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Proposal for a

COUNCIL DIRECTIVE

amending Directive 2011/16/EU to address the urgent need for deferring certain time limits for the filing and exchange of information in the field of taxation due to the COVID-19 pandemic

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The COVID-19 outbreak is a severe public health crisis which has affected all Member States. It poses a major challenge for public health care systems and is likely to have severe implications for the Union's economies for an extended period of time. This situation creates an overwhelming disruption in the life of citizens and businesses, who struggle to carry out their activities due notably to the constraints linked to the lockdowns in many Member States.

In light of these unprecedented circumstances, a number of Member States and persons liable to report information under Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation¹ have requested the deferral of certain deadlines for the filing and exchanging of information under this Directive. More specifically, the requests for deferral pertain to automatic exchanges of information on financial accounts of which the beneficiaries are tax resident in another Member State² and reportable cross-border arrangements³ that feature in Annex IV to Council Directive 2011/16/EU. The severe disruption caused by the COVID-19 pandemic hampers the timely compliance of financial institutions and of the persons liable to report cross-border arrangements and affect negatively the capacity of Member States' tax administrations to collect and process the data.

This situation requires an urgent and coordinated response within the Union and where relevant at global level. In this regard, it would be useful to take into account the initiative of the Steering Group of the Global Forum with respect to the common reporting standard (CRS) for Reporting Financial Institutions, the latter being transposed in Union law via Council Directive (EU) 2014/107.

It is therefore necessary to defer the deadline for the exchange of information on financial accounts of which the beneficiaries are tax resident in another Member State. This would accordingly allow Member States to adjust their national deadlines for the filing of such information by the Reporting Financial Institutions. In the same vein, the deadlines for filing and exchanging information on cross-border arrangements under Annex IV of Council Directive 2011/16/EU should also be extended.

Meanwhile, it should also be recalled that the exchange of information on financial accounts of which the beneficiaries are tax resident in another Member State and on reportable cross-border arrangements under Annex IV to Council Directive 2011/16/EU is crucial in the fight against tax avoidance and tax evasion in the Union. Member States will need tax revenues to finance their considerable efforts to contain the negative economic impact of the measures against the COVID-19 pandemic. Ensuring tax fairness by preventing tax avoidance and tax evasion becomes more important than ever. While the current crisis calls for adjusting the calendar for filing and transmitting some tax data, it should not lead to relinquishing the efforts of national administrations for ensuring fair taxation.

¹ OJ L 64, 11.3.2011, p. 1.

² Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.2.2014, p. 1).

³ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5.6.2018, p. 1–13).

The length of the deferral should not disrupt the established structure and functioning of Council Directive 2011/16/EU. Rather, it should be of limited duration, in proportion to the practical difficulties caused by a temporary lockdown aiming at containing the pandemic.

Considering the current uncertainty about the evolution of the COVID-19 pandemic, it is useful to provide for the possibility of one further extension of the deferral period for filing and exchanging information. This would be necessary if during part or all of the period of deferral, the exceptional circumstances of severe risks for public health caused by the COVID-19 pandemic persist and Member States have to either implement new or continue existing lockdown measures. Such extension should not disrupt the established structure and functioning of Council Directive 2011/16/EU. Rather, it should be of a limited and pre-determined duration in proportion to the practical difficulties caused by the temporary lockdown. The extension should not affect the essential elements of the obligation to report and exchange information under this Directive. It may merely extend the deferral of the deadline for complying with such obligations while ensure that no information remains without eventually being exchanged.

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

Since the beginning of the COVID-19 outbreak, the Commission has received a considerable number of questions and requests and has embarked on a number of initiatives in order to mitigate the impact of the crisis. In this context, DG TAXUD has already taken several decisions, mainly in the area of Customs and VAT, in order to urgently resolve problems or at least provide reassurance. These are summarized on the TAXUD website ([COVID-19 TAXUD response⁴](#)).

The proposed initiative is consistent with the measures adopted by the Commission to take into account the exceptional present difficulties faced by businesses and national tax administrations. It responds to the requests made by a number of persons liable to file information under Council Directive 2011/16/EU and by Member States for deferring the time limits for filing and exchanging information under Council Directive 2011/16/EU.

The proposed initiative is also aligned with that of the Steering Group of the Global Forum concerning the CRS for Reporting Financial Institutions to extend the deadline for the exchange of information from the end of September 2020 to the end of December 2020.

