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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Non-Paper from Commission Services - Possible need for the amendment
of 5 EU agreements with neighbour countries

Delegations will find attached Non-Paper from Commission Services.

Non-Paper from Commission Services**Possible need for the amendment of 5 EU agreements with neighbour countries****1. Introduction**

The EU signed and concluded between 2015 and 2016 five international agreements, in the form of Protocols replacing the title and the entire content of the pre-existing Savings taxation agreements with the countries concerned, which are Switzerland, Liechtenstein, Monaco, Andorra and San Marino. The agreements, in their most recent and currently applicable texts, provide the legal basis for the reciprocal automatic exchange of financial account information between each of the 27 EU Member States and each of these non-EU countries, in accordance with the OECD Common Reporting Standard (CRS). The same standard is implemented within the EU for exchanges between its Member States under the Council Directive 2014/107/EU of 9 December 2014 (first amendment - DAC 2 – to Directive 2011/16 on administrative cooperation in the field of taxation)

Important changes to the CRS were approved at international level on 26 August 2022, with implementation foreseen from 1 January 2026 in the framework of an Addendum - still to be submitted to signature - of the OECD relevant Multilateral Competent Authority Agreement (CRS-MCAA). The implementation of these changes within the EU has been included by the Commission in its proposal of 8 December 2022 for a seventh amendment – DAC8 - to Directive 2011/16 on administrative cooperation in the field of taxation (DAC), for which a common and general approach has been agreed at the ECOFIN Council of 16 May 2023.

Corresponding amendments to the above mentioned five EU agreements would therefore have to be negotiated and agreed by the EU with the five non-EU countries concerned, to ensure that the automatic exchange of financial account information between these countries and the EU Member States is aligned with and continue to take place in accordance with the updated CRS. The only possible alternative to such amendments would consist in the withdrawal of the five EU agreements and the switching to the updated CRS-MCAA of the CRS cooperation between the 27 EU Member States and the five non-EU countries concerned. As explained in more details below, all the five non-EU countries have informally expressed to the Commission services their preference for continuing cooperation with the EU Member States under updated EU agreements. From an EU viewpoint, continuing cooperation under the EU agreements would also present several advantages because:

- a) it makes it easier to ensure compliance with data protection rules. For example, detailed provisions were included in the agreements with San Marino and Monaco, with the assistance of EU data protection experts, because these two countries do not benefit of an EU Adequacy Decision and do not belong to the EEA.
- b) it ensures a better coherence with the solutions adopted in DAC for the application of the CRS at EU level. This facilitates the prevention of possible abuses, which is particularly relevant given geographical proximity of the third countries concerned with the EU. In 2015-2016 the five neighbour countries had indeed accepted certain alignments of their agreements with DAC2, for instance:
 - i. An exemption for certain Cash Value Insurance Contracts or Annuity Contracts which is provided by the CRS [Section III (A)], is either deleted or neutralised (thanks to Joint Statements) within the 5 EU agreement, similarly to what was done at EU level in DAC2.

- ii. Certain key elements of the Commentaries to the CRS (notably: definition of “change in circumstances”; definition of the residence of a Financial Institution; definition of accounts “maintained”; treatment of trusts which are Passive Non-Financial Entities) are made legally binding and where appropriate further detailed in the Annex II to all the 5 EU agreements, so as to ensure an implementation in line with that realised by EU MSs under DAC2 and under other provisions of the EU legislation.
 - iii. Some relevant options granted by the CRS and its Commentaries [notably the option concerning the definition of “Related entity” in Section VIII (E) (4) of the CRS that may be relevant for the inclusion in the scope of certain assets of Investment funds under common management] have been directly retained by Liechtenstein, San Marino and Monaco, in their respective agreements, in a practically identical way as in DAC2. Switzerland in particular, but also Andorra made choices that are also broadly similar to those retained in DAC2.
- c) It provides a timely overview on the application of the exchange relations between Member States and those third countries and ensures the level playing field. As an example, after the conclusion of the EU-LI revamped agreement in 2015, it was made evident by the notifications to be made under this agreement that LI had contacts with a Member State in view of agreeing an extensive interpretation of the provisions on Excluded Account¹. That was a serious risk to the level playing field and the proper application of the AEOI standard. The notification made to the European Commission allowed a timely intervention from the EU Institutions with a view to prevent this risk. Such a situation would have been much more difficult to detect and prevent on time in the context of MCAA AEOI exchanges.

¹ Such interpretation would have replaced the reporting of information on the accounts concerned with an alternative solution based on withholding taxes (a so called “Rubik” agreement).

