

INCEPTION IMPACT ASSESSMENT			
<b>TITLE OF THE INITIATIVE</b>	Initiative on introducing effective disincentives for advisors, promoters and enablers of aggressive tax planning schemes resulting in tax avoidance or evasion		
<b>LEAD DG – RESPONSIBLE UNIT – AP NUMBER</b>	TAXUD/D2	<b>DATE OF ROADMAP</b>	05/07/2016
<b>LIKELY TYPE OF INITIATIVE</b>	To be determined		
<b>INDICATIVE PLANNING</b>	-		
<b>ADDITIONAL INFORMATION</b>	-		
<b>This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</b>			

A. Context, Subsidiarity Check and Objectives
<b>Context</b>

A tax system in which all taxpayers pay their fair share is high on the agenda of the EU. Enhancing transparency is one of the key pillars in the Commission's strategy to combat tax evasion and avoidance. In particular the automatic exchange of information between tax administrations is crucial in order to take action against abusive or aggressive practices. In this context, the Commission presented three initiatives in 2015 and 2016 in order to create more transparency and to promote a fairer tax system:

1. In the March 2015 Transparency Package the Commission proposed a directive on the automatic exchange of information on tax rulings (adopted by Member States in December 2015 and entering into force in 2017).
2. In the January 2016 Anti-Tax Avoidance Package the Commission proposed a directive on the automatic exchange of country-by-country reports (CBCR) of multinational enterprises between tax authorities (adopted by Member States in May 2016 and entering into force in 2017).
3. In April 2016, the Commission proposed a directive on the publication of CBCR, which would provide the wider public with tax-relevant information of multinational enterprises on a country-by-country basis (currently under discussion by Council and European Parliament).
4. Finally, in its Communication on further measures to enhance transparency and the fight against tax evasion and avoidance of 5 July ("Commission Communication of 5 July"), the Commission is setting out the priority next steps in its work for fairer, more transparent and more effective taxation.

The Panama Papers have highlighted how certain financial intermediaries and other providers of tax advice appear to have actively helped their clients to conceal money offshore. Whilst some complex transactions and corporate structures may have entirely legitimate purposes, it is also clear that some schemes and offshore activities may be less legitimate and in certain cases even illegal.

The Commission Communication of 5 July 2016 outlines the Commission's assessment of the priority areas for action in the coming months, at EU and international level, to strengthen the fights against tax evasion, avoidance and illicit activity. Increasing oversight of intermediaries and advisors is one of the elements of that assessment. At EU level, on 5 July 2016 the Commission has proposed amendments to the Fourth Anti-Money Laundering Directive to enhance transparency of beneficial ownership structures of corporate entities and other legal arrangements. The same day, the Commission has adopted a proposal to ensure that tax authorities have access to and exchange where relevant information on beneficial ownership and customer due diligence measures in the context of amendments to the Directive on Administrative Cooperation Directive (DAC). This Inception Impact Assessment deals with additional and complementary action to ensure that effective disincentives for advisors, promoters and enablers of aggressive tax planning schemes are also put in place.

OECD BEPS Action 12 Mandatory Disclosure Requirements recommends that countries require promoters of tax planning schemes (tax advisors, legal advisors, financial institutions, etc.) to disclose to tax authorities any potentially aggressive or abusive tax planning schemes that they use or promote and to identify the users of those schemes. BEPS Action 12 has so far only been implemented by a limited number of Member States: United Kingdom, Ireland and Portugal.

Several calls have been made for the EU to take the lead in this field. The European Parliament has called for tougher measures against intermediaries who assist in tax evasion schemes. Following discussions at the informal ECOFIN Council 22 April 2016, the Dutch Presidency invited the Commission to consider initiatives on Mandatory Disclosure Rules inspired by OECD BEPS Action 12, with a view to introducing more effective

