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**COMMISSION STAFF WORKING DOCUMENT**

**Subsidiarity grid**

***Accompanying the document***

**Proposal for a Council Directive**

**amending Directive 2011/16/EU on administrative cooperation in the field of taxation**

{COM(2020) 314 final} - {SEC(2020) 271 final} - {SWD(2020) 130 final} -
{SWD(2020) 131 final}

## 1. Can the Union act? What is the legal basis and competence of the Unions' intended action?

**1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?**

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. Furthermore, given that the information exchanged under the Directive can be also used in the field of VAT and other indirect taxes, Article 113 of the TFEU is also quoted as a legal base.

**1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?**

In the case of direct taxation as far as the proposal relates to the establishment or functioning of the internal market, the Union's competence is shared.

## 2. Subsidiarity Principle: Why should the EU act?

**2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[1]:**

- Has there been a wide consultation before proposing the act?
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

There has been an extensive consultation process while preparing the current proposal. As the proposed legislation amends existing provisions of the Directive, the "evaluate principle" was applied.

- Evaluations of existing legislation

  In 2019, the Commission evaluated the effectiveness, efficiency, relevance, coherence and additional value of the Directive on administrative cooperation in the field of direct taxation. The evaluation concluded that cooperation brings about important benefits, yet there is still scope for improvement. It demonstrated that differences persist in the way Member States exploit the available tools of administrative cooperation. The information exchanged could be used more efficiently and the benefits of cooperation could be analysed in a more comprehensive manner. Building upon the evaluation, this legislative proposal presents a limited set of specific interventions to improve the functioning of administrative cooperation.

The following consultation activities were carried out:

- Stakeholder consultations

  On 10 February 2020 the European Commission launched a Public Consultation to gather feedback on the way forward for EU action on strengthening the exchange of information framework in the field of taxation. A number of possible options were presented and stakeholders gave their feedback in a total of 37 responses. In addition, the European Commission carried out targeted consultations with national administrations and also with platform operators. There was a consensus on the benefits of having a standardised EU legal framework for gathering information from platforms, as compared to several disparate national reporting rules.

- Member States' consultations

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

The European Commission carried out targeted consultations via a questionnaire for the Member States. In addition, on 26 February 2020, DG TAXUD organized a meeting of Working Party IV and Member States had the opportunity to debate a possible proposal for an amendment to the Directive. The meeting focused on the reporting and exchange of information on income earned through digital platforms.

Overall, broad support was recorded for a possible EU initiative for the exchange of information on income earned by Sellers via digital platforms. Member States favoured a broad scope for the new legal framework that in addition to income from renting immovable property and the provision of personal services, would also include the sale of goods, rentals of any mode of transport and crowdfunding services.

- Outcome of consultations

Both public and targeted consultations seem to converge on the challenges that the new rules on digital platforms should aim to tackle: underreporting in the digital platform economy and inefficiencies in the current EU administrative cooperation framework, such as in the field of joint audits.

The explanatory memorandum and the impact assessment include a section on the principle of subsidiarity, for details see question 2.2 below.

**2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?**

The proposal fully observes the principle of subsidiarity as set out in Article 5 TFEU. It addresses administrative cooperation in the field of taxation. This includes certain modifications in the rules to improve the functioning of the existing provisions that deal with cross-border cooperation between tax administrations from different Member States. The proposal also involves extending the scope of automatic exchange of information to platform operators by placing an obligation on them to report on the income earned by sellers of goods and services who make use of the relevant platforms.

The application of existing provisions of the Directive has shown significant discrepancies among Member States. While some Member States are willing to fully cooperate and exchange information, other Member States take a restrictive approach or even reject exchanges of information. Further, certain provisions have proved insufficient for addressing the needs of tax administrations in cooperating with other Member State(s) over time.
In addition, the increased use of digital platforms for providing services and selling goods has led to inconsistent declarations of income by sellers, which poses a high risk of tax evasion. While several Member States have imposed a reporting obligation in their national law and/or through administrative guidance, experience shows that national provisions against tax evasion cannot be fully effective, especially when the targeted activities are carried out cross-border.