2. Result of the informal contacts held in 2023 by Commission services

2.1. Switzerland

Representatives of the Federal administration of Switzerland indicated in an informal meeting held on 24 January 2023 with the Commission services their wish to continue the CRS cooperation with the EU Member States under the legal basis provided by the EU Agreement and therefore to update this agreement in line with the changes to the CRS, which were adopted at international level on 26 August 2022.

The Swiss representatives recommended to start the process for updating the relevant EU agreement as soon as possible, with a view to ensure the timely implementation of the CRS amendments by 1 January 2026. The Swiss procedures for a negotiating mandate may indeed require up to 6 months, to be added to the time necessary for the actual negotiations and to the time for the national ratification on the Swiss side (likely to be more than one year, as a referendum will be necessary).

At a further informal meeting held with the Commission services on 27 March 2023, the representatives of the Federal administration of Switzerland confirmed their readiness to propose the inclusion in their negotiating mandate of the possibility to negotiate with the EU also the amendments to the provisions of the EU agreement dealing with Confidentiality and Personal Data Protection. Such amendments appear to be necessary in light of the Opinion released on 8 July 2015 on the agreement by the European Data Protection Supervisor (EDPS)² and in light of the General Data Protection Regulation (GDPR)³ which entered into force after the conclusion of the agreement concerned⁴. Any possible amendment to the agreement in this respect will have to take into account the EU Adequacy Decision concerning Switzerland⁵ and include updated references to the applicable Swiss primary and secondary legislation.

² https://edps.europa.eu/sites/edp/files/publication/15-07-08_eu_switzerland_en.pdf

³ Regulation (EU) 2016/679 of 27 April 2016

⁴ Article 96 GDPR requires alignment to such Regulation at the occasion of any formal amendment of the international agreements concluded before 24 May 2016.

⁵ Decision 2000/518/EC of 26 July 2000 pursuant to Directive 95/46/EC on the adequate protection of personal data provided in Switzerland

2.2. Liechtenstein

Representatives of the Ministry of General Government Affairs and Finance, of the Office of Foreign Affairs and of the Fiscal Authority of the Principality of Liechtenstein indicated in an informal meeting held on 15 February 2023 with the Commission services their availability to develop a mandate to start negotiations for updating the EU agreement in line with the latest changes to the CRS.

The representatives from Liechtenstein also recommended to start the process for updating the relevant EU agreement as soon as possible, with a view to providing the basis for the timely implementation of the CRS amendments by 1 January 2026.

The representatives from Liechtenstein confirmed their availability to propose the inclusion in their negotiating mandate of the possibility to amend where appropriate the provisions of the EU agreement dealing with Confidentiality and Personal Data Protection. This seems necessary in light of the entry into force of the GDPR after the conclusion of the agreement concerned. Any possible amendment to the agreement in this respect will have to take into account the applicable primary and secondary legislation that Liechtenstein adopted as a Member of the European Economic Area (EEA) with a view to implement the provisions of the GDPR in its territory pursuant to the EEA Agreement.

2.3. Andorra

The Secretary of State for International Financial Matters of the Principality of Andorra indicated in an informal meeting held on 27 February 2023 with the Commission services the wish of the Principality to update the agreement with the EU in line with the latest changes to the CRS.

The Andorran Secretary of State explained that the Andorran legal requirements on negotiation and conclusion of international treaties and their amendments, are rather straightforward on subjects which are not controversial. Therefore, the timing for launching possible negotiations and concluding any amended agreement with the EU would mainly depend on the timing needed for the procedures to be followed on the EU side.

The Andorran Secretary of State explained in addition that any possible need for updates of some elements of the text of the EU agreement in light of the GDPR shouldn't raise any substantial problem. The above-mentioned EDPS Opinion regarding the EU agreement with Switzerland was already considered when finalizing the negotiations of text of the EU agreement with Andorra in the second half of 2015. Moreover, the EU has adopted an Adequacy Decision concerning Andorra⁶ and the Principality has recently further adapted its domestic legislation in line with the changes to data protection rules which have been introduced at EU level by the GDPR.

2.4. Monaco

At an informal meeting held on 9 March 2023, the Director-General for Finance of the Principality of Monaco, and other high-level representatives of the administration of the Principality, discussed with representatives of the Commission services about the two possible options (updating the existing EU agreement or switching to the use of the CRS-MCAA) for implementing the latest changes to CRS.

