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**NOTE**

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From:	General Secretariat of the Council
To:	Council
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Subject:	Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation – General approach

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**I. INTRODUCTION**

1. The March 2013 European Council has stated that "close cooperation with the OECD and the G20 is needed to develop internationally agreed standards for the prevention of base erosion and profit shifting".<sup>1</sup> Further on, the December 2014 European Council recognised that "there is an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels."<sup>2</sup>
2. The Commission presented the abovementioned legislative proposal<sup>3</sup> ("DAC4") on 28 January 2016, as part of the anti-tax avoidance package.

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<sup>1</sup> Doc. EUCO 23/13 CO EUR 3 CONCL 2, point 6.

<sup>2</sup> Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

<sup>3</sup> Doc. 5638/16 FISC 9 + ADD 1.

3. The opinions of the European Economic and Social Committee and of the European Parliament on this Commission proposal are expected to be delivered soon.
4. The Commission legislative proposal has been designed on the basis of the OECD "Transfer Pricing Documentation and Country-by-Country Reporting, on Action 13 of the OECD/G20 Action Plan on Base Erosion and Profit Shifting". It sets out the standards for country-by-country reporting of revenues, profits, taxes paid and certain measures of economic activity by MNE Groups, and foresees measures for automatic exchange of such reports by tax authorities.<sup>4</sup> Introduction of such standards are part of the OECD Base Erosion and Profit Shifting (BEPS) Action Plan, which was endorsed by G20 Finance Ministers in Lima, Peru, on 8 October 2015 and G20 Heads of State in Antalya, Turkey, on 15-16 November 2015, and which was welcomed by ECOFIN in its December 2015 "Council Conclusions on base erosion and profit shifting (BEPS) in the EU context"<sup>5</sup>.
5. Moreover, in the context of the work of the OECD, more than 30 countries (including 20 EU Member States) have already signed<sup>6</sup> the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA), which follows the OECD model and sets forth rules and procedures for Competent Authorities of jurisdictions implementing BEPS Action 13 to automatically exchange country by country reports annually, under the abovementioned OECD standard.

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<sup>4</sup> These texts can be found at <http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm>

<sup>5</sup> Doc. 15150/15 FISC 185 ECOFIN 965, point 6.

<sup>6</sup> The list of the signatories of the MCAA can be found at <http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf>

6. The Commission is aiming at transposing the abovementioned OECD standards into the EU legislation and supplementing the functioning of the CbC MCAA with harmonised rules set out in a EU legal instrument. Therefore the Commission proposes to amend the existing Directive 2011/16/EU on administrative cooperation in the field of taxation<sup>7</sup> (DAC) by extending the scope of DAC rules on automatic exchange of information between the tax authorities of the Member States: Multinational Enterprise (MNE) Groups with total consolidated group revenue equal or higher than EUR 750 000 000 will be obliged to file their country by country reports to tax authorities of Member States, in accordance with the rules of the new Annex III to DAC proposed by the Commission.
7. The ECOFIN Council at its meeting of 8 December 2015 has stressed the need to find common, yet flexible, solutions at the EU level consistent with OECD BEPS conclusions, paying specific attention to compliance with EU Treaty freedoms and competences and supported effective, swift and coordinated implementation by Member States of the anti-BEPS measures to be adopted at EU level. The ECOFIN Council has also indicated that EU directives should be, where appropriate, the preferred vehicle for implementing OECD BEPS conclusions in the EU in order to ensure both legal certainty and proportionality in the level of harmonisation required by the Single Market.<sup>8</sup>

## **II. STATE OF PLAY**

8. The Netherlands Presidency has prioritized work on the DAC4 legislative proposal (as the first step of its work on the recently presented anti tax avoidance package as a whole) and the ECOFIN at its meeting of 12 February 2016 has broadly supported that work on this dossier should be brought forward swiftly. The Presidency therefore aims at reaching an agreement on the Council's general approach on the Directive amending DAC by 8 March 2016 ECOFIN.

