Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements'

(COM(2017) 335 final — 2017/0138 (CNS))

(2018/C 197/05)

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Co-rapporteur: **Petru Sorin DANDEA**

Consultation	Council of the European Union, 10.7.2017
Legal basis	Articles 113 and 115 of the Treaty on the Functioning of the European Union
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	20.12.2017
Adopted at plenary	18.1.2018
Plenary session No	531
Outcome of vote (for/against/abstentions)	184/2/7

1. **Conclusions and recommendations**

1.1. The Commission proposal contains a directive amending Council Directive 2011/16/EU, which governs administrative cooperation among Member States in the field of taxation, and an annex setting out a list of hallmarks that could potentially indicate aggressive tax planning. It is proposed that the automatic exchange of information (AEOI) tool be used by the individual Member States to make the information reported by intermediaries available to the other Member States.

1.2. The EESC endorses the Commission's proposal given that current legal provisions do not allow Member States to exchange information where tax avoidance and/or evasion schemes come to their attention.

1.3. The EESC welcomes and supports the European Commission's decision to tackle the problem of intermediaries enabling aggressive tax planning. Making their activities transparent, through the reporting obligation proposed in the proposal for a directive, will deter intermediaries from offering their clients aggressive tax planning schemes, and thus reduce the harmful erosion of Member States' tax bases. This should create a level playing field and tax justice between companies that have a framework for aggressive tax planning and those that do not but which are subject to higher taxation to make up for the erosion of the tax base in the individual Member States. Thus, the proposal provides a response to the desire of the majority of European companies for tax fairness between taxpayers, and to the increasing pressure from individual taxpayers.

1.4. In this context, the EESC welcomes the Commission's decision to provide logistical and technical support to the Member States for the implementation of the secure central directory to be used to record the information subject to administrative cooperation. Given the complexity of some aggressive tax planning schemes, the EESC recommends that the Commission also support the Member States when it comes to training the staff who will be responsible for recording and exchanging the information concerned.

1.5. The proposal is very wide in its scope. It is important to ensure that the directive will be an effective deterrent to aggressive tax planning. More precise requirements for qualification of reportable transactions are required in order to prevent over-reporting from companies with time-consuming administration for both tax administrations and taxpayers.

1.6. The EESC notes that the requirement to comply with the arm's length principle of the OECD transfer pricing guidelines is not an exact science and inevitably includes a subjective interpretation from taxpayers and tax authorities. The EESC therefore calls for appropriate and constructive guidance from the Commission and Member States as to whether transactions fall within that hallmark or not.

1.7. The EESC notes that the taxpayer carries the ultimate responsibility to comply with the proposed directive. To fulfil the requirement of proportionality, the administrative costs must be reduced to the furthest extent possible for all sizes of businesses.

1.8. The EESC calls on the Commission to review the five-day deadline for reporting, so as to ensure that it is feasible for the entities that are subject to the reporting obligation and, at the same time, is consistent with the objective of an effective reporting policy. It would thus seem necessary and proportionate to extend this deadline.

1.9. The proposal for a directive leaves a number of issues unresolved, such as how it is to be applied to taxpayers in the digital economy, given the difficulty in determining their physical presence as taxable persons in individual Member State jurisdictions. Another issue relates to the clarity of the criteria laid down in the proposal for the purposes of ensuring a uniform approach across the national rules governing penalties for failure to report.

1.10. The Committee would point out that the reporting mechanisms must not create instability in tax legislation as a result of frequent changes, and that account must be taken of the fact that direct taxation falls within the legislative competence of the Member States.

2. **The Commission proposal**

2.1. Globalisation has increased the mobility of capital to an unprecedented level. In this context, and in the light of the scandals ([1]) that have emerged in recent years concerning corporations and jurisdictions that have promoted aggressive tax planning schemes, which have often resulted in tax base erosion in the Member States, the Commission has placed the fight against tax avoidance and aggressive tax planning among the top priorities on its agenda.

2.2. The Commission proposal contains a directive amending Council Directive 2011/16/EU, which governs administrative cooperation among Member States in the field of taxation, and an annex setting out a list of hallmarks that could potentially indicate aggressive tax planning.

2.3. The proposal for a directive introduces a reporting requirement for institutions and professionals providing advice on tax planning, which are referred to in the directive as intermediaries. These may be tax advisers, banks, rating agencies, and others who meet the definition of intermediaries as 'any person that carries the responsibility vis-à-vis the taxpayer for designing, marketing, organising or managing the implementation of the tax aspects of a reportable cross-border arrangement, or series of such arrangements, in the course of providing services relating to taxation'. Under certain circumstances, the obligation to file becomes the responsibility of the taxpayer.

2.4. Entities, individuals and companies providing advice in the field of tax planning will be required to disclose a reportable cross-border arrangement, or series of arrangements, no later than five days after the scheme has been made available for implementation. The information is to be made available to the relevant tax authorities and will be subject to the automatic exchange of information between Member State tax authorities. The automatic exchange will be carried out on a quarterly basis.

2.5. The Commission considers that the directive will have a deterrent effect on intermediaries that provide advice on aggressive tax planning, and will reduce aggressive tax planning practices.

2.6. The Commission considered three options for implementing its policy objectives: a (non-binding) recommendation for Member States to introduce mandatory disclosure into their national legislation, a code of conduct for intermediaries, or an EU directive requiring Member States to introduce a mandatory disclosure regime.

([1]) Luxleaks, Panama and Paradise Papers.

2.7. The Commission has chosen to proceed by means of a directive, in order to ensure that these measures aimed at tackling aggressive tax planning are implemented uniformly across all of the Member States. The Commission's initiative corresponds to Action 12 of the OECD's BEPS project, which recommends deterring the activities of intermediaries that advise companies on aggressive tax planning; it establishes a set of instruments to put this action into practice.

