

II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2023/823

of 13 April 2023

laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU as regards the assessment and determination of equivalence of information in an agreement between the competent authorities of a Member State and a non-Union jurisdiction

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC ⁽¹⁾, and in particular Article 8ac(7), first subparagraph, thereof,

Whereas:

- (1) Directive 2011/16/EU was amended by Council Directive (EU) 2021/514 ⁽²⁾ in order to improve the provisions that relate to all forms of exchanges of information and administrative cooperation by providing for a mandatory automatic exchange of information reported by platform operators.
- (2) Given the nature and flexibility of digital platforms, the reporting obligation extends to those platform operators as defined in Annex V, Section IA, point 4(b) of Directive 2011/16/EU that perform commercial activity in the Union but are neither resident for tax purposes, nor incorporated or managed, nor have a permanent establishment in a Member State ('foreign platform operators'). This ensures a level playing field for all digital platform operators regardless of their place of establishment and prevents unfair competition within the Union.
- (3) Directive 2011/16/EU lays down measures that are intended to reduce the administrative burden on foreign platform operators and the tax authorities of Member States, in cases where adequate arrangements exist which ensure that equivalent information is exchanged between a non-Union jurisdiction and a Member State.
- (4) Article 8ac(7), first subparagraph, of Directive 2011/16/EU provides that the Commission is to, following a reasoned request by a Member State or on its own initiative, determine whether the information that is to be automatically received by a Member State is equivalent to that specified in Section III, paragraph B, of Annex V to that Directive. Article 8ac(7) also provides that this same procedure should apply where there is a necessity for determining that the information is no longer equivalent.
- (5) This Regulation establishes the criteria for assessing and determining the extent to which the national law of a non-Union jurisdiction and an agreement between the competent authorities of a Member State and a non-Union jurisdiction ensures that the information that is to be automatically received by that Member State relates to the activities within the scope of Directive 2011/16/EU and is equivalent to the information required under the reporting rules set out in that Directive.

⁽¹⁾ OJ L 64, 11.3.2011, p. 1.

⁽²⁾ OJ L 104, 25.3.2021, p. 1.

- (6) At international level, the Organisation for Economic Cooperation and Development (OECD) published on 3 July 2020, Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy ⁽³⁾ ('Model Rules') and on 22 June 2021, an Optional Module extending the Model Rules to the sale of goods and the rental of means of transportation ⁽⁴⁾ ('Optional Module'). The Model Rules and Optional Module are not a minimum standard and, as a result, may be implemented in a different manner by jurisdictions. It is therefore necessary for the Commission to assess the national law transposing the Model Rules and Optional Module of the non-Union jurisdiction, on a case-by-case basis to determine the extent to which the activities in the scope of and the information required under the reporting rules of that national law are equivalent to the activities in the scope of Directive 2011/16/EU and to the information required under that Directive. It should also remain possible to determine equivalence, where appropriate, concerning a bilateral instrument or the exchange relationship with an individual non-Union jurisdiction and its national law.
- (7) The assessment and determination of such equivalence should take an approach that ensures that Member States receive the necessary information and prevents excessive burden on the platform operators that have already reported the relevant information in a non-Union jurisdiction. Therefore, the Commission should carry out the assessment in accordance with the corresponding criteria, as defined in Article 8ac(7) and with due consideration for the optional exclusions offered under the Model Rules and Optional Module.
- (8) The European Data Protection Supervisor was consulted on the measures provided for in this Regulation in accordance with Article 42(1) of Regulation (EU) 2018/1725 ⁽⁵⁾ of the European Parliament and of the Council.
- (9) The measures provided for in this Regulation are in accordance with the opinion of the Committee on Administrative Cooperation for Taxation,

HAS ADOPTED THIS REGULATION:

Article 1

Criteria for assessing and determining equivalence

The Commission shall apply the criteria set out in Articles 2 to 7 of this Regulation when determining whether the information that is required to be automatically exchanged pursuant to an agreement between competent authorities of a Member State and a non-Union jurisdiction is, within the meaning of subparagraph A(7) of Section I of Annex V to Directive 2011/16/EU, equivalent to that specified in paragraph B of Section III of Annex V to that Directive.