Legal certainty and clarity can only be ensured by addressing these inefficiencies through a single set of rules to apply to all Member States. The internal market needs a robust mechanism to address these loopholes in a uniform fashion and rectify existing distortions by ensuring that tax authorities receive appropriate information on a timely basis. Considering that the reporting obligation with respect to the income earned via the use of digital platforms aims to primarily inform tax authorities about activities with a dimension beyond a single jurisdiction, it is 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.

Therefore, the EU is better placed than individual Member States to address the problems identified and ensure the effectiveness and completeness of the system for the exchange of information and administrative cooperation.. First, it will ensure a consistent application of the rules across the EU. Second, all digital platforms in scope will be subject to the same reporting requirements. Third, the reporting will be accompanied with exchange of information and, as such, enable the tax administrations to obtain a comprehensive set of information regarding the income earned through a digital platform.

**2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?**

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

One of the main problems which needs to be addressed with this initiative is under-reporting (or lack of reporting overall) by platform sellers. At present, a sizeable amount of earnings obtained via digital platforms remains unknown to tax administrations and untaxed. The initiative is meant to improve the ability of Member States to detect and counter cross-border tax avoidance and evasion. With respect to the income earned via the use of digital platforms, it is possible to generalise and to estimate the tax gap for the whole EU. The impact assessment accompanying this initiative estimates the tax gap in all sectors (goods and services) in 2018 to be between €2.7 billion (lower bound) and €7.1 billion (upper bound)[2] The trend for the income earned through digital plaforms over the last 5 years has been an increasing one.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[3] or significantly damage the interests of other Member States?

National actions could potentially damage the interest of other Member States. For example, if a Member State applies the standards of the administrative cooperation and exchange of information stricter than other Member States, this can lead to impaired cooperation among the Member States. In addition, national actions would not be sufficient to address the problem in its entirety as the legislative proposal introduces not only a reporting requirement for platforms with respect to the income earned through their use, but also the mandatory exchange of this information in cross-border scenarios.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

Member States can individually impose domestic reporting measures. However, in some Member States, there is no legislation for self-initiated third party reporting whatsoever while in other countries the current state of legislation does not cover all the platforms from where their residents gain their income. In addition, there are uncertainties as to whether reporting obligations based on domestic legislation can be enforced to platforms that are neither registered nor have a permanent establishment in the regulating jurisdiction.
The Member States cannot unilaterally impose the appropriate measures for exchange of information and administrative cooperation. Therefore, the nature of the measure is not compatible with unilateral action at national level, which would not as such lead to

[2] Impact Assessment, p 28.
[3] https://europa.eu/european-union/about-eu/eu-in-brief_en