⁶: Commission Decision 2010/625/EU of 19 October 2010 pursuant to Directive 95/46/EC on the adequate protection of personal data in Andorra

The representatives from Monaco were also informed by the Commission services that, if the option to continue this cooperation under the legal basis provided by the EU Agreement is retained, the negotiations for the amendment of this agreement should include a review and, where appropriate, an update in the light of the GDPR requirements of the already existing provisions on Confidentiality and Data Protection included in Article 6 and Annex III of the text of the agreement as it was signed in 2016. As a bill for aligning to the GDPR the legal framework on data protection of the Principality is currently examined by its national parliament and should soon be adopted, any future discussions with the EU and its Member States on these issues should not raise any concerns.

At the informal meeting of 9 March 2023 with Commission services, the Director-General for Finance of the Principality of Monaco took a general reservation of a political nature about the preferences of the Principality concerning the instrument (EU Agreement or MCAA), as the administration needed to consult the competent Minister.

With a message sent to the Commission on 22 March 2023, the Director-General for Finance of the Principality of Monaco informed the Commission services of the preference expressed by the competent Minister to update the EU agreement in line with the latest changes to the CRS.

2.5. San Marino

At an informal meeting held on 27 February 2023, the Director for Finance and Budgetary Matters of the Republic of San Marino, the Ambassador to the EU and other high-level representatives of the administration and the foreign affairs of the Republic discussed with representatives of the Commission services about the two possible options (updating the existing EU agreement or switching to the use of the CRS-MCAA) for implementing the latest changes to CRS.

The representatives from San Marino were also informed by the Commission services that the negotiations for the amendment of this agreement should include a review and, where appropriate, an update of the already existing provisions on Confidentiality and Data Protection included in Article 6 and Annex III of the agreement as it was signed in December 2015. As a law for aligning to the GDPR the legal framework on data protection of San Marino has already been adopted by its national parliament and entered into force, any future discussions with the EU and its Member States on these issues shouldn't raise any concerns.

At the informal meeting of 27 February 2023 with Commission services, the Director for Finance and Budgetary Matters of the Republic of San Marino took a general reservation of a political nature about the preferences of the Republic concerning the instrument (EU Agreement or MCAA) as the administration needed to consult the competent Minister.

With a message sent to the Commission on 11 April 2023, the Director for Finance and Budgetary Matters of the Republic of San Marino informed the Commission services of the preference expressed by the competent Minister to update the EU agreement in line with the latest changes to the CRS.

3. Content of the possible requested amendments to the five EU agreements

The possible amendment to the five international agreements would primarily consist in changes to the Annexes where the Reporting and Due Diligence Rules are presented in more details. Annex I and, where appropriate, Annex II to the agreements would be amended to keep them in line with the changes to the CRS. These changes extend the scope of the CRS to cover electronic money products and central bank digital currencies. In addition, the changes further improve the due diligence procedures and reporting outcomes, with a view to increasing the usability of CRS information for tax administrations and limiting burdens on financial institutions, where possible.

As explained in the previous Section of this note, the possible amendments to the EU agreements may have also to include certain adaptations to the provisions of the agreements dealing with Confidentiality and Personal Data Protection.

4. The way forward with the activation of the process

Article 8 of each of the five EU agreements contains identical provisions for bilateral **formal** consultations between the contracting Parties (the EU with its Member States, on one side, and the relevant non-EU country on the other side) to take place “when an important change is adopted at OECD level to any of the elements of the Global Standard”. Paragraph 4 of said Article 8 states: “Following the consultations, this Agreement may be amended by means of a protocol or a new agreement between the Contracting Parties”. Paragraph 5 even allows for the possibility of a consensus between the parties on some form of provisional application of the changes, when one of the parties has already formally implemented them, as it would be the case for the EU Member States once the change proposed through DAC8 had been adopted in Council. It would however be best not to wait for the realisation of the conditions of the above paragraph 5 for commencing the process, because of the time needed on both sides for launching formal negotiations resulting in a valid “protocol or a new agreement between them”.

The five non-EU Member States have shown their interest in updating the EU agreements and EU Member States would benefit from having such updated agreements in place.

As the first step, it is important to confirm whether Member States also agree with the approach of working towards the amendment of the five agreements. The Commission could then prepare a recommendation proposing to the Council to consider the adoption of a Decision spelling out the negotiation mandate, in accordance with the procedures set by Article 218 of the Treaty on the Functioning of the European Union (TFEU). The aforementioned formal consultations under Article 8 of each of the five agreements could then also be launched. The Commission would be prepared to conduct the negotiations - as it was done for the existing agreements - in consultation with the Council, its Presidency and its relevant committees and bodies.