of Member States timely access to tax-related information as a deterrent to future aggressive schemes. Preparing material for publication would also require resources and could lead to delays and/or an inefficient allocation of capacities.

A straightforward direct exchange between Member States, including with the Commission, would allow sharing disclosed information among tax authorities but would not address other functions. The management of this information would be fully left to the recipients.

The use of a central directory by the Member States and the Commission would secure access to the relevant information and provide for additional management tools. In fact, the option of a directory would combine the advantages of regular automatic exchange on one side and an ad hoc early cooperation on the basis of spontaneous exchange on the other. This outcome clearly points to an improved situation compared to the "status quo". At the same time, the directory can provide tools for facilitating the follow-up cooperation or coordination between national authorities and the Commission. This indirect exchange through a central directory would offer more flexibility and opportunities while maintaining a high overall efficiency. The involvement of the Commission is crucial for the monitoring of the functioning of the exchange of information.

**Table 8: Comparison – means for exchange of information**

Specific features	Description of options	Effectiveness	Efficiency	Coherence
<b>Means for exchange of information</b>	1. Baseline scenario – No exchange	0	0	0
	1. Compulsory publication in the MS of disclosure	+	+	+
	2. Direct exchange between MSs	+	+	+
	3. Indirect exchange through a central directory	++	++	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing".

### **Conclusion:**

Option 3 is the preferred option because it offers tax authorities wider opportunities for an efficient collaboration.

## **9.4. The Preferred Option**

The preferred option reflects the conclusions arising from the evaluation of the options that were previously compared in the light of the objectives that this initiative seeks to achieve. The effectiveness of this option will be assessed by reference to its prospects for creating successful disincentives, allowing market transparency and an early detection of tax evasion and avoidance. The elements of the preferred option can be summarised as follows:

*Member States undertake to lay down an obligation on intermediaries and, as a fallback, on taxpayers to disclose potentially aggressive tax planning schemes with a cross-border element that engages at least two Member States and to automatically exchange the relevant information with other Member States.*

**Table 9: Assessment of all options overview**

Specific features	Policy options concerning disclosure regime	Assessment criteria		
	Description of options	Effectiveness	Efficiency	Coherence
<b>Baseline scenario</b>	No action	0	0	0
<b>Personal scope</b>				
<b>Subject of reporting obligation</b>	1. Single requirement (only intermediaries or only users)	+	+	+
	2. Double requirement (intermediaries and users)	++	+	+
	<b>3. Primary and secondary requirement (intermediaries or users)</b>	++	++	++
<b>Material scope</b>				
<b>Type of taxes covered</b>	1. All taxes ( <i>discarded suboption</i> )			
	<b>2. Direct taxes only</b>	++	++	++
<b>Composition of hallmarks</b>	1. Generic hallmarks	+	+	+
	2. Specific hallmarks	+	+	+
	<b>3. Generic and specific hallmarks</b>	++	++	++
<b>Timeframe</b>	1. <b>Only new schemes</b>	+	++	+
	2. New and existing schemes	++	+	++
<b>Exchange of information</b>				
<b>Form and frequency of exchange of information</b>	1. Spontaneous exchange	+	+	+
	<b>2. Automatic exchange</b>	++	++	++
<b>Means for exchange of information</b>	1. Compulsory publication in the Member State of disclosure	+	+	+
	2. Direct exchange between Member States	+	+	+
	<b>3. Indirect exchange through a central directory</b>	++	++	++

Source: European Commission (2017)

Annotation: The result of the comparison should be understood as relative to the baseline scenario of "doing nothing". Preferred suboptions are marked in bold.

Under this option there would be a requirement for Member States (i) to lay down an explicit obligation on intermediaries (or, as a fallback, on taxpayers who use the scheme(s)) to disclose potentially aggressive tax planning schemes with a cross-border element that engages at least two Member States to their national tax authorities; and (ii) to ensure that their national tax authorities automatically exchange this information with the tax authorities of other Member States by using the mechanism (central directory) provided for in the DAC.

The preferred option will consist of the following fundamental features:

- Only direct taxes are covered;
- Intermediaries have the primary reporting obligation and users a secondary;
- There is a broad definition of intermediaries;
- There is a list of generic and specific hallmarks which act as a gateway for determining whether or not a scheme shall be reported. The hallmarks primarily concern features of the (potentially aggressive) tax planning schemes;
- Only new schemes and schemes that were put in place after political agreement on this Directive was reached in Council will have to be reported (limited retrospectively);
- Automatic exchange of information will ensure the sharing of information between the competent national authorities in the Member States;
- Exchange of information should make use of a central directory.

### ***Compliance with the principle of proportionality***

The preferred option represents a proportionate answer to the identified problem since it does not exceed what is necessary for achieving the objective of the Treaties for a better functioning of the internal market without distortions. Thus, the common rules on mandatory disclosure and the automatic exchange of information are limited to addressing potentially aggressive tax planning arrangements with a cross-border element within the EU. In this way, it is ensured that EU-level legislation does not go broader than regulating the aspects that affect the functioning of the internal market. In addition, the harmonised approach reaches up to the point that the competent national authorities come to know about the potentially aggressive arrangements. Thereafter, it is for Member States to decide how they pursue cases of illegitimate arrangements. This approach is further illustrated in the case of penalties for non-compliance. In this regard, the national provisions that implement the Directive into national law will remain under the sovereign control of Member States.

## **10. ANALYSIS OF IMPACTS OF THE PREFERRED POLICY OPTION**

The impacts of the preferred policy option are assessed in the light of the objective of creating an effective rule which should have a deterrent effect, contribute to transparency and support the possibility of early detection.

*As regards intermediaries*, the preferred option, which involves the early disclosure of potentially aggressive cross-border tax planning schemes could have a deterrent effect, as it would increase the pressure to refrain from the schemes under discussion. As a consequence, the incentive to design and market new aggressive tax planning schemes would be reduced. Similarly, the life-cycle of existing schemes would be shortened and therefore ultimately the corridor for profit margin would become narrower. The burden of cost for intermediaries should be limited due to the fact that the reportable information would already be available to intermediaries when the schemes are designed and offered to taxpayers for use, namely, before they are implemented. Furthermore, ensuring tax compliance is already a main activity for intermediaries providing tax advice/services. It is therefore envisaged that the burden should be accommodated by existing compliance obligations of intermediaries. The preferred

option would also allow tax authorities to benefit from an early detection of tax avoidance and/or evasion in any of the Member States in which the schemes operate. The mandatory disclosure regime could provide more certainty for intermediaries, to ensure that they are tax compliant and thus render a higher quality service for clients. The current DOTAS scheme in the UK provides a reference number to taxpayers in order to include details of an arrangement or a series of arrangements in their tax returns although it does not imply acceptance of the arrangement by the tax authorities.

*As regards taxpayers*, the preferred option would also work as a deterrence tool. It would thus increase transparency as to what type of arrangement(s) could be acceptable to the tax authorities. In this light, taxpayers would be likely to reconsider implementing arrangements which have been captured by the hallmarks as being potentially aggressive tax planning. In addition, early disclosure would supply the tax administration with sufficient information for determining the tax consequences of these (disclosed) arrangements. Another result of the disclosure could well be greater tax certainty for taxpayers since they would be given an incentive to remain tax compliant.

Given the nature of cross-border tax planning, individuals who are highly mobile and/or high net wealth individuals would be mostly affected by the preferred option. In terms of tax compliance, this type of taxpayer presents risks, as they would have the means to engage in tax avoidance and also conceal assets/income from their national tax authorities when the income/assets are located in another jurisdiction. In terms of the compliance burden of the preferred option on taxpayers, the preferred option would require the taxpayer to report in a limited number of circumstances i.e. where: (i) a non-EU intermediary without any presence in the EU has created the scheme; (ii) the scheme has been created in-house; or (iii) the intermediary is protected by legal professional privilege or secrecy rules.

*As regards tax authorities*, the preferred option would enhance the effectiveness of their tax compliance activities, for example for risk assessment and audit purposes. They would be provided with timely information regarding potentially aggressive tax planning arrangements and should therefore be in a position to easier identify the intermediaries and users of those arrangements. On this premise, tax administrations would be able to quickly react, as a result of the early disclosures, to arrangements which they assess as harmful through operational measures, legislative or regulatory changes.

Data from national tax authorities in the EU regarding the volume of both tax evasion and tax avoidance is often not publically available. Therefore, it has not been possible to gauge the size of the problem and how the preferred option could reduce tax evasion and tax avoidance. Nevertheless, in 2009, the UK tax authorities estimated that the DOTAS scheme had proved to be highly successful and the Government had used information from DOTAS to introduce a range of anti-avoidance measures every year since 2004 – a total of 49 measures, closing off over GBP 12 billion in avoidance opportunities<sup>58</sup>. HMRC noted that there is considerable anecdotal evidence that DOTAS changed the economics of avoidance.

In the public consultation, the respondents considered that the most likely indirect consequence of the mandatory disclosure requirements would be an increase in administrative burden for public authorities although respondents considered that any benefit would outweigh such costs. In discussions with Member States which currently have an existing

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<sup>58</sup> See the speech by Exchequer Secretary to the Treasury, David Gauke MP (2012): "[Where next for tackling tax avoidance?](#)"

mandatory disclosure regime, increased administrative burden was not cited as a concern. Rather, the regime provided an additional tool against tax evasion and avoidance and could be dealt with by departments which are already dedicated to this or a similar function.

It is yet crucial that the design of the regime should be such that the amount of information to be reported is proportionate and does not create administrative costs that outweigh the benefits. In this respect the preferred option meets these requirements as it does not require retrospective reporting of arrangements prior to adoption of the proposal and offers certainty for all parties to the regime by having clear tests to ensure that only potentially aggressive tax planning arrangements need to be disclosed.

The ***overall impact*** will - to some extent - depend on the capacity of national tax administrations and the legislature to make use of the early detection and react rapidly in order to close down loopholes in national tax laws.

As regards the possible ***impacts on fundamental rights***, the preferred policy option for mandatory disclosure is fully compliant with the Treaties. The envisaged option respects private data protection rules as the disclosed information will not be made publicly available. In addition, the right of intermediaries, legal or natural persons, to provide services will not be impaired. In this context, professional secrecy will be respected (e.g. the legal profession privilege (LPP)) where this is required by the law. Finally, the preferred option is in line with the principle of proportionality since it will be limited to schemes of a cross-border dimension that fulfil certain indications of aggressive tax planning ("hallmarks").