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<sup>7</sup> OJ L 64, 11.3.2011, p. 1., as most recently amended by Council Directive (EU) 2015/2376 of 8 December 2015 (OJ L 332, 18.12.2015, p. 1.)

<sup>8</sup> See "Council Conclusions on base erosion and profit shifting (BEPS) in the EU context", doc. 15150/15 FISC 185 ECOFIN 965, points 10, 12 and 17.

9. The Commission proposal was discussed at two meetings of the Working Party on Tax Questions (WPTQ; 9 February and 16 February 2016), the High Level Working Party on Tax Questions (HLWP) on 23 February 2016, as well as in the meeting of the Committee of Permanent Representatives (Part 2) on 2 March 2016, where the Presidency aimed at addressing the concerns raised by a number of Member States on the original Commission proposal.
10. The Committee of the Permanent Representatives (Part 2) concluded that the Presidency compromise text, as it was set out in doc. 6418/16 FISC 26 ECOFIN 138 should be submitted for the Council for agreement on a general approach without any amendments, as no further work on the compromise outlined in that text was required at that stage. A number of delegations, however, still maintained parliamentary scrutiny reserves and one delegation indicated that it would only be able to state its position at ECOFIN meeting of 8 March 2016.

### **III. THE WAY FORWARD**

11. Against this background, the Presidency hopes that the remaining reserves held by some delegations could be lifted so that at ECOFIN level, all Member States will be in a position to support the compromise text, set out in the Annex to this note.
12. The Council is therefore invited to:
  - agree on a general approach on the text of the Directive, as set out in the Annex to this note, with a view to adopting the Directive, as an "A" item on the agenda of one of its forthcoming meetings, subject to legal-linguistic revision and receiving the opinion of the European Parliament.

2016/0010 (CNS)

Proposal for a

**COUNCIL DIRECTIVE**

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 and 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament<sup>9</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>10</sup>,

Acting in accordance with a special legislative procedure,

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<sup>9</sup> OJ C , , p. .

<sup>10</sup> OJ C , , p. .

Whereas:

- (1) In recent years, the challenge posed by tax fraud and tax evasion has increased considerably and has become a major focus of concern within the Union and at global level. The automatic exchange of information constitutes an important tool in this regard and the Commission in its Communication of 6 December 2012 containing an Action plan to strengthen the fight against tax fraud and tax evasion highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters. The European Council in its conclusions of 22 May 2013 requested the extension of automatic information exchange at Union and global levels with a view to combatting tax fraud, tax evasion and aggressive tax planning.
- (2) As Multi National Enterprise (MNE) Groups are active in different countries, they have the possibility of engaging in aggressive tax planning practices that are not available for domestic companies. When MNEs do so, purely domestic companies, normally small and medium-sized enterprises (SMEs) may be particularly affected as their tax burden is higher than that of MNE Groups. On the other hand, all Member States may suffer revenue losses and there is the risk of competition to attract MNE Groups by offering them further tax benefits.
- (3) Member States' tax authorities need comprehensive and relevant information on MNE Groups regarding their structure, transfer pricing policy and internal transactions in and outside the EU. That information will enable the tax authorities to react to harmful tax practices through changes in the legislation or adequate risk assessments and tax audits, and to identify whether companies have engaged in practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments.

- (4) Increased transparency towards tax authorities could have the effect of giving MNE Groups an incentive to abandon certain practices and pay their fair share of tax in the country where profits are made. Enhancing transparency for MNE Groups is therefore an essential part of tackling base erosion and profit shifting.
- (5) Resolution of the Council and of the representatives of the governments of the Member States on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD) already provides EU MNE Groups in the Union with a method to provide tax authorities with information on global business operations and transfer pricing policies (masterfile) and information on the concrete transactions of the local entity (local file). However, the EU TPD does not provide at present any mechanism for the provision of a country-by-country report.
- (6) In the country-by-country report, MNEs Groups should provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued. MNE Groups should also report number of their employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. Finally, MNE Groups should identify each entity within the group doing business in a particular tax jurisdiction and should provide an indication of the business activities each entity engages in.
- (7) In order to enhance the efficient use of public resources and reduce the administrative burden for MNE Groups, the reporting obligation should only apply to MNE Groups with annual consolidated group revenue exceeding a certain amount. The Directive should ensure that the same information is collected and made available to tax administrations in a timely manner throughout the EU.