<p>disincentives for intermediaries who assist in tax evasion schemes. In the May Council conclusions on the Commission Communication on External strategy and the Commission Recommendation on implementing measures against tax treaty abuse, the Council has invited “the Commission to consider legislative initiatives on Mandatory Disclosure Rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes”. The Report adopted by the Special Committee on Tax Rulings and Other Measures similar in Nature or Effect on 21 June (“TAXE 2 Report”) has called on the Commission to come forward amongst other measures with a legislative proposal introducing a mandatory disclosure requirement for banks, tax advisors and other intermediaries concerning complex structures and special services that are linked to jurisdictions on the common EU list of tax heavens and non-cooperative jurisdictions which are designed for and being used by clients to facilitate tax evasion, tax fraud, money laundering or terrorist financing<sup>1</sup>.</p>
<p><b>Issue</b></p> <p>Tax authorities need timely access to relevant information in order to identify and respond to tax risks posed by potentially aggressive or abusive tax planning schemes. They also need to identify the users and promoters of such schemes. Access to the right information at an early stage allows them to improve the speed and accuracy of their risk assessment and to make timely and informed decisions on appropriate legislative or regulatory responses to protect tax revenues.</p> <p>Enhanced transparency towards tax authorities will also have a dissuasive effect on promoters of such schemes and taxpayers who use them. They may be less inclined to promote or use certain schemes if they have to be disclosed.</p>
<p><b>Subsidiarity check</b></p> <p>a) Legal basis</p> <p>Depending on the policy option taken forward, either Article 115 of the Treaty on the Functioning of the EU (TFEU) or Article 114 TFEU could be chosen.</p> <p>Article 115 TFEU is the legal basis for legislative initiatives in the field of taxation. Although no explicit reference to direct taxation is made, Article 115 refers to directives for the approximation of national laws where their differences directly affect the establishment or functioning of the internal market, which implies that legislative initiatives of a cross-border nature fall within this Article. A robust mechanism to address tax avoidance and evasion by ensuring that tax authorities have appropriate information on a timely basis, while ensuring a level playing field between Member States and between providers of tax advice within the Union directly affects the functioning of the internal market.</p> <p>Article 114 TFEU allows for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. It does not apply to fiscal provisions.</p> <p>b) Subsidiarity</p> <p>The envisaged actions comply with the principle of subsidiarity.</p> <p>National measures adopted by Member States cannot provide effective solutions for tackling tax avoidance and tax evasion. The different aspects of this issue and cross-border nature require a common approach in the EU to achieve the best outcome. In addition, divergences in the solutions adopted at national level affect the functioning of the single market.</p> <p>For these reasons, this issue will be dealt with more efficiently by taking action at the EU level. The principle of subsidiarity will be respected: uncoordinated action by Member States would fail to achieve the intended results while a European common approach would permit it.</p>
<p><b>Main policy objectives</b></p> <p>The first objective of further action in this area at EU level is to increase transparency on the side of tax law enforcement authorities on aggressive tax planning schemes. This objective has a two-fold aspect: first, action would seek to ensure that tax authorities in Member States receive information on aggressive tax planning</p>

<sup>1</sup> In its Report, the Committee has also called for the existing codes of conduct for the tax advice industry to be strengthened, in particular in order to take account of potential conflicts of interest in such a way that they are clearly and understandably disclosed and for the Commission to come forward with a Union Code of Conduct for all advising services to provide for situations of potential conflicts of interest to be clearly disclosed. In addition, it has also asked for the Commission to explore the feasibility of introducing proportional financial liability for tax advisors engaged in unlawful harmful practices.

schemes either through those who enable or promote the schemes or through taxpayers who benefit from them. Second, action could seek to ensure that this information is or can be exchanged by tax authorities of different Member States. This would ensure that tax authorities have appropriate information on a timely basis to address tax avoidance and/or evasion.

The second objective of the action is to improve risk assessment and taxpayer compliance by deterring the use of potentially aggressive or abusive tax planning schemes.

Finally, one may also consider the objective of allowing the wider public receive information necessary to exercise public scrutiny.

## B. Option Mapping

### Baseline scenario – no EU policy change

Some Member States (United Kingdom, Ireland and Portugal) have implemented measure similar to those considered in OECD BEPS Action 12. Others have taken no action to date. Currently, no specific EU Action exists in this field.

Existing tax instruments available at EU level do not contain explicit provisions requiring Member States to receive information on aggressive tax planning schemes. Existing tax instruments available at EU level do not contain either explicit provisions obliging Member States to exchange information, where relevant, with other Member States on tax evasion and tax avoidance schemes that come to their attention. This notwithstanding, should tax authorities of a Member State have this information nowadays, its exchange with tax authorities of other Member States on a spontaneous basis would be possible under the existing provisions of the Directive on Administrative Cooperation (DAC).

### Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

The following options can be envisaged:

#### **Option 1**

One option would be that the EU would encourage Member States to gather and possibly to exchange information on such schemes through a recommendation. This non-binding option is unlikely to be effective to achieve the objectives as most Member States authorities will not have the means to retrieve this information in many cases and taxpayers and/or providers of tax advice would not be legally bound to report it.

