

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

CHAPTER I

**GENERAL PROVISIONS**

*Article 1*

**Subject matter**

1 This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.

2 This Directive also lays down provisions for the exchange of information referred to in paragraph 1 by electronic means, as well as rules and procedures under which the Member States and the Commission are to cooperate on matters concerning coordination and evaluation.

3 This Directive shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfilment of any obligations of the Member States in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements.

*Article 2*

**Scope**

1 This Directive shall apply to all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities.

2 Notwithstanding paragraph 1, this Directive shall not apply to value added tax and customs duties, or to excise duties covered by other Union legislation on administrative cooperation between Member States. This Directive shall also not apply to compulsory social security contributions payable to the Member State or a subdivision of the Member State or to social security institutions established under public law.

3 In no case shall the taxes referred to in paragraph 1 be construed as including:

- a fees, such as for certificates and other documents issued by public authorities; or
- b dues of a contractual nature, such as consideration for public utilities.

4 This Directive shall apply to the taxes referred to in paragraph 1 levied within the territory to which the Treaties apply by virtue of Article 52 of the Treaty on the European Union.

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### Article 3

#### Definitions

For the purposes of this Directive the following definitions shall apply:

1. ‘competent authority’ of a Member State means the authority which has been designated as such by that Member State. When acting pursuant to this Directive, the central liaison office, a liaison department or a competent official shall also be deemed to be competent authorities by delegation according to Article 4;
2. ‘central liaison office’ means the office which has been designated as such with principal responsibility for contacts with other Member States in the field of administrative cooperation;
3. ‘liaison department’ means any office other than the central liaison office which has been designated as such to directly exchange information pursuant to this Directive;
4. ‘competent official’ means any official who is authorised to directly exchange information pursuant to this Directive;
5. ‘requesting authority’ means the central liaison office, a liaison department or any competent official of a Member State who makes a request for assistance on behalf of the competent authority;
6. ‘requested authority’ means the central liaison office, a liaison department or any competent official of a Member State who receives a request for assistance on behalf of the competent authority;
7. ‘administrative enquiry’ means all controls, checks and other action taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation;
8. ‘exchange of information on request’ means the exchange of information based on a request made by the requesting Member State to the requested Member State in a specific case;
9. <sup>[F1]</sup>‘automatic exchange’ means,
  - (a) <sup>[F2]</sup>for the purposes of Article 8(1) and Articles 8a, 8aa and 8ab, 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) <sup>[F2]</sup>for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a, 8aa and 8ab, the systematic communication of predefined information provided in points (a) and (b) of this point.]

[<sup>F2</sup>In the context of Articles 8(3a), 8(7a) and 21(2), Article 25(2) and (3) and Annex IV, 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;]

10. 'spontaneous exchange' means the non-systematic communication, at any moment and without prior request, of information to another Member State;
11. 'person' means:
  - (a) a natural person;
  - (b) a legal person;
  - (c) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the status of a legal person; or
  - (d) any other legal arrangement of whatever nature and form, regardless of whether it has legal personality, owning or managing assets, which, including income derived therefrom, are subject to any of the taxes covered by this Directive;
12. 'by electronic means' means using electronic equipment for the processing, including digital compression, and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means;
13. 'CCN network' means the common platform based on the common communication network (CCN), developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation[<sup>F3</sup>;]
14. [<sup>F4</sup>'advance cross-border ruling' means any agreement, communication, or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions:
  - (a) is issued, amended or renewed by, or on behalf of, the government or the tax authority of a Member State, or the Member State's territorial or administrative subdivisions, including local authorities, irrespective of whether it is effectively used;
  - (b) is issued, amended or renewed, to a particular person or a group of persons, and upon which that person or a group of persons is entitled to rely;
  - (c) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of national laws relating to taxes of the Member State, or the Member State's territorial or administrative subdivisions, including local authorities;
  - (d) relates to a cross-border transaction or to the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment; and
  - (e) is made in advance of the transactions or of the activities in another jurisdiction potentially creating a permanent establishment or in advance of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place.

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The cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling;

15. ‘advance pricing arrangement’ means any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions:

- (a) is issued, amended or renewed by, or on behalf of, the government or the tax authority of one or more Member States, including any territorial or administrative subdivision thereof, including local authorities, irrespective of whether it is effectively used;
- (b) is issued, amended or renewed, to a particular person or a group of persons and upon which that person or a group of persons is entitled to rely; and
- (c) determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

Enterprises are associated enterprises where one enterprise participates directly or indirectly in the management, control or capital of another enterprise or the same persons participate directly or indirectly in the management, control or capital of the enterprises.

Transfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and ‘transfer pricing’ is to be construed accordingly;

16. For the purpose of point 14 ‘cross-border transaction’ means a transaction or series of transactions where:

- (a) not all of the parties to the transaction or series of transactions are resident for tax purposes in the Member State issuing, amending or renewing the advance cross-border ruling;
- (b) any of the parties to the transaction or series of transactions is simultaneously resident for tax purposes in more than one jurisdiction;
- (c) one of the parties to the transaction or series of transactions carries on business in another jurisdiction through a permanent establishment and the transaction or series of transactions forms part or the whole of the business of the permanent establishment. A cross-border transaction or series of transactions shall also include arrangements made by a person in respect of business activities in another jurisdiction which that person carries on through a permanent establishment; or
- (d) such transactions or series of transactions have a cross border impact.

For the purpose of point 15, ‘cross-border transaction’ means a transaction or series of transactions involving associated enterprises which are not all resident for tax purposes in the territory of a single jurisdiction or a transaction or series of transactions which have a cross border impact;

17. For the purpose of point 15 and 16, ‘enterprise’ means any form of conducting business<sup>[F2;]</sup>
18. <sup>[F5]</sup>‘cross-border arrangement’ means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:
- (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
  - (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
  - (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
  - (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
  - (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

For the purposes of points 18 to 25 of this Article, Article 8ab and Annex IV, an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part;

19. ‘reportable cross-border arrangement’ means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV;
20. ‘hallmark’ means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV;
21. ‘intermediary’ means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.

In order to be an intermediary, a person shall meet at least one of the following additional conditions:

- (a) be resident for tax purposes in a Member State;

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- (b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
  - (c) be incorporated in, or governed by the laws of, a Member State;
  - (d) be registered with a professional association related to legal, taxation or consultancy services in a Member State;
22. 'relevant taxpayer' means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement;
23. for the purposes of Article 8ab, 'associated enterprise' means a person who is related to another person in at least one of the following ways:
- (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
  - (b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
  - (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;
  - (d) a person is entitled to 25 % or more of the profits of another person.
- If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.
- If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.
- For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.
- In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50 % of the voting rights shall be deemed to hold 100 %.
- An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person;
24. 'marketable arrangement' means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised;
25. 'bespoke arrangement' means any cross-border arrangement that is not a marketable arrangement.]

#### Textual Amendments

- F1** Substituted by [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.](#)

- F2** Substituted by 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.
- F3** Substituted by Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
- F4** Inserted by Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
- F5** Inserted by 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.

#### Article 4

### Organisation

1 Each Member State shall inform the Commission, within one month from 11 March 2011, of its competent authority for the purposes of this Directive and shall inform the Commission without delay of any change thereto.

The Commission shall make the information available to the other Member States and publish a list of the authorities of the Member States in the *Official Journal of the European Union*.

2 The competent authority shall designate a single central liaison office. The competent authority shall be responsible for informing the Commission and the other Member States thereof.

The central liaison office may also be designated as responsible for contacts with the Commission. The competent authority shall be responsible for informing the Commission thereof.

3 The competent authority of each Member State may designate liaison departments with the competence assigned according to its national legislation or policy. The central liaison office shall be responsible for keeping the list of liaison departments up to date and making it available to the central liaison offices of the other Member States concerned and to the Commission.

4 The competent authority of each Member State may designate competent officials. The central liaison office shall be responsible for keeping the list of competent officials up to date and making it available to the central liaison offices of the other Member States concerned and to the Commission.

5 The officials engaged in administrative cooperation pursuant to this Directive shall in any case be deemed to be competent officials for that purpose, in accordance with arrangements laid down by the competent authorities.

6 Where a liaison department or a competent official sends or receives a request or a reply to a request for cooperation, it shall inform the central liaison office of its Member State under the procedures laid down by that Member State.

7 Where a liaison department or a competent official receives a request for cooperation requiring action which falls outside the competence it is assigned according to the national legislation or policy of its Member State, it shall forward such request without delay to the central liaison office of its Member State and inform the requesting authority thereof. In such

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a case, the period laid down in Article 7 shall start the day after the request for cooperation is forwarded to the central liaison office.