- (8) To ensure the proper functioning of the Internal Market, the EU has to provide for fair competition between EU MNE Groups and non-EU MNE Groups for which one or several of their entities are located in the EU. Both of them should therefore be subject to the reporting obligation.
- (9) Member States should lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and should ensure that those penalties are implemented. While the choice of penalties remains within the discretion of the Member States, the penalties provided for should be effective, proportionate and dissuasive.
- (10) To ensure the proper functioning of the internal Market, it is necessary to ensure that Member States adopt coordinated rules on transparency obligations of MNE Groups.
- (11) As regards exchange of information between Member States, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC already provides for the mandatory automatic exchange of information in a number of fields. Its scope should be enlarged to provide for the mandatory automatic exchange of country-by-country reports between Member States.
- (12) The mandatory automatic exchange of country-by-country reports between Member States should in each case include the communication of a defined set of basic information that would be accessible to those Member States in which, on the basis of the information in the country-by-country report, one or more entities of the MNE Group are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment of an MNE Group.

- (13) In order to minimise costs and administrative burdens both for tax administrations and for MNE Groups, it is necessary to provide rules that are in line with the international developments and contribute positively to their implementation. On 19 July 2013 the Organisation for Economic Development and Cooperation (OECD) published an Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan) which is a major initiative for modifying existing international tax rules. On 5 October 2015 the OECD presented its final reports that were endorsed by the G20 Finance Ministers. During the meeting of 15 and 16 November 2015, the OECD package was also endorsed by the G20 leaders.
- (14) The work on Action 13 of the BEPS Action Plan resulted in a set of standards for providing information for MNE Groups, including the masterfile, the local file and the country-by-country report. It is therefore appropriate to take into account the OECD standards when establishing the rules on the country-by-country report.
- (14a) In a situation where a Constituent Entity cannot obtain or acquire all the information required for fulfilling the reporting requirement under this Directive, Member States could consider this as an indication for the need to assess high-level transfer pricing risks and other base erosion and profit shifting risks related to this MNE Group.
- (14b) After a Member state determines that another Member State persistently fails to automatically provide country-by-country reports, it should endeavour to consult that Member State.
- (15) Union action in the area of country-by-country reporting should continue to take particular account of future developments at OECD level. In implementing this Directive, Member States should use the 2015 Final Report on Action 13 of the OECD/G20 Base Erosion and Profit Shifting Project, developed by the OECD, as a source of illustration or interpretation of this Directive and in order to ensure consistency in application across Member States.

- (16) It is necessary to specify linguistic requirements for the exchange of information between Member States on country-by-country report. It is also necessary to adopt the practical arrangements necessary for the upgrading of CCN network. In order to ensure uniform conditions for the implementation of Articles 20(6) and 21(6), implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.
- (17) In order to enhance the efficient use of resources, facilitate the exchange of information and avoid the need for each Member State to make similar adjustments to their systems the exchange of information should be made through the common communication network (CCN) developed by the Union. The practical arrangements necessary for the upgrading of the system should be adopted by the Commission in accordance with the procedure referred to in Article 26(2) of Directive 2011/16/EU.
- (18) The scope of mandatory exchange of information should therefore be extended to include the automatic exchange of information of the country-by-country report.
- (18a) Member States' yearly report to the Commission under Article 23, should detail the extent of local filing under Article 8aa and Point 1, Section 2, Annex III of Directive 2011/16/EU and a list of any jurisdictions where Ultimate Parent Entities of EU-based Constituent Entities are resident, but full reports have not been filed or exchanged.
- (18b) The information exchanged under this directive does not lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.
- (19) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

- (20) Since the objective of this Directive, namely the efficient administrative cooperation between Member States under conditions compatible with the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity and effectiveness required, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (21) Directive 2011/16/EU should therefore be amended accordingly.