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| achievement of its objectives. |
| (d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU? |
| Tax administrations have in several cases decided to act, on their own, to try to tackle this problem by introducing national reporting requirements for platforms regarding the income earned by sellers through the use of these platforms. Fragmentation may result in unnecessary burdens on digital platforms. The business environment becomes more complicated, with various national reporting models, higher compliance and administrative costs, without sufficiently tackling the issue. |
| (e) Is the problem widespread across the EU or limited to a few Member States? |
| The problem linked to the absence of a reporting obligation of income earned via the digital platforms is more emphasized in some Member States than others as a result of different approaches to the national regulation of the matter. However, the problem related to the lack of reporting is widespread across the EU as the sellers are located and active in all Member States. Given the flexible and cross-border nature of the subject matter, this problem affects all other Member States which cannot efficiently cooperate or exchange information amongst themselves. |
| (f) Are Member States overstretched in achieving the objectives of the planned measure? |
| As the proposed legislation improves the existings provisions of administrative cooperation and exchange of information, it is expected that the Member State will be required to build upon existing tools and systems. In addition, the proposed legislation adds a reporting requirement for income earned via the digital platforms. Several Member States already have domestic legislation and/or administrative guidance in place, but this has proved not to be sufficient for achieving the desired goals. Therefore, building upon existing tools and making those more efficient while, at the same time, standardizing reporting obligations on income earned via the digital platforms, does not overburden the Member States. |
| (g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU? |
| All Member States agreed that improvements in the existing provisions of the Directive should be done via an amending directive. National, regional and local authorities have expressed this concern during the evaluation and also in the expert group refered to as ACDT, organized by the Commission, which meets biannually. A broad support was recorded also for a possible EU initiative for the exchange of information on income earned by sellers via digital platforms. Member States favoured a broad scope for the new legal framework so that, in addition to income from renting immovable property and the provision of personal services, it would also include the sale of goods, rentals of any mode of transport and crowdfunding services. |
| **2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?** |
| (a) Are there clear benefits from EU level action? |
| An action at the level of the EU will bring an added value, as compared to individual Member State initiatives in the field. First, it will ensure a consistent application of the rules across the |

EU. Second, all platforms in scope will be subject to the same reporting requirements. Third, the reporting will be accompanied with exchange of information and, as such, enable the tax administrations to obtain a comprehensive set of information regarding the income earned through a digital platform.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The initiative aims at ensuring a fair and consistent functioning of the internal market, where everyone pays its fair share of tax. Lack of a level playing field and different reporting requirements imposed by Member States at national level may distort the market allocation of services and goods provided via digital platforms. By imposing a reporting requirement on the digital platforms, the income of sellers will be reported and in such way a level playing field created between the sellers operating with and those without the use of a digital platforms, and across platform operators that will all be subject to the same requirements.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

Individual practices in certain Member States have demonstrated that the standards are applied too strictly and therefore the administrative cooperation and exchange of information is impaired. As these are measures that address procedures for which cooperation of at least two Member States is required, it is crucial to define these standards and rules in a homogenous way. This will achieve consistent application across the EU and enable the efficient administrative cooperation and exchange of information.
Having a harmonized reporting requirement will create a simplified reporting system for the platfroms, and at the same time, ensure reporting of the income regardless of the jurisdiction of the platform's tax residence.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Yes, income earned through the digital platform economy is currently under-reported. Better reporting and exchange of information should therefore have a positive impact on the revenues collected by tax administrations. The estimated benefits in terms of the collection of tax revenue and improved administrative cooperation outweight the costs.

(e) Will there be improved legal clarity for those having to implement the legislation?

Yes, the purpose of improving the existing provision of the Directive is to provide legal clarity both for tax administrations and taxpayers. The standardized reporting of income earned via the digital platforms will provide legal clarity because the platforms will have to comply with the same standard across the EU, as defined in the Directive.

**3. Proportionality: How the EU should act**

**3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?**

The proposal consists of improving existing provisions of the Directive and extends the scope of automatic exchanges to certain specific information reported by the platform operators. The envisaged action does not go beyond what is necessary to achieve the objective of exchanges of information and more broadly, administrative cooperation. Considering that the identified distortions in the functioning of the internal market usually expand beyond the borders of a single Member State, EU common rules represent the minimum necessary for tackling the problems in an effective manner.

Thus, the proposed rules contribute to a clearer, consistent and effective application of the Directive leading to better ways for achieving its objectives. The envisaged obligation of Platform Operators to report on the revenue earned by their clients, i.e. the Sellers, also offers a workable solution against tax evasion through the use of mechanisms for the exchange of information that have previously already been tried for amending Directive 2014/107/EU and amending Directive 2016/881. In this vein, one can claim that the proposed initiative represents a proportionate answer to the identified inconsistencies in the Directive and also aims to tackle the problem of tax evasion.