The Council also organised an informal meeting with Member States on 29 April 2020 where all Member States agreed on the need to defer the filing and exchange of information requirements under Council Directive 2011/16/EU.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Articles 113 and 115 of the Treaty on the Functioning of the European Union (TFEU) constitute the legal base of this legislative initiative. Most initiatives linked to harmonising or coordinating the legal framework in the field of direct taxation rely on Article 115 TFEU, whilst indirect tax is dealt with under Article 113 TFEU. The proposed rules aim at amending the specific time limits for filing and exchanging certain information (information on financial accounts and reportable cross-border arrangements), to take into account the current difficulties in complying with the obligations under Council Directive 2011/16/EU due to the

⁴ https://ec.europa.eu/taxation_customs/covid-19-taxud-response_en

COVID-19 crisis. Considering that reportable cross-border arrangements may relate to both direct and indirect tax schemes, both legal bases are relevant to the proposed rules.

- **Subsidiarity (for non-exclusive competence)**

The proposal fully observes the principle of subsidiarity as set out in Article 5 TFEU. It addresses administrative cooperation in the field of taxation. Legal certainty and clarity for the application of the deferral of certain deadlines under the Directive can only be ensured if there is a coordinated approach to the identified problem across Member States.

- **Proportionality**

The proposal consists of adjusting existing provisions of the Directive regarding the deadlines applicable for the filing and exchange of certain information, in order to address challenges that persons liable to report information and tax administrations are facing due to the current COVID-19 outbreak. The adjustments do not go beyond what is necessary to achieve the objective of administrative cooperation between Member States. They provide for a deferral, which takes into account the length of confinement/ lockdown measures, and ensure that no information which becomes reportable during the period of deferral will be left unreported or without being exchanged.

- **Choice of the instrument**

The legal base for this proposal (Article 115 TFEU) lays down explicitly that legislation in this field may only be enacted in the legal form of a Directive.

The proposed Directive also constitutes the sixth amendment to Council Directive 2011/16/EU and follows Council Directives (EU) 2014/107/EU, 2015/2376, 2016/881, 2016/2258 and 2018/822.

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

- **Fundamental rights**

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

4. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL

The Directive proposes changes to certain time limits for filing and exchanging information under Council Directive 2011/16/EU, more specifically concerning information on financial accounts as provided by Council Directive 2014/107/EU and reportable cross-border arrangements as provided by Council Directive 2018/822/EU.

The proposed rules:

- Defer the time limit for exchanges of information on Reportable Financial Accounts by 3 months, i.e. until 31 December 2020;
- Change the date for the first exchange of information on reportable cross-border arrangements that feature in Annex IV to Council Directive 2011/16/EU from 31 October 2020 to 31 January 2021;

- Change the date for the beginning of the period of 30 days for reporting cross-border arrangements which are included in Hallmarks listed in Annex IV to Council Directive 2018/822/EU from 1 July 2020 to 1 October 2020;
- Change the date for the reporting of the ‘historical’ cross-border arrangements (i.e. arrangements that became reportable from 25 June 2018 to 30 June 2020) from 31 August 2020 to 30 November 2020.

Considering the current uncertainty regarding the evolution of the COVID-19 pandemic, the proposed initiative provides for the possibility of extending once the deferral period for the filing and exchange of information. The Commission will be empowered to give such extension by way of delegated acts.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 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 Parliament⁵,

Having regard to the opinion of the European Economic and Social Committee⁶,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The lockdown measures imposed by Member States to help contain the COVID-19 pandemic have an important disruptive effect on the capacity of businesses and tax administrations to carry out some of their obligations under Council Directive 2011/16/EU⁷.
- (2) A number of Member States and persons liable to report information to the competent authorities of Member States under Directive 2011/16/EU have requested the deferral of certain time limits laid down in that Directive for automatic exchanges of information on financial accounts of which the beneficiaries are tax resident in another Member State, as well as on reportable cross-border arrangements included in the Hallmarks listed in Annex IV to that Directive⁸.
- (3) The severe disruption caused by the COVID-19 pandemic in the activity of financial institutions and of the persons who are liable to report cross-border arrangements hampers the timely compliance with their reporting obligations under Directive 2011/16/EU. Financial institutions are currently faced with urgent tasks related to COVID-19. Furthermore, financial institutions and the persons liable to report cross-border arrangements included in the Hallmarks listed in Annex IV are faced with several work-related disruptions, primarily due to the remote working conditions

⁵ OJ C , , p. .

⁶ OJ C , , p. .

⁷ 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).

⁸ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5.6.2018, p. 1).

because of the lockdown in most Member States. Similarly, the capacity of Member States' tax administrations to collect and process the data is negatively affected.