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 2011/16/EU is amended as follows:

(1) In Article 3 is amended as follows:

(a) point 9 is replaced by the following

9. 'automatic exchange' means,

- (a) for the purposes of Article 8(1) and Articles 8a and 8aa, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. For the purposes of Article 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State.
- (b) for the purposes of Article 8(3a), the systematic communication of predefined information on residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals.
- (c) for the purposes of provisions of this Directive other than Article 8(1) and 8(3a), Article 8a and Article 8aa, the systematic communication of predefined information provided in points (a) and (b) of this point.”

(b) the following second subparagraph is added:

In the context of Articles 8(3a), 8(7a), 21(2) and 25(2) and (3) any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex I. In the context of Article 8aa and Annex III, any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex III.”

(2) in Section II of Chapter II, the following Article 8aa is inserted:

*"Article 8aa*

Scope and conditions of mandatory automatic exchange of information on country-by-country  
report

1. Each Member State shall take the necessary measures to require the Ultimate Parent Entity of an MNE Group that is resident for tax purposes in its territory, or any other Reporting Entity in accordance with Section II of Annex III, to file a country-by-country report with respect to its Reporting Fiscal Year within 12 months after the last day of the Reporting Fiscal Year of the MNE Group in accordance with Section II of Annex III.
2. The competent authority of a Member State where the Country-by-Country Report was received pursuant to paragraph 1 shall, by means of automatic exchange, communicate the report to any other Member State in which, on the basis of the information in the country-by-country report, one or more Constituent Entities of the MNE Group of the Reporting Entity are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment within the deadline laid down in paragraph 4.
3. The country-by-country report shall contain the following information with respect to the MNE Group:
  - (a) aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates;

- (b) an identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.
4. The communication shall take place within 15 months after the last day of the fiscal year of the MNE Group to which the country-by-country report relates. The first country-by-country report shall be communicated for the fiscal year of the MNE Group commencing on or after 1 January 2016, which shall take place within 18 months after the last day of that fiscal year.
5. [deleted]”;
- (2a) In Article 16, the following paragraph is added:

"6. Notwithstanding paragraphs 1 to 4 of this Article, information communicated between Member States pursuant to Article 8aa shall be used for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks, including assessing the risk of non-compliance by members of the MNE group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis. Transfer pricing adjustments by the tax authorities of the receiving Member State shall not be based on the information exchanged pursuant to Article 8aa. Notwithstanding the above, there is no prohibition on using the information communicated between Member States pursuant to Article 8aa as a basis for making further enquiries into the MNE Group's transfer pricing arrangements or into other tax matters in the course of a tax audit and, as a result, appropriate adjustments to the taxable income of a Constituent Entity may be made.";

(3) In Article 20, the following paragraph is added:

6. The automatic exchange of information on country-by-country report pursuant to Article 8aa shall be carried out using the standard form provided in Tables 1, 2 and 3 of Section III of Annex III. The Commission shall, by means of implementing acts, adopt the linguistic arrangements for that exchange by 31 December 2016. They shall not preclude Member States from communicating information referred to in Article 8aa in any of the official and working language of the Union. However, those linguistic arrangements may provide that the key elements of such information are sent also in another official language of the Union. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2).”;

(4) In Article 21, the following paragraph is added:

“6. Information communicated pursuant to Article 8aa (2) shall be provided by electronic means using the CCN network. The Commission shall, by means of implementing acts, adopt the necessary practical arrangements for the upgrading of the CCN network. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2).”;

(5) In Article 23, paragraph 3 is replaced by the following:

“3. Member States shall communicate to the Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in Article 8, Article 8a and 8aa as well as the practical results achieved. The Commission shall, by means of implementing acts, adopt the form and the conditions of communication of that yearly assessment. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).”;

- (6) The following Article 25a is inserted:

"Article 25a

Penalties

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive concerning Article 8aa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.”;

- (7) Article 26 is replaced by the following:

“Article 26

Committee procedure

1. The Commission shall be assisted by the Committee on administrative cooperation for taxation. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>(\*)</sup>.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

<sup>(\*)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13.)”;

- (8) Annex III, the text of which is set out in the Annex to this Directive, is added.