Regarding ***societal impact***, a majority of respondents to the public consultation, in particular NGO's and private citizens, considered that a mandatory disclosure regime, including the preferred policy option, would generally provide a better and fairer tax environment, would increase taxes collected both in and outside the EU, would deter the use of ATP schemes, and would provide a focus on wealthy taxpayers. The regime would therefore contribute to an environment of fairer taxation in the EU.

***As regards Small and Medium Enterprises (SMEs)***, the impact of the preferred policy option would most possibly be very limited. Thus, only a small number of SMEs make use of complex cross-border tax planning schemes. As confirmed by respondents to the public consultation on the indirect impacts of a proposal, the main benefit for SMEs in the longer term could be to gradually create a level-playing field between themselves and international groups, as the disclosure regime would reduce the attractiveness of aggressive tax schemes to the latter.<sup>59</sup> In addition, respondents to the public consultation considered that increasing innovation and competitiveness of SMEs compared to large companies would be two of the main benefits of a mandatory disclosure regime.

Regarding ***longer-term economic impacts***, an increase in transparency is expected to gradually change national tax practices. Where tax practices were used in the past to attract or keep international groups, it may become less attractive for groups to relocate profits on that basis. In the future, some groups might decide to leave again. This could result in a possible loss of foreign direct investment or economic activity. On the other hand, Member States that

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<sup>59</sup> For details see Annex 4.



were negatively impacted in the past by non-transparent practices of other States could expect a flow back of economic activity and a recovery of their tax base.

Member States which already have mandatory disclosure regimes did not report any negative effects from such a regime in terms of reducing their attractiveness as a place for investment. In the public consultation, 37 respondents considered that the introduction of a regime would not affect the attractiveness of the EU internal market whilst 32 respondents considered that it would reduce its attractiveness. In summary, decisions of investment depend on a wide range of factors other than taxation and the effect of the introduction of such a regime could potentially increase tax certainty which could be beneficial for companies' investment decisions.

## **11. CHOICE OF THE LEGAL INSTRUMENT**

The previous chapter assessed various options for the design of a mandatory disclosure regime for intermediaries resulting in the preferred option. This option can be implemented via different legal instruments.

### **11.1. Commission Recommendation (non-binding instrument)**

Under this option, the Commission would encourage Member States to introduce a mandatory disclosure regime for potentially aggressive tax planning schemes and to exchange information under existing tools for administrative cooperation. The recommendation would also encourage Member States to refer the reported schemes to the group of the Code of Conduct on business taxation, which looks at harmful tax practices in the EU<sup>60</sup>. This could ensure a proper follow up of cases by the Member States.

However, a non-binding recommendation would not necessarily ensure a sufficient level of consistent and coordinated implementation of the measure(s) across the internal market. Nevertheless, it is of primary importance to build a coordinated practice with the aim to achieve a coherent outcome in addressing the identified problems. This consistent approach should also be reflected in the practice of tax administrations, intermediaries and taxpayers.

### **11.2. EU Code of Conduct for intermediaries (non-binding instrument)**

Based on this instrument, the preferred option would be implemented through a European Code of Conduct for certain regulated professions. The aim would be to discourage members of certain professions from entering into aggressive tax planning activities. If they did so, they would be required to report such activities to the tax authorities. This instrument would be directed to certain professions of intermediaries.

A non-binding solution in the form of a Code of Conduct concerning intermediaries presents several shortcomings. Since the personal scope of the initiative should be as broad as possible and thus also cover unregulated or non-organised professions, any Code of Conduct for regulated professions would be limited to only certain categories thereof. It would therefore be difficult to ensure a level-playing field across all intermediaries in the internal market. This

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<sup>60</sup> More information can be found [here](#).

could create new loopholes as well as a disadvantageous treatment for some. Notably, new business opportunities would possibly emerge for certain intermediaries in the field of aggressive tax planning (as they would not be covered by an EU Code of Conduct), which would go against the main objective of this assessment. Furthermore, schemes that were devised without the intervention of an intermediary would not be covered.

Although 45 respondents to the public consultation rated the EU Code of Conduct as effective/very effective, there was wide divergence between the respondent categories in terms of how they rated the option: 58% of consultancy/tax advisor companies and 69% trade/business associations considered it effective/very effective with only 16% of NGO's, 32% of private citizens and 33% of academics sharing the same view. Respondent categories that rated this option as having low effectiveness considered that a Code would be weak in enforcing the rules and would lack a strong sanction regime. Respondents replying favourably to the option noted that an effective Code of Conduct existed in their jurisdiction and that intermediaries already had obligations to act in the public interest and not engage in tax evasion/avoidance.

### **11.3. EU Directive (binding instrument)**

This instrument would require Member States to introduce a mandatory disclosure regime combined with exchange of information through the transposition of an EU Directive in national legislation.

A legislative proposal could either be a stand-alone measure or it could amend Council Directive 2011/16/EU on administrative cooperation between Member States in the field of taxation (DAC). An advantage of linking this proposal to the DAC would be the opportunity to use the IT tools and infrastructure which is already in place therein (e-forms, effective feedback system, etc.). Such a link would also allow the proposal to come within the scope of the wider rules in DAC dealing with the organisation of information exchange, the use of standard forms and other technical elements. An amendment to the existing DAC would also fit into the Commission initiative for better regulation and simplification, by limiting the number of legislative documents.

As with results of the public consultation on the question regarding an EU Code of Conduct, there was a divergence of views on whether there was a need to impose mandatory reporting obligations for aggressive tax planning schemes: while 95% of NGO's and 68% of private citizens considered that there should be a mandatory disclosure obligation, only 17% of the consultancy/tax advisors and trade business associations considered that EU mandatory disclosure obligations were required.

In conclusion, a satisfactory level of effectiveness, efficiency and coherence of the preferred option in view of addressing the problem identified can only be achieved with an initiative in the form of an EU Directive. This would allow for a consistent disclosure of all potentially aggressive tax planning schemes across the EU.

## **12. MONITORING AND EVALUATION**

The Member States shall provide to the Commission data on exchange of information, in line with the existing guidelines for statistics. Such data will provide basis for an analysis of the efficiency and transparency of the information exchange. Furthermore, at the end of each year

Member States shall submit to the Commission their assessment of the effectiveness of the framework for exchange of information as well as the practical results achieved.

Based on the statistical data provided by the Member States and their assessment of the effectiveness, the Commission will prepare annual monitoring reports. The reports will be published and made available to the Member States for the purpose of discussion in the Code of Conduct Group.

Actual information/indicators suggested to be collected depend on the content of the preferred option, but should include as a minimum the number of disclosure schemes received in total by broad categories to be defined, the number of schemes exchanged between Member States (push), and the number of schemes received from other Member States for which they have requested information (pull). The purpose of the collection of information and of the monitoring report is to determine whether the framework set up for information exchange is utilized and to follow the development of the volume of information exchange over time and across Member States. The information will furthermore feed the retrospective evaluation and allow taking lessons learned and identify potential problems to be analysed in more detail in the evaluation for the design of further initiatives/suggestions for improvements.

In terms of operational objectives the analysis and any potential follow up measure should be based on the type of schemes reported and the number of reports exchanges. The Commission will have access to this data and can clearly monitor the developments in this regard. The initiative foresees the possibility to amend the list of hallmarks in order to update the criteria that make a scheme reportable.

Member States and the Commission shall examine and evaluate the functioning of the administrative cooperation provided for in this Directive. To that purpose, Member States shall communicate to the Commission any relevant information necessary for the evaluation of the effectiveness, efficiency, coherence with other interventions with similar objectives, and continued relevance of administrative cooperation in accordance with this Directive. The Commission will prepare a retrospective evaluation of the functioning of the directive five years after entry into force.

This monitoring should now be extended to all cases of double taxation disputes in cross-border situation for companies covered by the new legal instrument and gathered on a yearly basis. The following information collected will enable the Commission to assess whether the objectives are met.

- number of initiated/ closed/ pending across the EU
- duration of DTDRM including the reasons for not adhering to the timelines foreseen
- number of instances where access was denied by a MS including justification
- amounts of tax involved in cases (in general and for those who go to arbitration)
- number of instances of arbitration requested

As statistical data is already collected and should continue to be collected on a yearly basis, it is expected that the costs of such activity would remain unchanged, for MS and for the Commission. Annex L offers a template to be used for collection of the above mentioned monitoring data.

5 years after the implementation of the instrument, the Commission will evaluate the situation with double taxation resolution in cross-border situations for companies in the EU with respect to the objectives and the overall impacts on companies and the internal market. In this context, data will be collected from business on their actual cases of double taxation through Commission expert groups or similar consultation. The data collected from stakeholders will be mainly information which is not possible to be collected from MS (e.g. in how many cases no remedies were taken). The evaluation will consider international multilateral developments in the area of dispute resolution, for instance at the level of the OECD<sup>i</sup> or the UN<sup>ii</sup>.

## **13. GLOSSARY**

### **Advance Pricing Arrangements**

An Advance Pricing Arrangement is any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions: (a) is issued, amended or renewed by, or on behalf of, the government or the tax authority of one or more Member States, including any territorial or administrative subdivision thereof, including local authorities, irrespective of whether it is effectively used; (b) is issued, amended or renewed, to a particular person or a group of persons and upon which that person or a group of persons is entitled to rely; and (c) determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

### **Aggressive tax planning (see also: Tax planning)**

In the Commission Recommendation on aggressive tax planning, aggressive tax planning is defined as “taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)”.

A distinction should be made between schemes that could be deemed as aggressive tax planning and ordinary tax planning. Aggressive tax planning results in an abuse of the tax system while ordinary tax planning allows taxpayers to exercise their legitimate interests to plan their tax affairs according to the national tax rules of their state of residence. Indeed, some Member States explicitly permit all taxpayers in a similar situation to use products and investment vehicles which have tax advantages and as such these are not considered to be aggressive tax planning schemes as they are not used to circumvent the spirit of the legislation. The scope of aggressive tax planning should therefore not include such schemes.

### **Associated Enterprises**

Associated enterprises 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% 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% of the capital. 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 (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.

**Base Erosion and Profit Shifting (BEPS Project)**

Tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. The OECD has developed specific actions to give countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time giving enterprises greater certainty by reducing disputes over the application of international tax rules, and standardising requirements. More information on the Base Erosion and Profit Shifting project can be found [here](#).

**Beneficial owner**

Defined in Article 3(6) 4AMLD and means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

**Beneficial ownership register**

A register where information on beneficial owners are accessible either to public or to interested parties.

**Confidentiality clause**

A "confidentiality clause" is a contractual clause that requires the intermediary and/or the client to keep the scheme confidential.