2.8. The Commission proposal is based on the principle of dialogue between the taxpayer and the tax authority, and on the principle of sincere cooperation between them at single-market level. The mechanism to be established is prior notification of potentially aggressive tax planning transactions, under four standard types of indicators (or 'hallmarks'), set out in the annex to the proposal for a directive. It should be clear that simply reporting the arrangement does not mean automatic presumption of aggressive tax planning, but rather opens a dialogue between the taxpayer and the tax jurisdiction. Thus, the Commission has opted for a preventative approach, which should reduce the risk of penalties for taxpayers.

2.9. In the proposal for a directive, the Commission has also established a direct prior reporting obligation for the taxpayers themselves if the potentially aggressive tax planning scheme or transaction is carried out following an in-house proposal, without the involvement or advice of an intermediary, or if the intermediary/adviser is bound by a confidentiality clause or protected by national legislation on professional secrecy, or thirdly, if the intermediary or adviser is not under the jurisdiction of a Member State.

3. **General and specific comments**

3.1. The EESC welcomes and supports the European Commission's decision to tackle the problem of intermediaries enabling aggressive tax planning. Making their activities transparent, through the reporting obligation proposed in the proposal for a directive, will deter intermediaries from offering their clients tax planning schemes that artificially reduce the amount of tax they pay. As a result, the directive will reduce the harmful erosion of Member States' tax bases.

3.2. The proposal for a directive assumes the good faith of taxpayers, rather than an intention to avoid tax. It should be emphasised that the mere reporting of tax arrangements that could potentially constitute aggressive tax planning does not necessarily mean that aggressive tax planning has actually taken place.

3.3. The Commission's proposal should create a level playing field and tax justice between companies that have a framework for aggressive tax planning and those that do not but which are subject to higher taxation to make up for the erosion of the tax base in the individual Member States.

3.4. The proposal is very wide in its scope. It is important to ensure that the directive will be an effective deterrent to aggressive tax planning. More precise requirements for qualification of reportable transactions are required in order to prevent over-reporting from companies with time-consuming administration for both tax administrations and taxpayers.

3.5. A wide-range of interpretations must be avoided and more guidance from the Commission and Member States is therefore required to make the proposal effective. This is particularly the case relating to the application of the arm's length principle of the OECD transfer pricing guidelines.

3.6. Furthermore, the proposal for a directive leaves a number of issues unresolved, such as how it is to be applied to taxpayers in the digital economy, given the difficulty in determining their physical presence as taxable persons in individual Member State jurisdictions. Another issue relates to the clarity of the criteria laid down in the proposal for the purposes of ensuring a uniform approach across the national rules governing penalties for failure to report.

3.7. The EESC considers a more comprehensive impact assessment necessary in order to ensure that the proposed directive is proportionate. There is a need to assess how time consuming it would be for tax administrations and intermediaries/businesses to comply with the rules.

3.8. The Commission proposes that the automatic exchange of information (AEOI) tool be used by the individual Member States to make the information reported by intermediaries available to the other Member States. The EESC endorses the Commission's proposal given that current legal provisions do not allow Member States to exchange information where tax avoidance and/or evasion schemes come to their attention.

3.9. The EESC calls on the Commission and Member States to ensure a timely and effective implementation of the Directive on Dispute Resolution ([2]).

3.10. The EESC believes that, by using aggressive tax planning schemes, certain companies with cross-border activities are shifting a significant portion of the profits they make in a given Member State to jurisdictions with a lower rate of taxation, thus artificially reducing the Member States' tax bases and causing serious distortions on the internal market. The Committee therefore supports the Commission's proposal that the Member States make provision in their national legislation for penalties for breaching the directive, applicable to both intermediaries and taxpayers using aggressive tax planning schemes.

3.11. Here, the EESC calls on the Commission to introduce clear rules in the proposal for a directive on identifying the potential triggers for liability on the part of taxpayers and intermediaries that use aggressive tax planning schemes, and to leave it up to the Member States to decide on the level of the penalties involved.

3.12. It is imperative that European business and free competition in the single market — including a fair distribution of the tax burden — be protected by the Commission. The EESC thus urges the Commission to set out the areas in which it may add to the categories of hallmarks indicating aggressive tax planning schemes listed in the annex to the directive, by means of delegated acts.

3.13. The Committee would point out that the reporting mechanisms must not create instability in tax legislation as a result of frequent changes, and that account must be taken of the fact that direct taxation falls within the legislative competence of the Member States.

3.14. The EESC welcomes the Commission's decision to provide logistical and technical support to the Member States for the implementation of the secure central directory to be used to record the information subject to administrative cooperation. Given the complexity of some aggressive tax planning schemes, the EESC recommends that the Commission also support the Member States when it comes to training the staff who will be responsible for recording and exchanging the information concerned.

3.15. The EESC calls on the Commission to review the five-day deadline for reporting, so as to ensure that it is feasible for the entities that are subject to the reporting obligation and, at the same time, is consistent with the objective of an effective reporting policy. It would thus seem necessary and proportionate to extend this deadline.

3.16. The EESC asks the Commission to revise the timeframe for evaluating the implementation of the directive with a view to drawing up a report every two years, and calls for the report to be made public for European taxpayers and citizens. Given the considerable administrative effort, the EESC believes that this two-yearly report will ensure transparency if it centralises quantitative data, without infringing the companies' legitimate rights.

Brussels, 18 January 2018.

The President
of the European Economic and Social Committee
Georges DASSIS

([2]) Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union and EESC opinion 'Improving double taxation dispute resolution mechanisms' (OJ C 173, 31.5.2017, p. 29).