*Article 2*

1. Member States shall adopt and publish, by [DATE: 12 months after the date of entry into force of this Directive], the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those measures from [DATE: 12 months after the date of entry into force of this Directive + 1 day].

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 3*

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

*Article 4*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council  
The President*

## ANNEX III

## Filing rules for Groups of multinational enterprises

## SECTION I

## DEFINED TERMS

1. The term "Group" means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange.
2. The term "Enterprise" means any form of conducting business by any person referred to in points (b), (c) and (d) of Article 3 point 11.
3. The term "MNE Group" means any Group that includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and is not an Excluded MNE Group.
4. The term "Excluded MNE Group" means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than EUR 750 000 000 or an amount in local currency approximately equivalent to EUR 750 000 000 as of January 2015 during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

5. The term "Constituent Entity" means any of the following:

(a) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;

(b) any such business unit that is excluded from the MNE Group's Consolidated Financial Statements solely on size or materiality grounds;

(c) any permanent establishment of any separate business unit of the MNE Group included in (a) or (b) provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

6. The term "Reporting Entity" means the Constituent Entity that is required to file a country-by-country report conforming to the requirements in Article 8aa (3) in its jurisdiction of tax residence on behalf of the MNE Group. The Reporting Entity may be the Ultimate Parent Entity, the Surrogate Parent Entity, or any entity described in point 1 of Section II.

7. The term "Ultimate Parent Entity" means a Constituent Entity of an MNE Group that meets the following criteria:

(a) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of such MNE Group such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence;

(b) there is no other Constituent Entity of such MNE Group that owns directly or indirectly an interest described in point (a) in the first mentioned Constituent Entity.

8. The term "Surrogate Parent Entity" means one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as a sole substitute for the Ultimate Parent Entity, to file the country-by-country report in that Constituent Entity's jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in point b) of point 1 of Section II apply.
9. The term "Fiscal Year" means an annual accounting period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements.
10. The term "Reporting Fiscal Year" means that Fiscal Year the financial and operational results of which are reflected in the country-by-country report referred to in Article 8aa(3).
11. The term "Qualifying Competent Authority Agreement" means an agreement that is between authorised representatives of an EU Member State and a non-Union jurisdictions that are parties to an International Agreement and that requires the automatic exchange of country-by-country reports between the party jurisdictions.
12. The term "International Agreement" means the Multilateral Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement to which the Member State is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.
13. The term "Consolidated Financial Statements" means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity.
14. The term "Systemic Failure" with respect to a jurisdiction means either that a jurisdiction has a Qualifying Competent Authority Agreement in effect with a Member State but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement), or that a jurisdiction otherwise persistently failed to automatically provide to a Member State country-by-country reports in its possession of MNE Groups that have Constituent Entities in that Member State.

## SECTION II

### GENERAL REPORTING REQUIREMENTS

1. A Constituent Entity resident in a Member State which is not the Ultimate Parent Entity of an MNE Group shall file a country-by-country report with respect to the Reporting Fiscal Year of an MNE Group of which it is a Constituent Entity, if the following criteria are satisfied:
  - (a) the entity is resident for tax purposes in a Member State;
  - (b) one of the following conditions applies:
    - i. the Ultimate Parent Entity of the MNE Group is not obligated to file a country-by-country report in its jurisdiction of tax residence;
    - ii. the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has a current International Agreement to which the Member State is a party but does not have a Qualifying Competent Authority Agreement in effect to which the Member State is a party by the time specified in Article 8aa (1) for filing the country-by-country report for the Reporting Fiscal Year;
    - iii. there has been a Systemic Failure of the jurisdiction of tax residence of the Ultimate Parent Entity that has been notified by the Member State to the Constituent Entity resident for tax purposes in the Member State.