**3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?**

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes. The initiative is limited to improving existing provisions and to add an EU-wide reporting obligation combined with mandatory automatic exchange of information as national measures have proved insufficient for addressing the identified problem. As seen from the questionnaire to Member States on the latter, national authorities broadly support this initiative.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The policy intervention in the form of a directive ensures consistency and clarity in the most effective and simple way possible. It is also proportional to achieve its objectives. The regulatory option is the most appropriate way for meeting the objectives of EU action. The *status quo* or baseline scenario is the least effective, efficient or coherent option. Differently from the baseline scenario, an EU mandatory common standard would ensure that all EU tax administrations have the same tools for administrative cooperation and access to the same type of data. In other words, an EU regulatory action would put all tax authorities on an equal footing. This also allows for the automatic exchange of information at the EU level on the basis of common standards and specifications.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument og approach?)

Yes, the proposal is limited to imposing minimum standards and the rules necessary to achieve the set objectives. This will be done via a proposal for a directive the adoption of which requires unanimity in the Council.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The benefits clearly outweigh the costs as the analysis from the impact assessment report has shown. The costs are in line with the objectives of the initiative. See below, a short summary of the costs and benefits. It should be noted that these estimations are based on a number of assumptions and extrapolations that are explained in details in the impact assessment.

Costs:

- According to the estimates, the one-off, substantive compliance costs for platforms vary EU-wide between approximately EUR 250 million in the case of a limited scope to EUR 875 million in case of a full scope. These costs are estimated for the whole estimated population of sellers. The cost estimates per platform, on average, are circa EUR 400 000. The recurrent administrative costs for platforms would vary between EUR 30 million in the case of a limited scope to about EUR 100 million in case of a full scope. These costs are estimated for the whole population of sellers. The administrative costs per platform, on average, would range at 50 000 per year.
- One-off costs for all tax administrations are estimated at between EUR 54 million to €189 million, depending on the scope of reporting. That means EUR 2 million to €7 million per tax administration, on average. The recurrent costs of the system are estimated approximately between EUR 6 million (limited scope) and EUR 21 million (full scope) per year, or approximately EUR 200 000 to EUR 800 000 per Member State. These estimates are extrapolated from the costs incurred by Member States in operating the system for the automatic exchange of information of financial accounts (DAC2). In addition to the costs of running the system and keeping it operational (i.e. ensuring the actual exchange of data), tax administrations would incur (labour) costs for exploiting the data, which can be referred to as enforcement costs. Overall, recurrent enforcement costs would vary between EUR 3 million to more than EUR 10 million, or about EUR 100 000 to EUR 400 000 per tax administration.
- The Commission would also bear costs. In any legislative option, on the basis of current and past experience, it is likely that the Commission would incur development costs, for defining the common, EU specifications of the new system of data collection and for setting up or adapting the existing EU systems to enable the exchange of information to take place. The one-off costs for the Commission are estimated at EUR 1.1 million for the development and first five years of operations of the system. The recurrent, administrative costs are estimated at about EUR 0.2 million per year.

Benefits:

- Implementing the limited scope would logically yield the smallest tax revenues (between EUR 1.1 and 3.8 billion), as it would be applied to a subset of activities, whereas the full scope option (goods + all services) would yield the largest tax revenues (between EUR 2.7 billion and EUR 7.1 billion). By comparison, the total tax revenue arising from direct taxes was EUR 1.7 trillion in 2017 in the EU-27, which means that the additional tax benefits would vary between 0.07% (limited scope, lowest estimate) and 0.41% (full scope, highest estimate) of total direct taxes.
- The fiscal benefits of an EU intervention are much larger in case of reporting obligation applying to all services and sale of goods. In 2025, additional tax revenues are estimated to range approximately between EUR 11 and 33 billion while they would range between EUR 3 and 10 billion, if only a subset of services was covered

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| by the initiative. The estimation suggests that by 2025, the effects of the various options on tax revenue would be significantly higher, as the platform economy grows in importance across the EU. |
| (e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account? |
| Not applicable. |