Article 2

Reporting Platform Operator

1. The Commission shall assess the definitions regarding reporting platform operator set out in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction, to determine their equivalence with the definitions set out in Section I, subparagraphs A(1) to A(4) of Annex V to Directive 2011/16/EU.

⁽³⁾ OECD (3 July 2020). Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy

⁽⁴⁾ OECD (22 June 2021). Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods

⁽⁵⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

2. Where a non-Union jurisdiction does not consider as a reporting platform operator a Platform Operator that facilitates the provision of relevant activities for which, over the previous calendar year, the aggregate consideration at the level of the platform is less than EUR 1 million or less than an amount approximately equivalent to EUR 1 million in the local currency of that jurisdiction, a determination of equivalence shall only apply to reporting platform operators as defined in the national law of the relevant non-Union jurisdiction.

Article 3

Reportable Sellers

The Commission shall assess the definitions regarding reportable sellers set out in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction, to determine their equivalence with the definitions set out in Section I, subparagraphs B(1) to B(4), and C(1) and C(2), of Annex V to Directive 2011/16/EU.

Article 4

Relevant Activity

1. The Commission shall assess the definitions of relevant activity set out in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction, to determine their equivalence with the definitions set out in Section I, subparagraphs A(8), A(10), A(11), and C(9), of Annex V to Directive 2011/16/EU.

2. Where a non-Union jurisdiction does not include in its national law one or more of the relevant activities as defined in Section I, subparagraph A(8) of Annex V to Directive 2011/16/EU as a relevant activity, a determination of equivalence shall only apply to information in relation to a relevant activity as defined in the national law of that non-Union jurisdiction.

Article 5

Due diligence procedures

The Commission shall assess the due diligence procedures laid down in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction to determine their equivalence with the due diligence procedures set out in Section II of Annex V to Directive 2011/16/EU and the definitions set out in Section I, subparagraphs C(3) to C(7), of Annex V to Directive 2011/16/EU.

Article 6

Reporting requirements

The Commission shall assess the reporting requirements laid down in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction to determine their equivalence with the reporting requirements set out in Section III, subparagraphs A(1), A(2), A(5), A(6) and A(7), and paragraph B, of Annex V to Directive 2011/16/EU, and the definitions set out in Section I, subparagraphs C(3) to C(8), of Annex V to Directive 2011/16/EU.

Article 7

Effective implementation

The Commission shall assess the rules and administrative procedures laid down in the national law of a non-Union jurisdiction and pursuant to an agreement between the competent authorities of a Member State and the non-Union jurisdiction to ensure the effective implementation of, and compliance with, the due diligence procedures and reporting requirements, and to determine their equivalence with the provisions set out in Section IV, paragraphs A to D of Annex V to Directive 2011/16/EU.

*Article 8***Determination of equivalence**

Where the criteria referred to in Article 1 and assessed in accordance with Articles 2 to 7 are met, the information that is required to be automatically exchanged pursuant to an agreement between the competent authorities of the Member State and the non-Union jurisdiction concerned shall be considered equivalent. That determination of equivalence shall apply to the same agreement between the competent authorities of any other Member State and the non-Union jurisdiction concerned.

Without prejudice to Article 2(2), a Reporting Platform Operator as defined in Section I, subparagraph A(4), point (b), of Annex V to Directive 2011/16/EU that is not considered a reporting platform operator under the national law of the relevant non-Union jurisdiction, shall be obliged to register and report information to a single Member State in accordance with Article 8ac(4) and Section IV, subparagraph F(1) of Annex V to Directive 2011/16/EU.

Without prejudice to Article 4(2), a reporting platform operator as defined in Section I, subparagraph A(4), point (b), of Annex V to Directive 2011/16/EU, that facilitates the carrying out of any relevant activity that is not considered a relevant activity under the national law of the relevant non-Union jurisdiction, shall be obliged to register and report information on Reportable Sellers with respect to such relevant activity to a single Member State in accordance with Article 8ac(4) and Section IV, subparagraph F(1) of Annex V to Directive 2011/16/EU.

*Article 9***Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 April 2023.

For the Commission
The President
Ursula VON DER LEYEN