A Constituent Entity resident in a Member State as defined in paragraph 1 shall request its Ultimate Parent Entity to provide it with all information required to enable it to meet its obligations to file a country-by-country report, in accordance with Article 8aa(3). If despite that, that Constituent Entity has not obtained or acquired all the required information to report for the MNE Group, this Constituent Entity shall file a country-by-country report containing all information in its possession, obtained or acquired, and notify the Member State of its residence that the Ultimate Parent Entity has refused to make the necessary information available. This shall be without prejudice to the right of the Member State concerned to apply penalties provided for in its national legislation and this Member State shall inform all Member States of this refusal.

Where there are more than one Constituent Entities of the same MNE Group that are resident for tax purposes in the Union and one or more of the conditions set out in point (b) apply, the MNE Group may designate one of such Constituent Entities to file the country-by-country report conforming to the requirements of Article 8aa(3) with respect to any Reporting Fiscal Year within the deadline specified in Article 8aa(1) and to notify the Member State that the filing is intended to satisfy the filing requirement of all the Constituent Entities of such MNE Group that are resident for tax purposes in the Union. That Member State shall, pursuant to Article 8aa(2), communicate the country-by-country report received to any other Member State in which, on the basis of the information in the country-by-country report, one or more Constituent Entities of the MNE Group of the Reporting Entity are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment.

Where a Constituent Entity cannot obtain or acquire all the information required to file a country-by-country report, in line with Article 8aa(3), then such Constituent Entity shall not be eligible to be designated to be the reporting entity for the MNE Group in accordance with the third paragraph of this point. This rule shall be without prejudice to the obligation of the Constituent Entity to notify the Member State of its residence that the Ultimate Parent Entity has refused to make the necessary information available.

2. By derogation from point 1, when one or more of the conditions set out in point b of point 1 apply, an entity described in point 1 shall not be required to file a country-by-country report with respect to any Reporting Fiscal Year if the MNE Group of which it is a Constituent Entity has made available a country-by-country report in accordance with Article 8aa(3) with respect to such Fiscal Year through a Surrogate Parent Entity that files that country-by-country report with the tax authority of its jurisdiction of tax residence on or before the date specified in Article 8aa(1) and that, in case the Surrogate Parent Entity is tax resident in a jurisdiction outside the Union, satisfies the following conditions:
- a) the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of country-by-country reports conforming to the requirements of Article 8aa(3);
  - b) the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect to which the Member State is a party by the time specified in Article 8aa(1) for filing the country-by-country report for the Reporting Fiscal Year;
  - c) the jurisdiction of tax residence of the Surrogate Parent Entity has not notified the Member State of a Systemic Failure;
  - d) the jurisdiction of tax residence of the Surrogate Parent Entity has been notified no later than the last day of the Reporting Fiscal Year of such MNE Group by the Constituent Entity resident for tax purposes in its jurisdiction that it is the Surrogate Parent Entity;
  - e) a notification has been provided to the Member State in accordance with point 4.
3. Member States shall request that any Constituent Entity of an MNE Group that is resident for tax purposes in that Member State notifies the Member State whether it is the Ultimate Parent Entity or the Surrogate Parent Entity or the Constituent entity referred to in point 1, no later than the last day of the Reporting Fiscal Year of such MNE Group. Member States may extend that deadline to the last day for filing of a tax return of that Constituent Entity on the preceding fiscal year.

4. Member States shall request that where a Constituent Entity of an MNE Group, that is resident for tax purposes in that Member State, is not the Ultimate Parent Entity nor the Surrogate Parent Entity nor the Constituent entity referred to in point 1, it shall notify the Member State of the identity and tax residence of the Reporting Entity, no later than the last day of the Reporting Fiscal Year of such MNE Group. Member States may extend that deadline to the last day for filing of a tax return of that Constituent Entity on the preceding fiscal year.
5. The country-by-country report shall specify the currency of the amounts referred to in that report.