**Cross-border transaction**

A transaction or series of transactions where: (a) not all of the parties to the transaction or series of transactions are resident for tax purposes in one Member State (b) any of the parties to the transaction or series of transactions is simultaneously resident for tax purposes in more than one jurisdiction; (c) one of the parties to the transaction or series of transactions carries on business in another jurisdiction through a permanent establishment and the transaction or series of transactions forms part or the whole of the business of the permanent establishment. A cross-border transaction or series of transactions shall also include arrangements made by a person in respect of business activities in another jurisdiction which that person carries on through a permanent establishment; or such transactions or series of transactions have a cross border impact. It includes a transaction or series of transactions involving associated enterprises which are not all resident for tax purposes in the territory of a single jurisdiction or a transaction or series of transactions which have a cross border impact.

**Hallmarks**

In this context, a typical characteristic or feature of an aggressive tax planning scheme. In the BEPS Report, hallmarks are divided into two categories: generic and specific hallmarks. Generic hallmarks target features that are common to promoted schemes, such as the requirement for confidentiality or the payment of a premium fee. Generic hallmarks can also be used to capture new and innovative tax planning arrangements that may be easily replicated and sold to a variety of taxpayers. Specific hallmarks are used to target known vulnerabilities in the tax system and techniques that are commonly used in tax avoidance arrangements such as the use of losses.

## **Hybrid structures**

Hybrid structures allows taxpayers sometimes to claim a tax deduction for a payment that is either untaxed in the country of receipt of that payment, or for which a deduction has already been claimed in another jurisdiction. These structures also called hybrid mismatch arrangements are in effect structured transactions, whose purpose is to lower the tax burden on cross-border investments by exploiting differences in the tax treatment of instruments or entities in different tax jurisdictions.

## **Intermediaries who assist in potentially aggressive tax planning schemes**

For the purpose of the public consultation questionnaire, the term "intermediaries who assist in potentially aggressive tax planning schemes" refers to any natural or legal person responsible for the design, marketing, organization or management of a potentially aggressive tax planning scheme, or who provides assistance or advice with respect to creating, developing, planning, organizing, marketing or implementing such a scheme. The term includes consultants, lawyers, financial (investment) advisors, accountants, solicitors, insurance intermediaries, financial institutions, and company-formation agents known as Trust and Company Service Providers.

## **Non-bank financial corporation**

Financial institution, other than a bank, engaged primarily in the provision of financial services and activities auxiliary to financial intermediation, such as fund management.

Non-bank financial corporations include the following entities: special purpose vehicles, hedge funds, securities brokers, money market funds, pension funds, insurance companies, financial leasing corporations, CCPs, unit trusts, other financial auxiliaries and other captive financial institutions. They also include any public financial institutions such as development banks and export credit agencies.

## **Non-financial corporations**

Entity, whose principal activity is the production of market goods or non-financial services. Non-financial corporations include the following entities: legally constituted corporations, branches of non-resident enterprises, quasi-corporations, notional resident units owning land, and resident non-profit institutions that are market producers of goods or non-financial services.

## **Panama papers**

The 'Panama Papers' consists of 11.5 million leaked documents from Panamanian law firm Mossack Fonesca, detailing how the corporate service provider helped creating 214,488 offshore entities around the world for its clients since the 1970s.

## **Premium fee**

A "premium fee" is a fee payable to the intermediary that is to a significant extent attributable to the tax advantage, or to any extent contingent upon obtaining that tax advantage.

## **Tax avoidance**

According to the OECD glossary of tax terms, tax avoidance is defined as the arrangement of a taxpayer's affairs in a way that is intended to reduce his or her tax liability and that although the arrangement may be strictly legal is usually in contradiction with the intent of the law it purports to follow.

**Tax evasion**

According to the OECD glossary of tax terms, tax evasion is defined as illegal arrangements where the liability to tax is hidden or ignored. This implies that the taxpayer pays less tax than he or she is legally obligated to pay by hiding income or information from the tax authorities.

**Tax planning (see also: Aggressive tax planning)**

According to the OECD glossary of tax terms, tax planning is an arrangement of a person's business and/or private affairs in order to minimize tax liability.

**Transfer pricing**

Transfer pricing refers to the terms and conditions surrounding transactions within a multi-national company. It concerns the prices charged between associated enterprises established in different countries for their inter-company transactions, i.e. transfer of goods and services. Since the prices are set by non-independent associates within the multi-national, it may be that the prices do not reflect an independent market price. This is a major concern for tax authorities who worry that multi-national entities may set transfer prices on cross-border transactions to reduce taxable profits in their jurisdiction. This has led to the rise of transfer pricing regulations and enforcement, making transfer pricing a major tax compliance issue.



## **Annex 1: PROCEDURAL INFORMATION**

### **1. LEAD DG, AGENDA PLANNING AND WORK PROGRAMME**

The proposal for disincentives for intermediaries to engage in potentially aggressive tax planning schemes was prepared under the lead of Directorate-General for Taxation and Customs Union. In the Agenda Planning of the European Commission, the project is referred to under item 2017/TAXUD/003. The Commission Work Programme for 2017 includes this project under header "1.1. Fight against tax fraud and aggressive tax planning". The project is based on the OECD BEPS Package Action 12 "*Mandatory disclosure rules*". .

### **2. ORGANISATION AND TIMING**

Work on the preparation of this policy initiative started in April 2016.

An Inter-services Steering Group assisted DG Taxation and Customs Union in the preparation of this Impact Assessment report and included colleagues from the following Commission services:

DG Communication Networks, Content and Technology;

DG Competition;

DG Economic and Financial Affairs;

DG Financial Stability, Financial Services and Capital Markets Union;

DG Grow;

DG Internal Market, Industry, Entrepreneurship and SMEs;

DG International Cooperation and Development

DG Justice and Consumers;

DG Taxation and Customs Union;

DG Trade;

the Commission's Legal Service;

and the Commission's Secretariat-General.

The Steering Group met on 7 occasions between May 2016 and May 2017. The last meeting of the Steering Group took place on 5 May 2017. At each occasion, the members of the Steering Group were given the opportunity to provide comments orally or in writing on the draft versions of the documents presented.

### 3. CONSULTATION OF THE REGULATORY SCRUTINY BOARD

The impact assessment report was reviewed by the Regulatory Scrutiny Board on 27 April 2017. Based on the Board's recommendations, the impact assessment has been revised in accordance with the following points:

- The impact assessment does not clearly explain the context of the initiative, in particular the elements which are additional to BEPS/OECD commitments. How addressed: Updated in section 3 Problem definition, drivers and consequences of the impact assessment and, where appropriate, in sections 5 (Scope of the impact assessment, 7 (Policy options), and 9 (Comparison of options) ;
- The impact assessment needs to sufficiently explain and justify the need to act at an EU level and EU added value: How addressed: updated urgency to act in section 1 Introduction, new section 2.3 in Policy context, and reinforced argumentation on why EU action is justified in section 4 Why the European Union should act;
- The report does not clearly present the options and baseline. How addressed: updated section 7 Policy options to justify/clarify the choice of the assessed policy options, including why a different structure was used from the public consultation. Furthermore section 9 (previously section 8) on Comparison of options has been revised to clearly explain the comparisons between each options assessed and the baseline.
- The report does not provide a sufficiently detailed analysis of the impacts, including benefits, administrative burdens, and compliance costs for the stakeholders. How addressed: new section 8 Analysis of impact added which details impacts of the proposal on key groups including an analysis of administrative burdens. Furthermore, section 10 (previously section 9) Preferred option has more extensive analysis of the impacts on the preferred option.

#### Changes made following the Board's opinion

- On the context of the initiative, language has been added to section 1. and new section 2.3.1. has been included.
- The link to the OECD anti-BEPS action 12 has been clarified in the new section 2.3.2. and with other changes, e.g. in the section 5, 7.1., 7.2.2.1. and 9.2.2.
- On the urgency to act, language has been added to section 1. and new section 2.3. has been included.
- On the justification of the EU action and the cross-border relevance, language has been added to section 4.
- On the options, new language has been added in section 7.
- A new section 8 – Analysis of impacts has been included.
- Section 10 – Analysis of impacts of the preferred policy option has been extended and clarified.
- On the question of (dis)incentives and penalties a new section 2.3.3. has been added and further clarifications included through the analysis of impacts.

#### 4. EXTERNAL EXPERTISE

##### Consultation and expertise sought

The Commission has been consulting widely and has received input from various sources on this impact assessment work.

In November 2016 the Commission launched an Open Public Consultation<sup>61</sup> on the internet *"Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes"*.

In November 2016 the Commission services also participated in the Confédération Fiscale Européenne (CFE) conference on mandatory disclosure rules.

In December 2016, the Public Consultation was presented to the Commission [Platform on Tax Good Governance](#) (PTG).

In March 2017 the Commission consulted Member States in the context of a meeting of Working Party IV (for details see Annex 2).

According to the OECD BEPS Action 12, not all of the countries with mandatory disclosure regimes have collected data on the effectiveness of their regime in terms of these objectives. However, the report concludes that, “even though the available data is not comprehensive or detailed, the feedback from those with disclosure regimes provides a reasonably consistent picture that suggests that mandatory disclosure is successful in meeting its objectives.”

In developing BEPS Action 12<sup>7</sup>, the OECD carried out significant research and analysis and issued several studies and reports:

- Study on the Role of Tax Intermediaries (OECD, 2008);
- Tackling Aggressive Tax Planning through Improved Transparency and Disclosure, (OECD, 2011);
- Co-operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance (OECD, 2013).
- Stakeholders and Member States, in particular OECD Members, have been consulted on the issue during the OECD works on BEPS.

The Commission services have taken into account all of above-mentioned observations in the present impact assessment.

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<sup>61</sup> More information on the Open Public Consultation can be found [here](#).

## **Annex 2: STAKEHOLDER CONSULTATION**

The following contributions were received from stakeholders for the proposal.

### **1. PUBLIC CONSULTATION**

On 10 November 2016 the European Commission launched a Public Consultation<sup>61</sup> to gather feedback on the way forward for EU action on advisers and intermediaries who facilitate tax evasion and tax avoidance. The results of this Consultation are in a separate document to this Impact Assessment *'Summary Report Responses received on the Commission's consultation on disincentives for advisors and intermediaries for potentially aggressive tax planning schemes'*.

#### **Overview of responses to the Public Consultation**

##### **Breakdown of responses**

131 responses were received to the public consultation from a broad variety of stakeholders. The largest share of replies came from trade/business associations/professional associations with 27% of the replies and private citizens with 20% of the replies. Geographically speaking, the largest share of responses came from Germany with 24% of the total responses.