- (4) This situation requires an urgent and coordinated response within the Union. For this purpose, it is necessary to defer the time limit for the exchange of information on financial accounts of which the beneficiaries are tax resident in another Member State in order to allow Member States to adjust their national time limits for the filing of such information by the Reporting Financial Institutions. In the same vein, the time limits for filing and exchanging information on cross-border arrangements included in the Hallmarks listed in Annex IV to Directive 2011/16/EU should also be extended.
- (5) In order to determine the length of the deferral, it is necessary to consider that this aims to address an exceptional situation and should not disrupt the established structure and functioning of Directive 2011/16/EU. Consequently, it would be appropriate to limit the deferral to a duration that is proportional to the difficulties caused by the COVID-19 pandemic for filing and exchanging information.
- (6) Considering the current uncertainty about the evolution of the COVID-19 pandemic, it would also be useful to provide for the possibility of one further extension of the deferral period for the filing and exchange of information. This would be necessary if during part or all of the period of deferral, the exceptional circumstances of severe risks for public health caused by the COVID-19 pandemic persist and Member States have to either implement new or continue existing lockdown measures. Such extension should not disrupt the established structure and functioning of Council Directive 2011/16/EU. Rather, it should be of a limited and pre-determined duration in proportion to the practical difficulties caused by the temporary lockdown. The extension should not affect the essential elements of the obligation to report and exchange information under this Directive. It may merely extend the deferral of the time limit for complying with such obligations while ensure that no information remains without eventually being exchanged.
- (7) Directive 2011/16/EU should therefore be amended accordingly.
- (8) Considering that the measures laid down in this Directive concern obligations laid down in Directive 2011/16/EU which would otherwise become applicable within a short period of time, this Directive should enter into force as a matter of urgency,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2011/16/EU is amended as follows:

- (1) Article 8ab is amended as follows:
 - (a) paragraph 12 is replaced by the following:

‘12. Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 30 November 2020.’;
 - (b) paragraph 18 is replaced by the following:

‘18. The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed. The first information shall be communicated by 31 January 2021.’.

(2) The following Articles are inserted:

Article 27a

Deferral of time limits in response to COVID-19

1. Notwithstanding the time limit laid down in point (b) of Article 8(6), the communication of information laid down in Article 8(3a) that relates to calendar year 2019 or other appropriate reporting period, shall take place within 12 months following the end of calendar year 2019 or other appropriate reporting period.
2. Where a reportable cross-border arrangement is made available for implementation, or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and 30 September 2020, or where intermediaries referred to in the second paragraph of point 21 of Article 3 provided, directly or by means of other persons, aid, assistance or advice between 1 July 2020 and 30 September 2020, the period of 30 days for filing information laid down in paragraphs 1 and 7 of Article 8ab shall begin by 1 October 2020.

In the case of marketable arrangements, the first periodic report in accordance with Article 8ab(2) shall be made by the intermediary by 31 January 2021.

Article 27b

Extension of the period of deferral

The Commission shall be empowered to adopt a delegated act, in accordance with Article 27c, in order to extend the period of deferral for filing and exchanging information, as provided for in paragraphs 12 and 18 of Article 8ab and in Article 27a, for a maximum of 3 additional months.

The Commission may only adopt the delegated act mentioned in the first subparagraph if during part or all of the period of deferral, the exceptional circumstances of severe risks for public health caused by the COVID-19 pandemic persist and Member States have to implement lockdown measures.

Article 27c

Exercise of delegation

1. The power to adopt the delegated act referred to in Article 27b shall be conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt the delegated act referred to in Article 27b shall be conferred on the Commission only for the period of deferral of the time limits for filing and exchanging information, as provided for in paragraphs 12 and 18 of Article 8ab and in Article 27a.
3. The delegation of power referred to in Article 27b may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the

publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of the delegated act if already in force.

4. Before adopting the delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-institutional Agreement on better law making of 13 April 2016.
5. As soon as it adopts the delegated act, the Commission shall notify it to the Council. The notification of the delegated act to the Council shall state the reasons for the use of the urgency procedure.
6. The delegated act adopted pursuant to Article 27b shall enter into force without delay and shall apply as long as no objection is expressed by the Council. The Council may object to the delegated act within five working days of the notification of that act. In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the Council.
7. The European Parliament shall be informed of the adoption of a delegated act by the Commission, of any objection formulated to it and of the revocation of a delegation of powers by the Council.’.

Article 2

1. Member States shall adopt and publish, by 31 May 2020 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 1 June 2020.

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

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

Article 3

This Directive shall enter into force on the day following that 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*