#### **Option 2**

Another option would be to introduce an explicit reporting obligation to authorities for those who promote, use, enable and/or engage in certain tax planning schemes. This obligation could be introduced in various ways:

##### ***Option 2a***

This option would require banks and other financial and non-financial service providers (such as tax advisors or lawyers) advising individuals and corporates to report when using aggressive tax planning schemes or where they make a referral to another person or entity for that purpose. The reporting could be done either directly to tax authorities or to supervision authorities, who would convey the information to tax authorities. To avoid the risk of creating an uneven playing field, this option should be carefully elaborated to ensure that all the relevant service providers are covered by the obligation. Transparency requirements could be laid down under financial legislation regulating the behaviour of certain providers of tax advice (for example, through an amendment of the Markets in Financial Instruments Directive (MiFID) or through a stand-alone provision that would apply horizontally to providers of tax advice. This option would however not allow having the reporting obligation laid down directly on taxpayers in those instances in which the advisors, promoters and enablers did not fall within the scope of the obligation (if; for instance, providers advising companies operating in the European Union fell outside the geographical scope of application of the Directive).

##### ***Option 2b***

Another option would be to lay down a horizontal automatic reporting obligation to tax authorities for all those who promote, use and enable but also on those who engage in certain tax planning schemes. One possible way of introducing this reporting obligation would be through an amendment of DAC, which since 2014 also contains reporting obligation on financial information to tax authorities. In addition, tax authorities could be obliged to exchange this information and also information they uncover in their day-

to-day activity efficiently with authorities of other Member States. Alternative ways of creating such reporting obligations will be explored as well as part of this option.

### **Option 3**

In addition, another option would be to combine any of the Options 2 with a requirement laid down on at least certain taxpayers making use of the tax planning scheme to publish (elements or all) of the information to be provided to Member States' authorities, which would add an additional element of public scrutiny. The obligation to disclose publicly for large corporate taxpayers could be done for instance through an amendment to the Accounting Directive.

### **Alternative policy approaches**

The Commission could favour the exchange of best practices amongst Member States to foster the retrieval of information on potentially aggressive or abuse tax planning scheme sand, where relevant, the exchange of this information in different fora (such as the Code of Conduct Group).

### **Alternative policy instruments**

Another possible avenue would be to ensure that Member States, in cooperation with the Commission, take measures to encourage the drawing up at Community level of codes of conduct aimed at facilitating the provision of tax advice services.

A European code of conduct should then establish rules restricting the provision of aggressive tax planning services by regulated providers with the objective of facilitating tax avoidance or tax evasion. This would require however defining in advance the limits of the conduct to be sanctioned and it may be difficult to find agreement on this point at this stage in time.

Codes of conduct are regularly found in the sector of regulated professions. Tax advice is an activity which is reserved for certain regulated professions in Cyprus, France and Luxembourg. The profession of tax advisors is regulated in the Czech Republic, Germany, Poland, Croatia, Hungary, Greece, Austria, Slovakia and Romania. In addition, it must be borne in mind that European codes would only have declaratory value. In order to guarantee the effectiveness of the European code of conduct, it would need to be transposed into the codes of the national professional associations - some of which have been approved by law. National professional organisations would then be the first and often the only organisation that can monitor and act in the event of infringements by professionals of the provisions of the code. As a result, through this option it would be very difficult to ensure supervision and compliance with the obligation on the side of advisors in those Member States which do not require a professional qualification to perform this activity. Since this avenue would not address behaviour by all players in the market providing tax advice services, it would result in an uneven playing field.

### **Alternative/differentiated scope**

Depending on the option covered some of them may particularly target some sectors or categories of providers of tax advice services. In principle, options targeting equally all providers of tax advice in the market would better ensure a level playing field in the market.

### **Options that take account of new technological developments**

Any of the options taken forward should allow for the submission of information by electronic means. In addition, should an option foreseeing the exchange of information between authorities be chosen, it should also foresee exchange by electronic means. It is important to bear in mind in this context that DAC already facilitates the effective and efficient exchange of information between national competent authorities, either based on automatic or spontaneous exchange via the secured CCN system. Currently, in the context of DAC3, a central depository is being developed, which should be up and running by mid-2017. This depository could provide an additional technical feature to be used by national administrations for the exchange of information on cross-border tax planning schemes.

### **Preliminary proportionality check**

The solutions identified are structured around the problems which cannot be solved by the Member States working individually. They take into account the works of the OECD in the context of the BEPS project (Action 12). In doing so, they strive to build on and complement the existing arrangements or solutions already available for tackling tax avoidance and evasion. The principles of proportionality, additionality and universality of the solutions have therefore been actively followed.

## C. Data Collection and Better Regulation Instruments

### Data collection

According to the OECD BEPS Action 12, not all of the countries with mandatory disclosure regimes have collected data on the effectiveness of their regime in terms of these objectives. However, the report concludes that, *“even though the available data is not comprehensive or detailed, the feedback from those with disclosure regimes provides a reasonably consistent picture that suggests that mandatory disclosure is successful in meeting its objectives.”*

In developing BEPS Action 12, the OECD carried out significant research and analysis and issued several studies and reports:

- Study on the Role of Tax Intermediaries (OECD, 2008);
- Tackling Aggressive Tax Planning through Improved Transparency and Disclosure, (OECD, 2011);
- Co-operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance (OECD, 2013).