##### **Providing and receiving tax advice**

46 respondents replied that they had received professional tax advice with tax advisors being the largest professional group from which tax advice were received (52%). 30 respondents replied that they provided tax advice, and 15 of them maintaining contact with the tax authorities.

##### **Opinions on the objectives of the policy initiative**

The following objectives were deemed the most relevant to classify aggressive tax planning schemes: policy options designed to address artificial arrangements, preferential treatment under the application of national law, schemes designed to circumvent the Common Reporting Standard followed by the use of jurisdictions that present difficulties in identifying the beneficial owner. With regard to the most important objectives to strengthen the fight against tax evasion and tax avoidance the most favoured option was to facilitate administrative cooperation between Member States followed by the need to improve voluntary compliance. 41% of respondents considered that Member States should be made aware of any ATP scheme while 51% considered they should only be aware of such schemes if applied within their jurisdiction. Respondents were split evenly between those who considered that all schemes should be included within the scope of the recommendations and those who considered that only schemes with a cross-border should be included within the scope. Only 21% of the respondents considered that the future EU list for third country jurisdictions that fail to comply with tax good governance standards should be used for defining ATP schemes due to a wide range of reasons, including other measures would be more suitable including hallmarks and concern that such a list would be too limited to be effective.

## **Tax transparency**

For tax transparency 100 respondents agree/agreed very much that the EU should implement the OECD recommendations at an international level followed by implementation of a mandatory scheme alongside its global partners (82 respondents agree/agreed very much). The least popular option was that current legislation related to potential ATP schemes is sufficient and should be left to Member States to decide whether or not to implement the recommendation issued at international level by the OECD. On the direct impact of no action by the EU, 82% of respondents considered the most likely result would be different transparency requirements. All stakeholder categories provided high affirmative responses to this question. Only 30% of the respondents to the public consultation considered that Member States would be likely/very likely to introduce transparency requirements at all if no EU action was envisaged. From the main stakeholder groups who replied to this question 38% of consultancy/tax advisors, 32% of private citizens, and 21% of NGO's thought this would be the case.. In terms of indirect consequences of mandatory disclosure obligations the most likely outcome according to respondents would be an increase in administrative burden for public authorities. The next most likely indirect impacts were that there would be a level playing between SME's and large companies in terms of competitive ness, and opportunities would be reduced for large companies to take advantage of ATP schemes

## **Mandatory disclosure requirements**

25% of respondents have mandatory disclosure obligations in their own national legislation with 69% of respondents stating that such obligations changed ATP schemes whilst 67% of respondents claimed that the introduction of such obligations would change ATP schemes. 21% of respondents replied that disclosure requirements for intermediaries existed in their own national legislation with 85% of respondents claiming their introduction changed ATP schemes whilst 69% indicated that the introduction of such obligations would change ATP schemes. 43% of respondents indicated that code of conduct/ethic rules existed in their national legislation for intermediaries with 30% of respondents stating that such arrangements had changed tax advice practice while 68% believe that their introduction would change tax advice practice.

Despite the positive effects of mandatory disclosure obligations, only 44% considered that there was need to impose mandatory disclosure obligations at EU level. There was a wide divergence between respondent categories on the need to impose obligations: 93% of NGO's and 68% of private citizens replied yes with only 17% of the consultancy/ tax advisors and trade business associations considering that mandatory disclosure obligations were required. A number of contributors noted that any proposal would need to be carefully evaluated in terms of costs and benefits, have clear definitions and would need to introduced with a number of other measures at the same time in relation to tax legislation amendments. In terms of who should be required to follow such obligations, 36% of respondents considered taxpayers and intermediaries would be required to report whilst 25% of respondents provided another opinion. From the main stakeholder groups there was a wide range of responses regarding whether both intermediaries and taxpayers should report: NGO's (84%), private citizens (54%), consultancy/tax advisors (11%) and Trade/business associations (8%).

In terms of scope of the mandatory disclosure, the following were rated as the most important: details of potential ATP schemes, details of the provisions/hallmark that qualifies the tax

planning scheme as potentially aggressive, identification of the different jurisdictions used in the scheme, and description of the tax benefit or advantage.

### Policy options and their impacts

Regarding how effective the policy options would be, the following options were considered almost equally effective: Option C: Disclosure and exchange of information (50%); Option A: encourage Member States to use current exchange of information mechanisms (49%); Option D: disclosure (option B) and exchange (Option C) + publication (47%); and Option E: EU Code of Conduct (45%). There was a wide divergence in respondent categories regarding whether Option E: EU Code of Conduct would be effective: 58% of consultancy/tax advisors and 69% of trade/business associations considered it was effective/very effective with only 16% of NGO's, 32% of private citizens and 33% of academics sharing the same view.

With regard to Option D which had a wide range of disclosure including publication which was not included under the other option categories there was a wide divergence in the main stakeholder categories regarding whether this would be considered as effective/very effective: NGO's (89%), companies (75%), private citizens (60%), consultancies/tax advisors (25%), and trade/business associations (19%).

## 2. HOW THE CONCERNS OF STAKEHOLDERS HAVE BEEN ADDRESSED IN THE PROPOSAL

The concerns raised on an EU mandatory disclosure regime mainly came from the business sector and are outlined in Table 3 below together with how the concern has been addressed in the proposal.

### Stakeholder concerns

Stakeholder concerns	How taken into account
Tax evasion is a criminal offence and should not be included in an EU mandatory disclosure regime	The proposal does not replace national laws related to tax crime and how this is defined. The Hallmarks are meant to signal a potentially aggressive tax scheme to the authorities and would allow taxpayers to be informed about possible problems related to tax avoidance and tax evasion issues thus providing a safeguard to the users of such schemes.
The proposal would involve being required to define tax avoidance which largely depends on national laws and therefore an EU definition would not be possible.	The proposal includes Generic and Specific Hallmarks to define an aggressive tax planning scheme and thus does not include a definition of tax avoidance which is left to Member States.
Intermediaries would have to observe requirements on legal profession privileges and fundamental rights and thus would be not be able to notify such schemes to the national authorities.	Legal profession privileges would be safeguarded in Member States where legal profession privileges operate as the taxpayer can elect to notify the scheme
The introduction of an EU proposal would lead to an unacceptable administrative burden, in particular for the public authorities, which is not	The Impact Assessment does not quantify the specific costs of an EU mandatory disclosure regime but as outlined below incremental costs

justified by the possible benefits	would be limited on public authorities as existing resources used to combat tax avoidance and tax evasion could be mobilised. With regard to intermediaries information summaries already prepared for clients could be used for notification purposes therefore limited incremental administrative costs. With regard to benefits, the UK scheme national DOTAS scheme raised GBP 12 billion with a total of 49 measures during the period 2004-09.
Due to differences in tax legislation between EU Member States it is not possible to have a set of Hallmarks for aggressive tax planning that would be applicable to all Member States.	The proposal contains Generic Hallmarks which could be applicable to all Member States as it describes general features of an aggressive tax planning scheme. The Specific Hallmarks cover a wide range of possible avoidance/evasion schemes including those relevant to other EU tax instruments in this field. However it is acknowledged that Member States may have legislation that is not covered by these Hallmarks and, where appropriate, can introduce their own Specific Hallmarks according to their national legislation

*Source: European Commission (2017)*

### 3. ADDITIONAL STAKEHOLDER CONTRIBUTIONS TO THE CONSULTATION

The following contributions were received regarding the survey for the public consultation: the Council of Bars and Law Societies of Europe (CCBE), the European Banking Federation (EBF), the Law Society of England and Wales (LSEW), the Law Society of Ireland (LSI), and PricewaterhouseCoopers UK – Tax (PwC). The text below is a summary of the contributions received from these organisations.

#### 3.1. General comments

The **CCBE** does not believe that the suggested measures in the submission are suitable or workable at EU level. The CCBE asserts that tax avoidance is different from tax evasion and should have different remedies. Furthermore, OECD BEPS 12 does not include tax evasion in its recommendations as these should be addressed by the criminal law and AML legislation. CCBE indicates that any proposal could potentially violate the European Convention on Human Rights as tax avoidance by its inherent nature involves a subjective assessment and does not provide for legal certainty for taxpayers. The CCBE does not consider that the EU has the right to act and the principle of subsidiarity has not been adequately considered. **LSI** considers that the public consultation document is lacking neutrality and that the questions are designed to elicit a certain outcome. Tax advisors play a crucial role in enabling tax compliance as cited in the OECD report on tax intermediaries. The **LSEW** considers the consultation as not conducive to providing a representative response on this topic and does not adequately take into account the broader impact of the proposal. **EBF** did not specifically address the questions in the consultation but emphasised the role of AML legislation both in the EU and globally in tackling tax evasion. EBF supports the risk based approach, in particular related to offshore/non-cooperative jurisdictions and PEP, which helps target information that is actually required for tax evasion purposes rather than mass data. **PwC**

noted that tax competition plays a role in creating very challenging perceptions and risks which will not be dealt with by the proposed options. These broader aspects should be dealt with first. There the proposal may have unhelpful and costly regulation which does not address the source of the concerns.

### 3.2. Objectives of the policy initiative

From the UK perspective, the **CCBE** questions the evidence that mass marketed ATP schemes now exist and that there are sufficient measures in the EU to address avoidance like GAAR's. CCBE considers that the public consultation document does not take into account the potential impact of the proposal on the taxpayer/ tax adviser relationship. With regard to hallmarks the current disclosure regimes in UK, IE, and PT refer to national legislation and it would be impossible to have an EU list of hallmarks that would be capable of being implemented. CCBE noted that French Constitutional Court rejected the FR proposal because the tax optimisation definition was too vague. CCBE believes the objectives could be achieved by better policing of the tax system and for Member States to correctly draft tax legislation.

**LSEW** indicates that the 'mass marketed' schemes are now rare and as such the proposal is no longer relevant. With regard to subsidiarity the proposal does not sufficiently provide arguments on why the EU should act. Instead it is up to Member States to legislate action in this field according to their national legislation and information disclosure provisions. Existing measures under the Directive in Administrative Cooperation in direct taxation may be sufficient. Indeed there also other transparency and information exchange mechanisms at the disposal of Member States which may be adequate. The Consultation makes insufficient distinction between tax evasion which is illegal and tax avoidance, the latter which could possibly include acceptable tax planning arrangements. Indeed the BEPS 12 initiative only refers to tax avoidance and not tax evasion - other measures are intended to address tax evasion like Anti-Money Laundering Legislation.

