# Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/ EU as regards mandatory automatic exchange of information in the field of taxation

## COUNCIL DIRECTIVE (EU) 2016/881

## of 25 May 2016

## 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 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 Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with a special legislative procedure,

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: in its Communication of 6 December 2012 setting out an Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission 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. In its conclusions of 22 May 2013, the European Council requested the extension of automatic information exchange at both Union and global level with a view to combating tax fraud, tax evasion and aggressive tax planning.

(2) As multinational enterprise groups (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 MNE Groups 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 Union. That information will enable the tax authorities to react to harmful tax practices by making changes in legislation or by undertaking adequate risk assessments

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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) The 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)[(3)] already sets out a way for MNE Groups in the Union to provide tax authorities with information on global business operations and transfer-pricing policies ('the masterfile') and information on the concrete transactions of the local entity ('the local file'). However, the EU TPD does not at present provide for any mechanism for the provision of a country-by-country report.

(6) In the country-by-country report, MNE 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 the number of their employees, stated capital, accumulated 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 provide an indication of the business activities in which each entity engages.

(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. This Directive should ensure that the same information is collected and made available to tax administrations in a timely manner throughout the Union.

(8) To ensure the proper functioning of the internal market, the Union has to provide for fair competition between Union MNE Groups and non-Union MNE Groups for which one or several of their entities are located in the Union. Both of them should therefore be subject to the reporting obligation. However, in order to ensure a smooth transition, Member States should be able to defer by one year the reporting obligation for Constituent Entities resident in a Member State which are not the Ultimate Parent Entities of MNE Groups or their Surrogate Parent Entities.

(9) Member States should lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and 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[(4)] already provides for the mandatory automatic exchange of information in a number of fields

(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 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 its Action Plan on Base Erosion and Profit Shifting ('BEPS Action Plan'), which is a major initiative to modify existing international tax rules. On 5 October 2015 the OECD presented its final reports, which 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.

(15) In a situation where a Constituent Entity cannot obtain or acquire all the information required in order to fulfil the reporting requirement under this Directive, Member States could consider this as an indication of the need to assess high-level transfer-pricing risks and other base-erosion and profit-shifting risks related to that MNE Group.

(16) Where a Member State determines that another Member State has persistently failed to automatically provide country-by-country reports, it should endeavour to consult that Member State.

(17) 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 for this Directive and in order to ensure consistency of application across Member States.

(18) It is necessary to specify linguistic requirements for the exchange of information between Member States on the country-by-country report. It is also necessary to adopt the practical arrangements necessary for the upgrading of the common communication network defined in point 13 of Article 3 of Directive 2011/16/EU ('the CCN network'). In order to ensure uniform conditions for the implementation of Articles 20(6) and 21(6) of Directive 2011/16/EU, 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[(5)].

(19) 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 its systems,

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the exchange of information should be made through the CCN network. 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.

(20) The scope of the mandatory exchange of information should therefore be extended to include the automatic exchange of information on the country-by-country report.

(21) Member States' yearly report to the Commission under Article 23 of Directive 2011/16/EU, should detail the extent of local filing under Article 8aa of that Directive and Point 1 of Section II of Annex III thereto and a list of any jurisdictions where Ultimate Parent Entities of Union-based Constituent Entities are resident, but full reports have not been filed or exchanged.

(22) The information exchanged under this Directive does not lead to the disclosure of a commercial, industrial or professional secret, a commercial process or information the disclosure of which would be contrary to public policy.

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

(24) Since the objective of this Directive, namely 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 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.

(25) Directive 2011/16/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 2011/16/EU is amended as follows:

(1) point 9 of Article 3 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 (3a) and Articles 8a and 8aa, the systematic communication of predefined information provided in points (a) and (b) of this point.

In the context of Articles 8(3a), 8(7a) and 21(2) and Article 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 Chapter II, Section II the following Article is inserted:

*Article 8aa*

**Scope and conditions of mandatory automatic exchange of information on the 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 of 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 and within the deadline laid down in paragraph 4, communicate the country-by-country 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 subject to tax with respect to the business carried out through a permanent establishment.

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 that Constituent Entity and, where different from that jurisdiction of tax residence, the jurisdiction under the laws of which that Constituent Entity is organised, and the nature of the main business activity or activities of that Constituent Entity.

4 The communication shall take place within 15 months of 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 of the last day of that Fiscal Year.;