



EUROPEAN COMMISSION

*Brussels, 21.11.2017
C(2017) 7713 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a 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}.

One of the Commission's top political priorities is to tackle tax avoidance and evasion in the European Union. Enhancing transparency is one of the key pillars in the Commission's strategy. In particular, the exchange of information between tax administrations is crucial for providing the authorities with the necessary information for exercising their duties efficiently. The proposal for disclosing potentially aggressive tax planning schemes features as part of the ambitious agenda that the Commission has advanced over the last years in fighting against tax evasion and avoidance. Thus, enhancing transparency and securing access to the right information at an early stage would allow the authorities to improve the speed and accuracy of their risk assessment and make timely and informed decisions on how to protect their tax revenues.

The Commission welcomes the Bundesrat's broad support for the aims of the proposal. In response to the specific observations expressed in the Opinion, the Commission would like to refer the Bundesrat to the attached Annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

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First Vice-President*

*Pierre Moscovici
Member of the Commission*

*Mr Michael MÜLLER
President of the Bundesrat
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ANNEX

The Commission has carefully considered each of the issues raised in the Bundesrat's opinion and is pleased to offer the following clarifications:

The Bundesrat inquires whether, in transposing the Directive into national law, there is even a duty arising from the fundamental freedoms to extend disclosure beyond international schemes to purely domestic situations in order to avoid discriminatory treatment. The Commission would like to clarify that discrimination is the result of unequal treatment of comparable situations. Cross-border potentially aggressive tax arrangements do not usually have domestic comparable arrangements. They only work within the context of a specific combination of jurisdictions.

What is more, the Directive does not preclude Member States from laying down national rules which extend the reporting obligation to purely domestic facts since the rules referring to the domestic context fall outside its scope. This said, even in the event that domestic and cross-border intra-EU arrangements were comparable, the obligation to report only the latter would not cause illegitimacy. Thus, the mandatory disclosure of cross-border potentially aggressive arrangements does not include an assessment of tax. In fact, it is only limited to an obligation to inform. In addition, Member States have already legislated on the automatic exchange of advance cross-border rulings¹. This confirms that legislation or cross-border reporting, without a requirement for disclosure of purely domestic issues, is not discriminatory.

The Commission also takes note of the request that the Bundesrat addresses to the Federal Government for keeping costs as low as possible and negotiating amendments to the text, in order to make the Directive more practical and better reflective of the particularities of the German context.

The Bundesrat suggests that for triggering the duty of disclosure in connection with some hallmarks, it should be enough that the tax advantage is a key feature and not necessarily the main feature of the arrangement(s). The Commission wishes to underscore that it is only a few hallmarks where the reporting obligation is contingent upon a tax advantage being the main feature of the arrangement. The application of most remaining hallmarks depends on objective facts.

The Bundesrat expresses its doubts about delegated acts, questioning whether it would be admissible to delegate future amendments to the hallmarks to the Commission. Considering that aggressive tax planning arrangements can proliferate very quickly, the proposal empowers the Commission to update the list of hallmarks with a view to facilitate a swift reaction to include new arrangements. In the Commission's view, timely

¹ 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, OJ L 332, p. 1, 18.12.2015.

reaction to aggressive tax arrangements is critical, to ensure effectiveness of the Directive. This is why delegation can be a useful tool for achieving results in this context.

The Bundesrat stresses that the duty to report, which lies with the intermediaries in the first instance, should remain so. It should not become the rule that taxpayers undertake to disclose aggressive arrangements due to constraints related to the intermediaries' professional secrecy. Indeed, the proposal shifts the reporting obligation to taxpayers only in exceptional situations. The Commission agrees with this approach, as it accurately reflects the content of the Directive. It should however be noted that professional secrecy rules vary significantly across Member States both in the degree and form of protection. It is thus crucial that anonymous reporting by intermediaries be avoided because such a prospect would severely compromise the effectiveness of the Directive. Namely, the authorities would most probably not be able to match the disclosed information with the specific elements of the cross-border arrangements of a taxpayer.

The Bundesrat urges to considerably extend the reporting deadline, as 5 working days before implementation is seen as being too short. It is suggested to have a later reporting date, e.g. directly before the first actual implementation. Such a solution could also allow for giving intermediaries and taxpayers the right to explain the notified arrangement and the reasons behind it. On this point, the Commission would insist on the usefulness of early reporting.

The Bundesrat inquires whether Member States are entitled and/ or obliged to use the collected data for legislative counter-measures. In this context, the Bundesrat puts forward the idea of fixing minimum and maximum standards in order to guarantee an EU-wide harmonised approach to these reactions. The Commission wishes to clarify that the proposal does not take the additional step to oblige Member States to take counter-measures. It is instead limited to laying down a reporting obligation and leaves Member States free to decide how to benefit from their access to the reported tax information. On this note, it should also be clarified that the absence of action by a Member State does not mean "clearance" of a certain scheme for tax purposes.