**PwC** believes that tax evasion and tax avoidance should not be mixed and although important subjects for policy debate they require different solutions and the confusion hinders both clarity and accountability. Regarding tax evasion, amendments to AML legislation are already under way and other transparency/exchange of information instruments. The new OECD and EU standards will therefore have an impact already on potential ATP schemes in addition to forums like the Joint International Tax Shelter Information Centre. The benefits of these and other initiatives will take a number of years to come to fruition.

### 3.3. Tax Transparency

**LSI** considers that the section on direct and indirect impacts of imposing reporting obligations on tax advisors and other intermediaries lacks neutrality. The consultation only refers to 4 negative consequences and does not consider the impact that the proposal could have on the proper functioning of the relationship between tax advisor and the client, in particular with regard to legal privilege. Legal privilege is not mentioned in the public consultation – it is an essential element of any developed justice system and allows clients to make full disclosure to their lawyers so that they can obtain comprehensive legal advice and is not designed to protect lawyers. Furthermore, this would result in tax advice being treated differently from any other type of legal advice. Furthermore legal professional privilege is also protected under the ECHR Convention under Articles 6 and 8 and that legal privilege cannot be used to facilitate



tax evasion. Commission should assess whether existing provisions under the Directive on Administrative Cooperation in direct taxation are sufficient.

**LSEW:** legal privilege is designed to the principle of the rule of law, ensure appropriate access to justice and provide legal certainty to taxpayers. These are also protected under the European Convention on Human Rights. Therefore appropriate exclusions should be adopted to safeguard such rights.

In terms of impact, **CCBE** considers that it is necessary to have a tax system that is stable, sufficiently clear and fiscally comparable to its competitors' tax systems. The mandatory disclosure regime as proposed could result in more aggressive advice being provided by advisers from outside the EU.

### 3.4. Mandatory disclosure requirements

**LSI:** the mandatory disclosure regime was introduced in Ireland in 2010 – the Irish rules do not seek to override legal professional privilege and are not required to disclose and inform according to this right. Therefore any EU instrument should provide a carve-out for legally privileged information. LSI considers that mandatory disclosure requirements would not affect tax evasion and instead the focus should be tax avoidance. Potentially aggressive tax planning is not defined in the consultation document and there remains an inherent risk that all tax planning may be considered as potentially aggressive tax planning. Any proposal needs to have clear definitions in order to ensure the rule of law is not eroded

**CCBE** stressed that the purpose of professional secrecy/ legal professional privilege is to facilitate full and frank disclosure between those who need legal advice and their lawyers and safeguarding this arrangement in the public interests and also for taxpayers Furthermore professional secrecy is an obligation that, in many Member States, is protected under sanctions in the criminal codes, for example Luxembourg, Belgium, Germany and France. Regarding the national systems, in IE the taxpayer can decide whether to waive LPP, in the UK LLP can prevent the promotor from providing the information to make a full disclosure, and in PT mandatory disclosure obligation<sup>62</sup> states that lawyers and law firms are not be considered to be "*promoters*", and are therefore not subject to disclosure obligations. CCBE noted that in the UK in the vast majority of cases the principle of legal privilege has been maintained whilst HMRC has been able to access the desired information through the uses of the scheme.

### 3.5. Policy options and their impact

**LSI** is against the proposal suggesting that taxpayers are required to publish some or all information to the tax authorities. – European Taxpayer's Code states this is private information. With reference to an EU Code of Conduct, this was rejected in the discussions for the Service Directive as the EU has limited competence in the regulation of tax related services and Member States should regulate their own professions as they see fit. In this case such a standard would be unenforceable as tax advisors are members of a broad range of service providers depending on the Member State and as such any standard would be unenforceable.

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<sup>62</sup> Contribution notes that in the first two years 87 communications were made – recent year statistics are not yet publically available.

**PwC** provided the following assessment of the options: **No action now**: unnecessary burden will be avoided and risks addressed by evaluation of the current measures already in place when they have had time to take effect. **Existing exchange of information mechanisms**: adding other exchange of information measures will be burdensome for national authorities and agreed measures already in place address intermediaries albeit indirectly through particular structures and transactions. **Mandatory disclosure requirements: Action 12** of BEPS is sufficient and contains adequate hallmarks. There may be the risk of different interpretations, inherent vagueness and the risk of over-reporting. Mandatory disclosure regimes have not been as effective as intended as a disincentive to aggressive tax planning, in addition to affecting investment. **Publication of disclosures**: would necessitate changes to some national laws in the EU to allow this and any public disclosure should only take place after the proper legal safeguards for the individual have been ensured. PwC supports a properly drafted **Code of Conduct** option which is standardised and could be used in all EU jurisdictions, an advantage being that a rule based system may not be compatible with every national legislation in the EU. As another option the Commission might encourage Member States to invest more in tax certainty through ruling and advance pricing agreement APA programs and cooperative compliance programs.

#### **4. CONSULTATION WITH MEMBER STATES IN COMMISSION EXPERT GROUP WPIV**

The Commission held a meeting with Member States on the 2<sup>nd</sup> of March in the Commission expert group WPIV<sup>63</sup> to gather views and comments from the national experts on the objectives, the scope and other elements of a potential EU initiative concerning intermediaries. Main comments received:

Member States were asked about the need for an EU action and their preferred policy options. 8 Member States clearly supported a mandatory EU initiative and stressed the need for the EU proposal to address the Panama scandal while other Member States expressed their willingness for further discussion. 3 Member States did not consider a proposal as a high priority as they had doubts whether the benefits of any scheme. Some Member States stressed that an EU proposal should ensure coherence with the OECD BEPS Action 12, which already provides a minimum standard for OECD members to implement in their jurisdictions, and should not result in a second layer of legislation. Member States expressed their preferences for a range of options with a majority being in favour of mandatory reporting including exchange of information as a general approach.

As regards the policy options, the majority of MS expressed a preference for mandatory disclosure obligations imposed on intermediaries/taxpayers, coupled with automatic exchange of information between tax authorities. However, it appears that such option would be regarded as proportionate only to the extent that it covered aggressive tax planning schemes having a cross-border element. MS could be interested in receiving information also on purely domestic schemes but for this information other, less binding, forms of communications would seem to be more appropriate.

Specific elements of Public consultation were discussed in detail including the scope (Member States requested a broad scope), definitions, the hallmarks and sanctions. Many Member States stressed the importance of clearly defining what has to be reported as crucial

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<sup>63</sup> More information on expert group 953 on direct taxation can be found at the register of Commission expert groups [here](#).

for the effectiveness of any proposal. The use of hallmarks (combination of generic and specific) were confirmed by many Member States as the right approach to take. One Member State warned there may be items which would prove difficult for Member States to agree on, for example defining what a low-taxation jurisdiction is, and issues already covered by ATAD. With regard penalties Member States highlighted the limits of EU law and supported the approach with the standard article on them.

Member States were asked to provide written contributions by 17 March. To date no contributions have been received.

## **Annex 3: CONSULTATION STRATEGY**

### **1. BACKGROUND OF THE INITIATIVE**

#### *Introduction and context*

Recent public discussions have shown the crucial role that legal and tax advisors and certain intermediaries play in facilitating tax evasion and tax avoidance.

At international level, the OECD issued last year a set of recommendations as regards the use and promotion of potentially aggressive tax planning schemes (Final Report on BEPS Action 12).

BEPS Action 12 Report notes the usefulness of disclosure initiatives in addressing the lack of comprehensive and relevant information, available to tax authorities, on tax planning strategies. It provides an overview of mandatory disclosure regimes, based on the experiences of countries that have such regimes, and set out recommendations for a modular design of a mandatory disclosure regime including recommendations on rules designed to capture international tax schemes. Furthermore, the report sets out a standard framework for a mandatory disclosure regime, to ensure some consistency, but also includes options to provide sufficient flexibility to deal with country specific risks and to allow tax administrations to control the quantity and type of disclosure.

Stakeholders and Member States, in particular those which are members to the OECD, had already the opportunity to respond to the OECD's discussion draft entitled "BEPS Action 12: Mandatory disclosure rules". In March 2015, the Committee on Fiscal Affairs (CFA) of the OECD invited interested parties to send written comments on the draft. In addition, in previous years, the OECD carried out significant research and analysis and issued several studies and reports:

- Study on the Role of Tax Intermediaries (OECD, 2008);
- Tackling Aggressive Tax Planning through Improved Transparency and Disclosure, (OECD, 2011);
- Co-operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance (OECD, 2013).

### **2. OBJECTIVES AND SCOPE OF THE COMMISSION'S CONSULTATION**

The EU is considering action concerning disincentives for advisors and intermediaries dealing with potentially aggressive tax planning schemes. The Commission carried out consultations in the context of such a possible initiative. The purpose of these consultations was to gather views of the different stakeholders on whether there is a need for EU action aimed at introducing more effective disincentives for intermediaries facilitating tax evasion and tax avoidance.

The Commission gathered views in particular on the following aspects:

- need for EU action;
- evidence on the size and impacts of the problem;
- the different options identified, in case EU action is appropriate;
- key design features of a possible disclosure regime;
- impacts of the policy options;
- proportionality aspects.

### 3. STAKEHOLDER IDENTIFICATION AND CONSULTATION TOOLS

The Commission was interested to collect input from the following stakeholders and intends to use the following consultation tools:

**Table 10: Stakeholder identification and consultation tools**

Stakeholder group	Method of consultation	Consultation period	Scope of consultation
Public Authorities in Member States	1) Interviews, committees, working groups 2) Open Public Consultation	1) Q4 2016 – Q2 2017 2) Q4 2016	
Economic operators: Companies receiving tax advice	1) Interviews, committees, working groups 2) Open Public Consultation	1) Q4 2016 – Q2 2017 2) Q4 2016	<ul style="list-style-type: none"> <li>• Need for EU action.</li> <li>• The different options identified, in case EU action is appropriate.</li> </ul>
Intermediaries providing tax advice	Open Public Consultation	Q4 2016	<ul style="list-style-type: none"> <li>• The key design features of the reporting regime.</li> </ul>
Organisations/associations: e.g. EU and national organisations of economic operators	1) Interviews, committees, working groups 2) Open Public Consultation	1) Q4 2016 – Q2 2017 2) Q4 2016	<ul style="list-style-type: none"> <li>• Data and evidence collection.</li> </ul>
Civil society, NGOs	1) Interviews, committees, working groups 2) Open Public Consultation	1) Q4 2016 – Q2 2017 2) Q4 2016	
Citizens	Open public consultation	Q4 2016	
All stakeholders	Other	tbc	<ul style="list-style-type: none"> <li>• Collect evidence and quantify the problem and the impact of the different options</li> </ul>

Source: European Commission (2017)

## 4. CONSULTATION TOOLS AND LANGUAGE REGIMES

**Table 11: Consultation tools and language regime**

Consultation tool	Consultation period	Objective	Languages covered
Feedback mechanism	4 weeks Q4 2016	During a 4-week period, all interested stakeholders will be able to provide feedback on the Inception Impact Assessment outlining the initial structure and outline of the project.	The inception Impact Assessment is available in English only. Feedback is possible in any of the 24 working languages of the EU
Open Public Consultation	3 months Q4 2016	To ascertain the views of a broad range of stakeholders.	EN.
Targeted consultation: Interviews, committees, working groups	Q4 2016 – Q2 2017	To ascertain views of stakeholders with experience of operating a mandatory disclosure regime or will be directly affected by a mandatory disclosure regime.	EN

Source: European Commission (2017)

The different steps of the consultation process and strategy require different types of consultation activities.

