

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 1*

Directive 2011/16/EU is amended as follows:

- (1) Article 3 is amended as follows:
- (a) point 9 is amended as follows:
- (i) in the first subparagraph, point (a) is replaced by the following:
- (a) 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;;
- (ii) in the first subparagraph, point (c) is replaced by the following:
- (c) 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.;
- (iii) in the second subparagraph, the first sentence is replaced by the following:
- 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.;
- (b) the following points are added:
18. “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

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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;
- (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.;

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- (2) the following Article is inserted:

*Article 8ab*

**Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements**

- 1 Each Member State shall take the necessary measures to require intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within 30 days beginning:

- a on the day after the reportable cross-border arrangement is made available for implementation; or
- b on the day after the reportable cross-border arrangement is ready for implementation; or
- c when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first.

Notwithstanding the first subparagraph, intermediaries referred to in the second paragraph of point 21 of Article 3 shall also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

- 2 In the case of marketable arrangements, Member States shall take the necessary measures to require that a periodic report be made by the intermediary every 3 months providing an update which contains new reportable information as referred to in points (a), (d), (g) and (h) of paragraph 14 that has become available since the last report was filed.

- 3 Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:

- a the Member State where the intermediary is resident for tax purposes;
- b the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
- c the Member State which the intermediary is incorporated in or governed by the laws of;
- d the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

- 4 Where, pursuant to paragraph 3, there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

- 5 Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.

6 Each Member State shall take the necessary measures to require that, where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph 5, the obligation to file information on a reportable cross-border arrangement lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

7 The relevant taxpayer with whom the reporting obligation lies shall file the information within 30 days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information shall be filed only with the competent authorities of the Member State that features first in the list below:

- a the Member State where the relevant taxpayer is resident for tax purposes;
- b the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
- c the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
- d the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

8 Where, pursuant to paragraph 7, there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

9 Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lie with all intermediaries involved in the same reportable cross-border arrangement.

An intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another intermediary.

10 Each Member State shall take the necessary measures to require that, where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information in accordance with paragraph 6 be the one that features first in the list below:

- a the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;
- b the relevant taxpayer that manages the implementation of the arrangement.

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Any relevant taxpayer shall only be exempt from filing the information to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another relevant taxpayer.

11 Each Member State may take the necessary measures to require that each relevant taxpayer file information about their use of the arrangement to the tax administration in each of the years for which they use it.

12 Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of this Directive. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020.

13 The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 12 of this Article shall, by means of an automatic exchange, communicate the information specified in paragraph 14 of this Article to the competent authorities of all other Member States, in accordance with the practical arrangements adopted pursuant to Article 21.

14 The information to be communicated by the competent authority of a Member State under paragraph 13 shall contain the following, as applicable:

- a the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- b details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;
- c a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- d the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
- e details of the national provisions that form the basis of the reportable cross-border arrangement;
- f the value of the reportable cross-border arrangement;
- g the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;
- h the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

15 The fact that a tax administration does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of that arrangement.

16 To facilitate the exchange of information referred to in paragraph 13 of this Article, the Commission shall adopt the practical arrangements necessary for the

implementation of this Article, including measures to standardise the communication of the information set out in paragraph 14 of this Article, as part of the procedure for establishing the standard form provided for in Article 20(5).

17           The Commission shall not have access to information referred to in points (a), (c) and (h) of paragraph 14.

18           The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed. The first information shall be communicated by 31 October 2020.;

(3)       in Article 20, paragraph 5 is replaced by the following:

5.           The Commission shall adopt standard forms, including the linguistic arrangements, in accordance with the procedure referred to in Article 26(2), in the following cases:

- a   for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;
- b   for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8ab before 30 June 2019.

Those standard forms shall not exceed the components for the exchange of information listed in Articles 8a(6) and 8ab(14), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a and 8ab, respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a and 8ab in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union.;

(4)       in Article 21, paragraph 5 is replaced by the following:

5.           The Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8a(1) and (2) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December 2019 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ab(13), (14) and (16) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8ab(17). The necessary practical arrangements shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in Article 8a(1) and (2) and Article 8ab(13), (14) and (16) shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements.;

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(5) in Article 23, paragraph 3 is replaced by the following:

3. Member States shall communicate to the Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in Articles 8, 8a, 8aa and 8ab as well as the practical results achieved. The Commission shall, by means of implementing acts, adopt the form and the conditions of communication for that yearly assessment. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2).;

(6) Article 25a is replaced by the following:

#### *Article 25a*

##### **Penalties**

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.;

(7) Article 27 is replaced by the following:

#### *Article 27*

##### **Reporting**

1 Every five years after 1 January 2013, the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council.

2 Every two years after 1 July 2020, the Member States and the Commission shall evaluate the relevance of Annex IV and the Commission shall present a report to the Council. That report shall, where appropriate, be accompanied by a legislative proposal.;

(8) Annex IV, the text of which is set out in the Annex to this Directive, is added.

#### *Article 2*

1 Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply those provisions from 1 July 2020.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 3*

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



*Article 4*

This Directive is addressed to the Member States.

Done at Brussels, 25 May 2018.

*For the Council*

*The President*

V. GORANOV