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4 March 2019

European Commission: Public consultation on the functioning of the administrative cooperation in the field of direct taxation

Introduction and scope of our response

PricewaterhouseCoopers International Limited on behalf of its network of member firms (PwC) welcomes the opportunity to respond to the European Commission (“the Commission”) with respect to its consultation to assist the evaluation of the key provisions for administrative cooperation in the field of direct taxation (Council Directive 2011/16/EU - “the Directive”). We welcome this consultation and the Commission’s broader review of the operation of this important plank of the European Union’s tax framework.

While we agree that the areas that the consultation focuses on are well chosen, we believe that our views are better represented through a freeform response to these areas, as opposed to responses to multiple choice questions. In addition, we expect that the stakeholders best placed to comment on the Exchange of Information itself will be tax administrations, while we are well placed to comment on sections C (Legal Entities) and D (Consultants / Advisers).

We therefore particularly welcome the opportunity to provide all our comments under section F of the consultation, through this concise paper, and accordingly have not completed the optional questions in sections B through E.

General comments on scope

Directives in scope

It is not clear what is meant with the “key provision for administrative cooperation”, but would welcome clarity on this point. The Directive is a body of law that has grown up by way of

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amendment to the original directive of 2011. As it has been amended five times, we refer to the Directive at each point in time as follows:

- DAC1: 2011/16/EU (application from January 2013 and January 2015 for non-AEOI and AEOI respectively)
- DAC2: 2104/107/EU (application from January 2016)
- DAC3: 2015/2376/EU (application from January 2017)
- DAC4: 2016/881/EU (application from June 2018)
- DAC5: 2016/2258/EU (application from January 2018)
- DAC6: 2018/822/EU (application from July 2020; including disclosure of arrangements from June 2018)

The implementation period for DAC6 thus still has time to run (and at the time of writing has only been legislated in one Member State). DAC5 has been applicable as from 1 January 2018. However, the consolidated text of January 2018 seems to be of DAC1 to DAC4, rather than inclusive of DAC5.

In addition, the consultation is also said to be part of the evaluation on administrative cooperation in the field of direct taxation, where a report under Article 8b of the Directive is foreseen for January 2019. Looking at the evaluation roadmap (attached of 22 February 2018) it states:

The focus of the evaluation will be data on activities up until the end of 2017, reported to the Commission by mid-2018. While automatic exchanges under DAC1 have continued for some years already, and DAC2 and DAC3 exchanges have recently started, exchanges under DAC 4 and DAC 5 are still under way and data from these will therefore not be included in this evaluation.

We have thus taken the position that while DAC6 is not covered by this review, DAC4 and DAC5 amendments are, to the extent that they have already impacted on stakeholders (which in practice will be limited for stakeholders other than tax administrations, despite the inclusion of Country by Country Reporting questions in Section C of the consultation).

Consultation format and questions

Some of the questions posed appear to extend beyond the remit of assessing the functioning of the Directive; testing whether it achieves objectives that it was not designed to. For example, the second question in Section A seeks to assess whether the Directive is successful in curbing tax competition between Member States, rather than promoting administrative cooperation between them. As no decision has been agreed by Member States regarding harmonisation of tax bases and systems, we question the appropriateness of such questions in this review. Such a question may be more appropriate when a review of the Common Consolidated Corporate Tax Base is undertaken, should such an objective become attractive to Member States.

The survey does not include questions on how the operation of the Directive could be improved to offer benefits to taxpayers, for example how EoI could be used to avoid or resolve double taxation disputes. We would welcome further review in this area.

Operation of the Directive

Rights of taxpayers

We have the following observations regarding potential areas where the Directive could be improved to give greater respect to the rights of taxpayers without hampering (and in some cases improving) the fulfilment of the Directive's operation:

- Under the Directive, there is no requirement for taxpayers to be notified when an exchange of their information has taken place (nor the right to review the accuracy of the information exchanged). In light of developments such as the implementation of the European Union's General Data Protection Regulation, it may be appropriate to review whether taxpayers should and could be given such rights.
- Under the Directive, there is no automatic right of taxpayers to review correspondence between tax administrations and limit the information exchanged to what is most relevant. In light of the ruling from the European Court of Justice in 2017 regarding the Berlioz case (C-682/15), we believe that the Directive could be improved (and future disputes lessened) by ensuring an opportunity for taxpayers to review such correspondence in advance to allow assessment of the "foreseeable relevance" condition.

Transparency and certainty

Tax certainty is a key concern for businesses, and the extensive changes to the tax system in the EU, OECD Inclusive Framework countries and beyond in response to the OECD BEPS recommendations places us in an environment of significant change. The work of the OECD, EU, and individual countries regarding the taxation of the digitalisation of the economy furthers the uncertainty that businesses currently face. We are hopeful that this will be resolved by a broad and deep consensus among countries about the future of the international tax system.

We welcome transparency initiatives destined to treat economic actors consistently and coherently, irrespective as to whether or not they operate within a Member State, and full transparency with tax administrations. With increased information (particularly standardised information for which context may be lacking) there are increased opportunities for disputes to arise - a further challenge to tax certainty. However, the Directive could also be a catalyst in the path towards cooperative compliance where taxpayers and tax authorities can target the employment of valuable resources and management time and avoid litigation by constructive upfront exchange of views between experienced tax professionals who are empowered to serve that purpose. We would welcome additional initiatives at an EU level to resolve (and prevent) disputes, and believe that the exchanges of information under DAC may provide a useful springboard for such approaches to be developed.



For any clarification on this response, please contact the undersigned or any of the contacts below. We look forward to discussing any questions you have on the points we raise above. We would welcome the opportunity to contribute to the discussion.

Yours faithfully,

A handwritten signature in black ink, appearing to be "Stef van Weeghel", with a long horizontal stroke extending to the right.

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