Depending on the stakeholder group identified, different tools and methods have been used in order to conduct the consultation.

The information gathered with these consultations has been analyzed to discuss whether an EU action is needed, and if so, its key features. A synopsis report will be published that summarises the consultation activities and the responses received, including possible contributions within the feedback mechanism of the European Commission.

## **Annex 4: WHO IS AFFECTED BY THE INITIATIVE AND HOW**

The objective of this annex is to set out the practical implications of the initiative for various parties who will be affected by the proposal

### **INTERMEDIARIES/ADVISORS FOR AGGRESSIVE TAX PLANNING SCHEMES**

Under the option chosen the intermediary who devised the scheme will have the main responsibility for reporting the scheme if they are defined as an EU intermediary according to the proposal. Intermediaries bound with legal privilege or secrecy rules could ask the taxpayer to waive these duties in order for the intermediary to be able to report the scheme instead of the user. The mandatory disclosure obligations can be recorded on a standardised form using a summary of the information prepared for the client. Although some Member States already have mandatory disclosure schemes (IE, PT and UK) intermediaries in other Member States will need to create new reporting forms and incur training costs for staff. However, ensuring tax compliance is already a main activity for intermediaries providing tax advice/services therefore it is envisaged that the burden could be accommodated by existing compliance obligations of intermediaries.

### **USERS OF THE SCHEME – WHEN THE TAXPAYER IS AN INDIVIDUAL**

Given the nature of cross-border tax planning individuals who are highly mobile and/or high wealth individuals will be the most affected by the proposal. The user is obliged to report in following situations: (i) Non-EU intermediary has created the scheme, (ii) No intermediary exists for example when the scheme has been created "in-house" and (iii) an intermediary is bound by legal professional privilege or secrecy rules. Reporting under the mandatory disclosure obligations may be difficult for most taxpayers as it would require knowledge and experience in the field of taxation, in particular for the application of hallmarks to the scheme. However, this burden should be minimal in both scenarios as in (i) the taxpayer could have the non-EU intermediary prepare the disclosure requirements, although the taxpayer would remain legally responsible for the reporting of the scheme and for (ii) any individual capable of creating such a scheme should have the requisite knowledge and expertise to ensure the scheme is tax compliant.

### **USERS OF THE SCHEME – WHEN THE TAXPAYER IS A BUSINESS ENTITY**

Large companies will be more affected by the proposal than SME's given that they are more likely to have cross-border activities and will therefore fall under the scope of the scheme. According to the Public Consultation, one of the most highly indirect impacts from the proposal expected by respondents would be that there would be a level playing field between large companies and SME's as large companies, in particular multinationals, were considered as being the main beneficiaries of aggressive tax planning schemes to the detriment of SME's. Respondents also noted that the proposal would increase the competitiveness and innovation of SME's with respect to large companies. In terms of reporting obligations if the user would need to report the scheme the same considerations will apply to companies as to individuals as described above in (i), (ii) and (iii).

## **TAX AUTHORITIES**

Tax authorities will incur costs for implementing the new system, notably on staff resource allocation or hiring and staff training. Discussions with Member States which already have national mandatory disclosure obligations (IE/PT and the UK) have indicated that the increased administrative burden would be minimal and could be accommodated by existing human and IT resources used to address tax avoidance and tax evasion, in particular using reporting applications already used for information exchange purposes, for example under Directive 2011/16/EU<sup>18</sup>. The main costs for tax authorities would be to assess the schemes and then process the information to be used for exchange of information with the national authorities of other Member States. The main benefits of the scheme would be to act as a deterrent to tax evasion, in addition to risk management and for audit purposes. Although the assessment indicates that the proposal would incur minimal costs and could be accommodated by existing report arrangements, respondents to the public consultation considered that an increase in administrative burden on Public Authorities was the most likely impact of the proposal while 3 Member States in WPIV (see Annex II to the Impact assessment) cited cost/benefit as an essential consideration for this proposal.



## **Annex 5: DIRECTIVE ON ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION (DAC)**

EU Member States have agreed that EU tax authorities have to cooperate more closely so as to be able to apply their taxes correctly to their taxpayers and combat tax fraud and tax evasion. The essential piece of legislation in this respect is Council Directive 2011/16/EU on administrative cooperation in the field of taxation. The 2011 Directive established useful tools for better cooperation between tax administrations in the European Union - such as exchanges of information on request; spontaneous exchanges; automatic exchanges; participation in administrative enquiries; simultaneous controls; and notifications to each other of tax decisions.

This Directive was recently amended<sup>64</sup> by extending the cooperation between tax authorities to automatic exchange of financial account information (Council Directive 2014/107/EU), cross-border tax rulings and advance pricing arrangements (Council Directive 2015/2376/EU), and country-by-country reporting by multinationals operating in the EU (Council Directive 2016/881/EU). Another amendment to ensure access to beneficial ownership information has been adopted (Council Directive 2016/2258).

The EU has made huge progress on tax transparency in recent years. Existing tax instruments available at EU level do not contain explicit provisions requiring Member States to automatically exchange information, where relevant, with other Member States on tax evasion and tax avoidance schemes that come to their attention. However, the DAC contains a general obligation for tax authorities of EU Member States to spontaneously communicate information to the other EU tax authorities in certain circumstances, including the loss of tax in a Member State or savings of tax resulting from artificial transfers of profits within groups of companies.<sup>65</sup>

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<sup>64</sup> More information on the amendments of Council Directive 2011/16/EU can be found [here](#).

<sup>65</sup> Council Directive [2011/16/EU](#) of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Article 9

## Annex 6: **MANDATORY DISCLOSURE RULES: OECD BEPS ACTION 12**<sup>66</sup>

In July 2013, the OECD started its work on the Action Plan on Base Erosion and Profit Shifting (BEPS) directed with the view to ensure the coherence of corporate income taxation at the international level. In December 2015, the G20/OECD endorsed the 15 point OECD Action Plan to fight BEPS.

The problem of aggressive tax planning arrangements is directly addressed in BEPS Action 12 “*Mandatory Disclosure Requirements*” (“BEPS 12”). BEPS 12 recommends that countries require taxpayers and promoters of tax planning schemes (tax advisors, legal advisors, financial institutions, etc.) to disclose to tax authorities any potentially aggressive or abusive tax planning schemes that they use or promote and to identify the users of those schemes. It notes that to successfully design an effective mandatory disclosure regime, the following features need to be considered: who reports, what information to report, when the information has to be reported, and the consequences of non-reporting. For example, in the EU context, if the promoter is outside the EU, the obligation could then fall to the taxpayer. To date, only a limited number of Member States (United Kingdom, Ireland and Portugal) have mandatory disclosure rules in place. However, some member States provide for criminal sanctions for those facilitating tax crimes.

BEPS 12 makes a series of recommendations about the design of mandatory disclosure regimes, with a view to encouraging maximum consistency between countries' approaches in this area. Unlike other BEPS Actions, BEPS 12 is more about best practices and less about minimum standards. For this reason, it leaves much more room for manoeuvre for countries when setting up national rules. BEPS 12 makes clear that the mandatory disclosure recommendations are not a minimum standard and that jurisdictions are free to choose whether or not to introduce such a regime.

In existing disclosure regimes, disclosure is often triggered by an arrangement that includes certain features or characteristics (hallmarks). The Action 12 Report recommends that the existence of a single hallmark in respect of a scheme should be sufficient to give rise to a disclosure obligation. Hallmarks can either be general or specific, and the BEPS Action 12 Report recommends that each country's hallmarks should include a mixture of both types. General hallmarks should include a promoter's desire to keep the arrangement confidential or the requirement of a contingent or premium fee. BEPS 12 indicates that a country may also want to adopt additional generic hallmarks such as one applying to standardized tax products.

In addition, BEPS 12 recommends that countries use specific hallmarks designed for their local circumstances. Examples of specific hallmarks include leasing transactions, transactions similar to those included on a black list, those involving use of losses or income conversion schemes or transactions with counterparties in low tax jurisdictions. Individual countries are left to design the specific hallmarks most appropriate to their local circumstances and may attach a de minimis filter to individual specific hallmarks.

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<sup>66</sup> <http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm>

## Consultation and research carried out at OECD level

Stakeholders and Member States, in particular OECD Members, had the opportunity to respond to the OECD's discussion draft (DD) entitled "BEPS Action 12: Mandatory disclosure rules". In March 2015, the Committee on Fiscal Affairs (CFA) of the OECD invited interested parties to send written comments on the DD<sup>67</sup>.

BEPS 12 notes the usefulness of disclosure initiatives in addressing the lack of comprehensive and relevant information available to tax authorities on tax planning strategies. The DD provided an overview of mandatory disclosure regimes, based on the experiences of countries that have such regimes, and set out recommendations for a modular design of a mandatory disclosure regime including recommendations on rules designed to capture international tax schemes.

The DD set out a standard framework for a mandatory disclosure regime, to ensure some consistency, but also includes options to provide sufficient flexibility to deal with country specific risks and to allow tax administrations to control the quantity and type of disclosure.

In developing BEPS 12, the OECD carried out significant research and analysis and issued several studies and reports:

- Study on the Role of Tax Intermediaries (OECD, 2008)<sup>68</sup>;
- Tackling Aggressive Tax Planning through Improved Transparency and Disclosure, (OECD, 2011)<sup>69</sup>;
- Co-operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance (OECD, 2013)<sup>70</sup>.

As regards empirical data, according to the OECD Final Report on BEPS Action 12, not all of the countries with mandatory disclosure regimes have collected data on the effectiveness of their regime in terms of these objectives. However, the report concludes that, "even though the available data is not comprehensive or detailed, the feedback from those with disclosure regimes provides a reasonably consistent picture that suggests that mandatory disclosure is successful in meeting its objectives."