**Table 2** List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction

Name of the MNE group: Fiscal year concerned:														
Tax Jurisdiction	Constituent Entities Resident in the Tax Jurisdiction	Tax Jurisdiction of Organisation or Incorporation if Different from Tax Jurisdiction of Residence	Main Business Activity(ies)											
			Research and Development	Holding or Managing Intellectual Property	Purchasing or Procurement	Manufacturing or Production	Sales, Marketing or Distribution	Administrative, Management or Support Services	Provision of Services to Unrelated Parties	Internal Group Finance	Regulated Financial Services	Insurance	Holding Shares or Other Equity Instruments	Dormant
	1.													
	2.													
	3.													
	1.													
	2.													
	3.													

<sup>1</sup> Please specify the nature of the activity of the Constituent Entity in the “Additional Information”

**Table 3:** Additional Information

Name of the MNE group: Fiscal year concerned:
<i>Please include any further brief information or explanation you consider necessary or that would facilitate the understanding of the compulsory information provided in the country-by-country Report</i>

## **B. General instructions for filling in the country-by-country report**

### 1. Purpose

The template shall be used for reporting a multinational enterprise's (MNE) group allocation of income, taxes and business activities on a tax jurisdiction-by-tax jurisdiction basis.

### 2. Treatment of Branches and Permanent Establishments

The permanent establishment data shall be reported by reference to the tax jurisdiction in which it is situated and not by reference to the tax jurisdiction of residence of the business unit of which the permanent establishment is a part. Residence tax jurisdiction reporting for the business unit of which the permanent establishment is a part shall exclude financial data related to the permanent establishment.

### 3. Period covered by the annual template

The template shall cover the fiscal year of the Reporting MNE. For Constituent Entities, at the discretion of the Reporting MNE, the template shall reflect on a consistent basis either of the following information:

(a) information for the fiscal year of the relevant Constituent Entities ending on the same date as the fiscal year of the Reporting MNE, or ending within the 12 month period preceding such date;

(b) information for all the relevant Constituent Entities reported for the fiscal year of the Reporting MNE.

#### 4. Source of data

The Reporting MNE shall consistently use the same sources of data from year to year in completing the template. The Reporting MNE may choose to use data from its consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts. It is not necessary to reconcile the revenue, profit and tax reporting in the template to the consolidated financial statements. If statutory financial statements are used as the basis for reporting, all amounts shall be translated to the stated functional currency of the Reporting MNE at the average exchange rate for the year stated in the Additional Information section of the template. Adjustments need not be made, however, for differences in accounting principles applied from tax jurisdiction to tax jurisdiction.

The Reporting MNE shall provide a brief description of the sources of data used in preparing the template in the Additional Information section of the template. If a change is made in the source of data used from year to year, the Reporting MNE shall explain the reasons for the change and its consequences in the Additional Information section of the template.

### **C. Specific instructions for filling in the Country-by-Country Report**

#### **1. Overview of allocation of income, taxes and business activities by tax jurisdiction (Table 1)**

##### 1.1. Tax Jurisdiction

In the first column of the template, the Reporting MNE shall list all of the tax jurisdictions in which Constituent Entities of the MNE group are resident for tax purposes. A tax jurisdiction is defined as a State as well as a non-State jurisdiction which has fiscal autonomy. A separate line shall be included for all Constituent Entities in the MNE group deemed by the Reporting MNE not to be resident in any tax jurisdiction for tax purposes. Where a Constituent Entity is resident in more than one tax jurisdiction, the applicable tax treaty tie breaker shall be applied to determine the tax jurisdiction of residence. Where no applicable tax treaty exists, the Constituent Entity shall be reported in the tax jurisdiction of the Constituent Entity's place of effective management. The place of effective management shall be determined with internationally agreed standards.

## 1.2. Revenues

In the three columns of the template under the heading 'Revenues', the Reporting MNE shall report the following information:

(a) the sum of revenues of all the Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with associated enterprises;

(b) the sum of revenues of all the Constituent Entities of the MNE group in the relevant tax jurisdiction generated from transactions with independent parties;

(c) the total of the sums referred to in points (a) and (b).