### Consultation approach

Considering the impact of this initiative on a wide range of stakeholders (services providers, public authorities and clients), a stakeholder consultation would be necessary to collect their views and explore possible solutions.

An open online public consultation will be launched in the third quarter of 2016. The consultation will be published on the website Your Voice on Europe. This 12 weeks consultation might be complemented by further targeted consultations with Member States experts, professional associations, think tanks etc.

### Will an Implementation plan be established?

Yes  No

## D. Information on the Impact Assessment Process

Preparatory steps for the assessing the impacts will be initiated. An Inter-service Steering Group will be called under the new better regulation framework to advise on a potential proportionate assessment of the possible options, taking into account the work already carried out by the OECD.

The Inter-service Steering Group will consist of the following Commission Services:

- Secretariat-General;
- Taxation and Customs Union;
- Legal Service;
- Financial Stability, Financial Services and Capital Markets Union;
- Internal Market, Industry, Entrepreneurship and Small and Medium Enterprises
- Economic and Financial affairs;
- Competition;
- Justice and Consumers;
- Migration and Home Affairs.

## E. Preliminary Assessment of Expected Impacts

### Likely economic impacts

Likely positive. The main expected impact is a **better and fairer tax environment** where all taxpayers pay their share of taxes.

Transparency requirements on potentially aggressive or abusive tax planning schemes should deter the use of aggressive tax planning. Tax evasion and avoidance deprive public budgets of billions of euros in revenues each year, distort competition between businesses and erode the fair and level-playing field for all taxpayers. Tax avoidance can also increase the tax wedge on labour, as governments compensate for the lost revenue by increasing taxes elsewhere, to the detriment of employment and a healthy labour market. By helping reduce tax evasion and avoidance through increased transparency on aggressive or abusive tax planning schemes, this

action is likely to have a positive effect on growth, investment and employment.
<b>Likely social impacts</b>
Likely positive. There is a strong public demand for action to combat aggressive tax practices. Transparency requirements on potentially aggressive or abusive tax planning schemes should deter their use. Fighting efficiently against tax avoidance and aggressive tax planning should result in an increase on the taxes collected by tax authorities, which will then have more revenues available for investment in public services, such as schools or hospitals. In addition, fighting aggressive tax planning schemes means that tax authorities can focus their efforts in ensuring that the privileged taxpayers using them also pay their fair part. It will also enhance voluntary tax compliance from the average taxpayers as they will consider that the tax system is fairer and that everybody, not only them, pays his/her share.
<b>Likely environmental impacts</b>
Unlikely.
<b>Likely impacts on simplification and/or administrative burden</b>
To be examined. This initiative will increase the administrative burden and costs for taxpayers and their advisors involved in potentially aggressive or abusive tax planning. Taxpayers, promoters and enablers will need to assess whether a tax planning scheme needs to be reported to tax authorities, which will entail additional burden and cost. The cost arising from the reporting obligations may deter in certain cases the use of aggressive tax schemes as it will make their use overall more expensive.
<b>Likely impacts on SMEs</b>
To be examined but likely positive. SMEs are in general less well equipped to make use of aggressive tax schemes. Therefore, SMEs will not be facing material new costs since no new obligations would be imposed on them or on their advisors. Instead, they will benefit from a level playing field as big enterprises will have fewer opportunities to use potentially aggressive tax schemes.
<b>Likely impacts on competitiveness and innovation</b>
To be examined. An increased level playing field between all companies should result in increased competitiveness and innovation.
<b>Likely impacts on public administrations</b>
To be examined. A reporting (and exchanging) obligation towards tax authorities already creates certain costs and administrative burden both for reporting entities and for administrations to which they report. It means that tax administrations will receive information which has to be processed and exchanged with other authorities, where relevant. On the other hand, timely access to relevant information will allow tax authorities to identify and respond to tax risks posed by tax planning schemes and to identify the users of the schemes. Access to the right information at an early stage allows them to improve the speed and accuracy of their risk assessment, the efficiency of tax audits and to make timely and informed decisions on appropriate legislative or regulatory responses to protect tax revenues. While the increase on revenues from the collection of taxes due to this initiative is difficult to measure, it could be concluded that it will outweigh the costs involved.
<b>Likely impacts on third countries, international trade or investment</b>
The initiative could imply a reduction on the use on aggressive tax planning schemes and, consequently, on the availability of tax avoidance schemes in the market; both on the side of the demand and the supply side. It could have a particular impact on the jurisdictions considered as non-cooperative jurisdictions, where a significant number of advisory firms providing these services are located.