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<sup>67</sup> <http://www.oecd.org/tax/aggressive/public-consultation-beps-action-12-mandatory-disclosure-rules.htm>

<sup>68</sup> <http://www.oecd.org/tax/administration/studyintotheoleoftaxintermediaries.htm>

<sup>69</sup> <http://www.oecd.org/tax/administration/tacklingaggressivetaxplanningthroughimprovedtransparencyanddisclosure.htm>

<sup>70</sup> <http://www.oecd.org/ctp/administration/co-operative-compliance.htm>

## **Annex 7: REGIMES IN PLACE IN IRELAND, PORTUGAL AND THE UNITED KINGDOM**

The existing mandatory disclosure schemes were discussed with officials from IE, PT and the UK for the preparation of this impact assessment.

### **1. IRELAND'S MANDATORY DISCLOSURE REGIME**

#### **Overview**

Ireland's mandatory disclosure regime was first introduced in 2011 with some amendments made subsequently.

The regime is intended to act as an early warning mechanism for what the Minister described at the launch of the regime as "aggressive tax avoidance schemes".

*"By obtaining information on aggressive tax avoidance schemes at an early stage before a loss of taxation becomes apparent, the Government can decide, if appropriate, to close them down before they can do significant damage to tax revenues"*<sup>71</sup>.

Under the Irish Mandatory Disclosure legislation, any transaction, or proposal for any transaction, is a disclosable transaction and must, therefore, be disclosed if it meets the following tests and is not specifically excluded the Regulations or Guidelines,

- It will, or might be expected to, enable a person to obtain a tax advantage;
- The tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the transaction, and

It falls within any one of the specified descriptions i.e. classes or transaction, set out in the legislation.

#### **Who is obliged to report?**

In the majority of disclosable schemes, the reporting obligation falls on the promoter who, in most cases is the tax adviser, accountant or lawyer involved in the provision of tax advice. The taxpayer is obliged to report the transaction where no promoter exists or where the promoter is based outside Ireland. "In-house" schemes developed by small or medium sized companies (SME's) with no promoter involvement are excluded from the UK regime, however, there is no such exclusion in Ireland.

#### **Legal Professional Privilege (LLP)**

The Irish regime recognises that LPP may prevent information about a taxpayer being provided to Revenue by a promoter in certain cases where the information would otherwise require disclosure. In such cases where the taxpayer is entitled to LPP and the promoter

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<sup>71</sup> Minister for Finance, Brian Lenihan, 24 March 2010

cannot provide the information, the taxpayer is obliged to report the transaction themselves. In these cases, the promoter must advise the client of their obligation to disclose.

With regard to the implementation of the Fourth Anti-Money Laundering Directive, in November 2016 Ireland transposed the first sub-paragraph of Article 30(1) of this Directive into statutory regulations, recognising the principle of LPP.

*“(4) Nothing in this Regulation shall be construed as requiring a person to whom a notice under it is given to disclose any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.”<sup>72</sup>*

## **Hallmarks**

For a transaction to be subject to disclosure under the Irish regime, it must fall within one of the general or specific hallmarks.

Any transaction will be reportable if it meets one of the following hallmarks:

- A promotor may wish to keep the transaction confidential from other promoters or from Revenue;
- A premium or contingent fee could potentially be charged for the transaction;
- Standardised documentation is involved, subject to specified exceptions; or
- The transaction falls within a “specified type of transaction”.

The specified types of transactions (often referred to as the “specific hallmarks”) included the following:

- The artificial creation of losses
- Shifting income into capital
- Employment schemes (with certain exclusions)
- Income into gift schemes

Specific hallmarks have been chosen based on perceived risks in the Irish tax system and may not be the appropriate hallmarks for other Member States. For example, in Ireland there is a significant difference between the top rate of income tax (52%) and the capital gains tax rate (33%). Flexibility for Member States to identifying the appropriate specific hallmarks that should apply if they introduce a mandatory reporting regime.

## **Day-to-Day Tax Advice**

The Irish regime does not apply to “ordinary day-to-day tax advice” provided by a tax adviser to a taxpayer. The scope of exclusion such as this can be unclear and Irish Revenue subsequently updated its guidance to clarify the meaning. The exclusion essentially allows for advice to be given on reliefs and exemptions without being reportable if they are used in a bona fide manner.

## **Clarity on Scope of Reporting**

Ireland believes that any disclosure regime should be as prescriptive as possible as regards its application so as to provide clarity on when to report and in order to reduce the increasing administrative burden on taxpayers/advisers and believes that too much information can actually reduce the effectiveness of the regime.

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<sup>72</sup> SI 560 of 2016 European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016

## Timelines for Reporting

In general, disclosures on reportable transactions must be made within **5 working days** of the applicable trigger date. The trigger date differs for marketed and bespoke schemes;

- For marketed schemes, the trigger date is the date on which a marketing contact is first made and in which steps are taken to market a scheme.
- For bespoke schemes, the trigger date is the date on which the promoter becomes aware that the transaction has been implemented. Where a scheme is disclosed to Revenue, then within **90 working days**, the Revenue must either
  - i. assign a unique transaction number to the transaction, or
  - ii. determine that the transaction is not a transaction subject to disclosure.

If the scheme is disclosable by a promoter, then the promoter must, within **5 working days** of receipt of the transaction number, give that number to any person to whom the promoter has made the scheme available for implementation, or any person who is marketing the scheme on behalf of the promoter.

In addition, a promoter is required to regularly provide the Irish Revenue with information on persons (a “client list”) to whom a transaction subject to disclosure has been made available for implementation, unless the promoter is satisfied that the taxpayer has not actually implemented the scheme.

- Where the scheme is a marketed scheme, the client list must be provided within **30 working days** commencing the day after the promoter first makes the disclosed transaction available to a person for implementation.
- Where the scheme is bespoke, the client list must be provided within **30 working days** commencing the day after the promoter first becomes aware that the scheme has been implemented.

The number of mass-marketed schemes in Ireland is low.

## Non-compliance

Promoters or taxpayers who fail to comply with the mandatory disclosure legislation may be liable to a civil penalty, the extent of which will depend on the nature of the offence.

- For certain specified “lesser” offences, there is an initial civil penalty of up to EUR 4 000, while a further fixed penalty of EUR 100 per day may also apply.
- For more serious compliance failures, there is a flexible initial penalty of up to EUR 500 per day and where the failure continues after that penalty is imposed, a further penalty of EUR 500 per day applies for every day that the failure continues. Revenue notes that the purpose of the flexible daily penalty (over a fixed penalty) is to deter promoters from deliberately delaying disclosure of a scheme.

As well as these monetary penalties, the prospect of reputation damage for the promoters is also a major deterrent.

## The impact of the disclosure regime in Ireland

Ireland already has a complex General Anti-Avoidance Provision (GAAR) in place when the mandatory disclosure provisions were introduced. As part of the GAAR regime, taxpayers can opt to make a “protective notification” to Irish Revenue which can reduce the impact of

interest and penalties in the event that Revenue successfully challenges the transaction under the GAAR. While the protective notification is a separate requirement from mandatory disclosure, it is an additional consideration for tax advisers when providing advice.

The main reason for introducing the regime was to encourage further behavioural change. The Irish Tax Institute does not have data on the number of disclosures that have been made to Irish Revenue under the regime. However, while this data may be interesting, Ireland would caution against over-reliance on the data which cannot be viewed as evidence of the success or otherwise of the regime, due to the impact of behavioural change. This is particularly true in the case of countries that have strong pre-existing GAAR or other anti-avoidance regimes.

## **2. PORTUGAL'S MANDATORY DISCLOSURE REGIME**

### **Overview**

The PT tax planning disclosure regime (Decree-law no. 29/2008) entered into force on 15 May 2008. The Decree-Law deems tax planning as any scheme (defined as tacit or explicit plan, project, proposal, advice instruction or recommendation, materialised or not) or conduct (contract, arrangement, promise, commitment, corporate structure, transaction or deed) that leads to or is expected to lead to, exclusively or predominantly, to a tax advantage. Secondly, one of a number of hallmarks applies – see below. The scope of the PT mandatory disclosure regime covers corporations and individuals. In the case of individuals it is the user that usually reports if an off-shore entity is part of the scheme.

All income and expenditure is included within the scope of the proposal including property taxes, personal and corporate income taxes, value added tax, municipal tax on immovable, transfer tax on immovable, and stamp duties.

### **Who is obliged to Report?**

The definition of intermediaries (promoters) is broad and covers promoters resident or located in PT territory including certified auditors, accountants, financial institutions (bank secrecy does not apply) and company services providers. Lawyers are not liable for disclosure if rendering advice on a scheme or conduct: (a) when analysing the legal position of a client; (b) in the context of a legal consultation; (c) when defending or representing a client in a judicial proceeding, or in relation to judicial proceedings, including advice on how to commence or prevent them or any other activities exclusive to lawyers. In such a case if the scheme comes within the scope of the mandatory disclosure regime the taxpayer would need to report it. However, when a lawyer approaches a person to "sell" a scheme, the lawyer is not considered as being protected by legal professional privilege.

If no Portuguese intermediary is involved with the scheme then the liability for disclosure falls with the beneficiary. In such cases the obligation to disclose applies only to schemes involving the participation of entities located in low-tax jurisdictions.

### **Hallmarks**

For a transaction to be reportable under the PT scheme, one of the following hallmarks should apply :i) participating entity subject to a special regime or tax exempt, ii) (hybrid) financial instruments and derivatives, iii) use of tax losses.

### What needs to be disclosed?

The information which must be provided to the tax authorities includes the following items:

- a detailed description of the scheme, including a description of the agreements, the corporate structures, the operations and the transactions used, as well as the type of tax advantage;
- indication of the applicable law; and
- name, domicile, and tax identification number of the promotor of the scheme.

Regarding the detailed description of the scheme, the tax authorities can request further information. Apart from when the user is obliged to report, intermediaries do not need to reveal the name of the clients to whom the scheme has been proposed.

### Non-compliance with disclosure

Fines for non-compliance vary between EUR 1 000-100 000. Furthermore, the loss of tax benefits and the official publication of the penalty at the expense of the breaching party may also be imposed. The promoters of the scheme will still continue to be required to disclose the relevant information whenever possible. The tax authorities can also publish details of the scheme on the internet.

### The impact of the disclosure regime in Portugal

PT authorities received almost 100 reports on tax schemes from intermediaries (promoters) since the introduction of mandatory disclosure regime until now, with the peak between 2009 and 2011. Around 25% of reports were made by the users. The users are obliged to report in the following circumstance: when the promoter is not PT resident, is prevented by the rules of the profession (e.g. lawyers), or is an in-house scheme. Statistics on sanctions are not known.