Revenues shall include revenues from sales of inventory and properties, services, royalties, interest, premiums and any other amounts. Revenues shall exclude payments received from other Constituent Entities that are treated as dividends in the payer's tax jurisdiction.

## 1.3. Profit (Loss) before Income Tax

In the fifth column of the template, the Reporting MNE shall report the sum of the profit (loss) before income tax for all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. The profit (loss) before income tax shall include all extraordinary income and expense items.

## 1.4. Income Tax Paid (on Cash Basis)

In the sixth column of the template, the Reporting MNE shall report the total amount of income tax actually paid during the relevant fiscal year by all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. Taxes paid shall include cash taxes paid by the Constituent Entity to the residence tax jurisdiction and to all other tax jurisdictions. Taxes paid shall include withholding taxes paid by other entities (associated enterprises and independent enterprises) with respect to payments to the Constituent Entity. Thus, if company A resident in tax jurisdiction A earns interest in tax jurisdiction B, the tax withheld in tax jurisdiction B shall be reported by company A.

### 1.5. Income Tax Accrued (Current Year)

In the seventh column of the template, the Reporting MNE shall report the sum of the accrued current tax expense recorded on taxable profits or losses of the year of reporting of all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. The current tax expense shall reflect only operations in the current year and shall not include deferred taxes or provisions for uncertain tax liabilities.

### 1.6. Stated Capital

In the eighth column of the template, the Reporting MNE shall report the sum of the stated capital of all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. With regard to permanent establishments, the stated capital shall be reported by the legal entity of which it is a permanent establishment unless there is a defined capital requirement in the permanent establishment tax jurisdiction for regulatory purposes.

### 1.7. Accumulated Earnings

In the ninth column of the template, the Reporting MNE shall report the sum of the total accumulated earnings of all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction as of the end of the year. With regard to permanent establishments, accumulated earnings shall be reported by the legal entity of which it is a permanent establishment.

## 1.8. Number of Employees

In the tenth column of the template, the Reporting MNE shall report the total number of employees on a full-time equivalent (FTE) basis of all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. The number of employees may be reported as of the year-end, on the basis of average employment levels for the year, or on any other basis consistently applied across tax jurisdictions and from year to year. For this purpose, independent contractors participating in the ordinary operating activities of the Constituent Entity may be reported as employees. Reasonable rounding or approximation of the number of employees is permissible, providing that such rounding or approximation does not materially distort the relative distribution of employees across the various tax jurisdictions. Consistent approaches shall be applied from year to year and across entities.

## 1.9. Tangible Assets other than Cash and Cash Equivalents

In the eleventh column of the template, the Reporting MNE shall report the sum of the net book values of tangible assets of all the Constituent Entities resident for tax purposes in the relevant tax jurisdiction. With regard to permanent establishments, assets shall be reported by reference to the tax jurisdiction in which the permanent establishment is situated. Tangible assets for this purpose do not include cash or cash equivalents, intangibles, or financial assets.

## **2. List of all the Constituent Entities of the MNE group included in each aggregation per tax jurisdiction (Table 2)**

### 2.1. Constituent Entities Resident in the Tax Jurisdiction

The Reporting MNE shall list, on a tax jurisdiction-by-tax jurisdiction basis and by legal entity name, all the Constituent Entities of the MNE group which are resident for tax purposes in the relevant tax jurisdiction. As stated in point 2 of the General instructions with regard to permanent establishments, however, the permanent establishment shall be listed by reference to the tax jurisdiction in which it is situated. The legal entity of which it is a permanent establishment shall be noted.

## 2.2. Tax Jurisdiction of Organisation or Incorporation if Different from Tax Jurisdiction of Residence

The Reporting MNE shall report the name of the tax jurisdiction under whose laws the Constituent Entity of the MNE is organised or incorporated if it is different from the tax jurisdiction of residence.

## 2.3. Main Business Activity(ies)

The Reporting MNE shall determine the nature of the main business activity(ies) carried out by the Constituent Entity in the relevant tax jurisdiction, by ticking one or more of the appropriate boxes.”

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