## 3. THE UK'S MANDATORY DISCLOSURE REGIME

Table 12: HM Revenue and Customs - Disclosure statistics

Financial year	Financial <sup>(1)</sup>	Employment <sup>(1)</sup>	Main regime	(NI hallmark) <sup>(2)</sup>	IHT	SDLT <sup>(3)</sup>	AETD
01/08/04 - 31/03/05	340	163	0	(0)	0	0	0
01/04/05 - 31/03/06	94	28	0	(0)	0	485	0
01/04/06 - 31/03/07	29	7	125	(0)	0	185	0
01/04/07 - 31/03/08	2	0	205	(23 N)	0	70	0
01/04/08 - 31/03/09	0	0	102	(Less than 5)	0	28	0
01/04/09 - 31/03/10	0	0	116	(6 N)	0	61	0
01/04/10 - 31/03/11	0	0	97	(11 N)	0	21	0
01/04/11 - 31/03/12	0	0	116	(17 N)	Less than 5	13	0
01/04/12 - 31/03/13	0	0	59	(7 N)	Less than 5	18	0



<b>01/04/13 - 31/04/14</b>	0	0	28	(7 N)	Less than 5	10	0
<b>01/04/14 - 30/09/14<sup>(4)</sup></b>	0	0	Less than 5	0	0	Less than 5	Less than 5

Source: HMRC website

Annotations: Data for period from 01/08/2004 to 30/09/2014

<sup>(1)</sup> Financial and employment categories have been replaced since 01/08/2006

<sup>(2)</sup> Data for SDLT commenced on 01/08/2005

<sup>(3)</sup> N = Number of hallmarked disclosures reported under the NIC Regulation

<sup>(4)</sup> Provisional date for period 01/04/2014-30/09/2014

The DOTAS regime introduced in 2004 essentially requires promoters of certain types of tax avoidance schemes, or in some cases users of the schemes, to disclose them to HMRC. The regime has been subject to several changes since its introduction. The scope of the regime has been broadened gradually so it now covers the whole of Income Tax, Corporation Tax, Capital Gains Tax, and certain arrangements relating to Stamp Duty Land Tax and Inheritance Tax. The regime also applies, with necessary modifications, to National Insurance contributions and Value Added Tax. In the March 2015 Budget, the Government announced a package of measures to ensure that the DOTAS regime keeps pace with the current avoidance market. As part of this the Government launched a consultation on the detail of changes to strengthen the DOTAS hallmarks and the results were published in February 2016. New changes are expected in regards to Indirect Tax Avoidance Disclosure Regime and penalties for enablers of abusive tax planning arrangements in line with measures recently published on 5 December 2016.

There are 2 different disclosure regimes, one for VAT and one for Direct taxes and National Insurance contributions:

### **Direct taxes and National Insurance contributions**

The disclosure of tax avoidance schemes (DOTAS) regime covers Income Tax, Corporation Tax, Capital Gains Tax, Stamp Duty Land Tax, Inheritance Tax, and the Annual Tax on Enveloped Dwellings and National Insurance contributions.

### **Who has to report?**

UK imposes the primary obligation to disclose on the promoter. Who is a promoter? (FA 2004, s. 307)

A person is a promoter if, in the course of a relevant business, they:

- are to any extent responsible for the design of a scheme,
- make a firm approach to another person with a view to making a scheme available for, implementation by that person or others,
- make a scheme available for implementation by others, or
- organise or manage the implementation of a scheme.

However, the scheme user may need to make the disclosure where:

- the promoter is based outside the UK,
- the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC, or
- there is no promoter, such as when a person designs and implements their own scheme or there is an in-house counsel.

Where a lawyer is ‘marketing’ a scheme, as described at paragraph 14.3, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligations and the lawyer should disclose the scheme (providing the other conditions are met) to the Counter-Avoidance Directorate in the normal way.

DOTAS addresses many other categories of people involved in the scheme however the obligation to disclose is not directly imposed on them.

### **What has to be reported?**

The UK adopts a multi-step approach meaning there is a threshold that the scheme needs to satisfy before it is assessed against the hallmarks. The arrangement only needs to be reported on if it has an impact on the UK tax base of the taxes included under DOTAS. Therefore arrangements that affect non-UK tax bases are not included. HMRC has recently launched initiatives to target offshore tax evasion/avoidance by UK taxpayers<sup>73</sup>. A tax arrangement should be disclosed where:

- it will, or might be expected to, enable any person to obtain a tax advantage and
- tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement.

Transaction needs to be disclosed if it falls within the hallmarks prescribed in the relevant regulations. The UK targets confidentiality, premium fee, and standardised tax product as a generic hallmark. As for specific hallmarks there are 8 hallmarks aimed at new and innovative schemes, marketed schemes and targeting specific schemes, for example loss schemes.

### **What has to be disclosed?**

The name of the promoter, the clients of the promoter, what kind of reportable transaction was entered into, a description of the transaction, and the expected tax benefits.

### **Scope of DOTAS**

DOTAS applies to both natural and legal persons. In terms of the split between corporate and individuals, the amount of tax under consideration (in ongoing audits) is one-third corporation tax, and two-thirds income tax, capital gains tax and property tax (Stamp Duty Land Tax).

Some of the mass-marketed personal tax issues involve many hundreds of users in very complex schemes which take a long time to investigate and litigate. Corporate tax may involve higher amounts of tax per user but tend to be more bespoke in nature and, potentially, quicker to resolve.

It covers different taxes (including VAT, although the name/regime is different).

There is a special regime for SME: they are exempted from reporting obligations when there is no intermediary and the scheme is developed "in-house".

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<sup>73</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546589/Strengthening\\_Tax\\_Avoidance\\_Sanctions\\_and\\_Deterrents-discussion\\_document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546589/Strengthening_Tax_Avoidance_Sanctions_and_Deterrents-discussion_document.pdf)

## **When is reporting required?**

Disclosure is required when the promoter makes a scheme available for implementation. The promoter must disclose a scheme within five working days of making a scheme available for implementation by another person.

The due date for making a disclosure, where the user is required to make the disclosure, is by reference to the first transaction forming part of the scheme. Where there is no promoter (other than in the case described in paragraph 14.5 of Guidance) the user must disclose within 30 days of the scheme being implemented.

## **Process**

1. Promoter discloses scheme to the UK tax administration, usually within five days of scheme being made available to clients (see above).
2. The UK tax administration issues a Scheme Reference Number (SRN) to the Promoter. Issuing an SRN does not mean that HMRC approves the scheme. Disclosure regime is not a clearance procedure.
3. Promoter must pass the SRN to clients who implement the scheme.
4. Promoter provides quarterly report to the UK tax administration of clients who have implemented the scheme.
5. Clients must report the SRN on a return affected by the use of the scheme.

## **Penalties**

The penalties for failure to comply with a DOTAS obligation without reasonable excuse fall into three categories:

- Disclosure penalties – apply to failure to disclose a scheme.
- Information penalties – apply to all other failures to comply with DOTAS except for some
- User penalties – apply to failure by a scheme user to report a scheme reference number to HMRC.

Disclosure penalties and Information penalties involve an initial penalty and a further penalty if non-compliance continues. The initial penalty is determined by a Tribunal and is up to GBP 600 a day. If this is not considered to be sufficient deterrent the penalty may be of up to GBP 1 million. If the user of a tax avoidance scheme fails to report the scheme reference number to HMRC the penalty is up to GBP 5 000 the first time the intermediary fails to do this. If the intermediary fails to report a scheme reference number again the intermediary may have to pay a penalty of up to GBP 7 500. On the third and future occasions he may have to pay a penalty of up to GBP 10 000 for each failure. Current initiative in the form of the draft Finance Bill 2017 contains the proposed new power for HMRC to levy a penalty on those (referred to as ‘enablers’) who facilitate abusive tax avoidance arrangements.

## Evaluation of the scheme

Although there is no publically available evaluation of the scheme, the HMRC stated in 2009 that the DOTAS scheme had proved to be highly successful and the Government had used information from DOTAS to introduce a range of anti-avoidance measures every year since 2004 – a total of 49 measures, closing off over GBP 12 billion in avoidance opportunities<sup>58</sup> HMRC noted that there is considerable anecdotal evidence that DOTAS has changed the economics of avoidance.

In 2012 the Oxford Centre for Business taxation analysed the DOTAS regime considering its claims to success in the light of the evidence that was then available<sup>74</sup>. The review acknowledged the difficulties of measuring a scheme like DOTAS in particular due to the deterrent effect in estimating the tax collected because arrangements were not undertaken required a number of assumptions to be made. Regarding compliance the review notes the following:

- Of schemes disclosed before May 2005 where no users were known to have reported a SRN, research has shown that around 25% of those schemes did in fact have users;
- By the December 2006 HMRC had identified over 100 entities where there was evidence of involvement in promoting schemes of a type that it would have expected to be disclosed but had not been;
- Analysis carried out in September 2007 for the tax year 2005/06 in relation to a sample of Limited Liability Partnerships indicated that around 40% of individual partners who have been issued with a SRN by the promoter did not report it correctly. In other cases the number is reported, but not in the specified box on the return or the number may be transposed. Other analysis indicates that SRN reporting failures are not confined to individuals but extend to corporate users;
- At April 2008 there were around 12 500 known users of disclosed schemes of whom around 80% are individuals carrying on a business as sole proprietors or partners. In 2007 between 5 000 and 6 000 of the reported a SRN (with some users reporting two or more);
- In 2008 the compliance rate of scheme users recording their SRNs as required was estimated at 60%;
- As at May 2008, HMRC received disclosures from, and issued SRNs to, a pool of 50 promoters, all of which it described as “businesses”;
- Between 01/05/2010 and 19/10/ 2011: 78 promoters disclosed schemes under DOTAS.

The review concluded that while some figures for the impact of DOTAS could be estimated others could not unless certain assumptions were made. In order to validate the GBP 12.5 billion collected as a result of DOTAS the assumptions on which this figure were based would need to be known. However the review noted that estimating the tax collected as a result of certain interventions, such as challenging schemes on the ground that they fall foul of the law,

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<sup>74</sup> The National Audit Office commissioned the Oxford University review the Disclosure of Tax Avoidance Schemes regime and the tax avoidance landscape. The study is published as Oxford University Centre for Business Taxation – OUCBT (2012): "[The disclosure of tax avoidance schemes regime](#)"

should present less difficulties in estimating and would useful to assess the impact of the regime.

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<sup>i</sup> OECD BEPS Action 14 "Making dispute resolution more effective" and follow up action.

<sup>ii</sup> UN Tax Committee (2015)