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Tax Transparency Package – Automatic Exchange of Tax Rulings and New Transparency Requirements for Companies (Country-by-Country Reporting)

Dear Commissioner,

As the leading eight associations of trade, industry and finance in Germany, we wish to bring to your attention our concerns vis-à-vis two elements of the Package on Tax Transparency that the Commission presented on 18 March 2015. We support the objective of the Commission to promote a fair tax competition within the EU. Nevertheless the present proposal raises serious problems. Firstly,

there are some problematic issues with the proposal to amend Council Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (the Directive) and secondly, we are worried about the Commissions announcement to assess the impact of possible public disclosure requirements for multinational companies, which could require them to make certain sensitive corporate tax information public.

I. Automatic Exchange of Tax Rulings: Comments on the Proposed Amendments

The proposal is problematic for a number of reasons:

- Wide scope
  - The definition of the tax rulings to be exchanged is extremely broad. According to the Fact Sheet issued by the Commission this aims at avoiding divergent interpretations of what constitutes a ruling, which could enable some Member States to circumvent the new information exchange obligations. However, the effects of a broad definition would be disproportionate to its objective. According to the Commission´s proposed definition tax returns as well as tax audit conclusions could be classified as rulings which would consequently have to be exchanged. Having to process such a vast number of documents would cause immense administrative burdens for the issuing as well as for the receiving Member State(s) and the Commission. Instead of broadly defining any communication of a Member State as a potentially harmful ruling it would in our view be more sensitive in a first step to identify the features of “harmful” rulings. This would allow for a more targeted approach to dealing with abusive practices.
  - The information is to be communicated to all Member States as well as to the European Commission; i.e. the exchange of information is not limited to the Member States that may be affected by the ruling. We cannot see any compelling reason why this should be the case. Exchanging rulings and APA that often contain sensitive commercial data with every Member State and the Commission without a substantive reason would be disproportionate. If the Commission fears an adverse effect on the internal market because of a certain Member State´s rulings practice, the Commission already is empowered to examine the national law of the Member State in question. Thus we strongly argue in favour of limiting the automatic exchange of information to the affected Member States.
  - The new communication requirements are to be applied *ex tunc* and also affect advance cross-border rulings and APA issued within a period beginning ten years before the entry into force but still valid on the date of entry into force of this Directive. We believe that this requirement should be abandoned as it interferes with the rights of taxpayers that had not been

aware of the information exchange at the time their ruling or APA was issued. At the same time it poses an enormous administrative burden for tax administrations.

- Confidentiality
  - We support the Commission in not proposing to make all tax rulings public, as this would present enormous challenges as how to protect data and sensitive commercial information and how to prevent the published information from being misused. However, information that has been exchanged is subject to the confidentiality regime applicable in the receiving Member State (cf. on the one hand, article 16, paragraph 1 subpara 1 of the Directive; on the other hand article 23a paragraph 2 subpara 1 sentence 2 of the proposal). This is not sufficient. Not all Member States apply a strict tax secret. Furthermore, the information that has been exchanged may be forwarded to countries outside the EU. Additionally, the mere knowledge of a ruling being issued relating to certain parties can reveal sensitive information, especially with regard to planned business activities or transactions such as mergers and acquisitions. Also, the proposal that the exemption in article 17(4) of the Directive, according to which the "provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy" shall not apply to exchange of information on advance cross-border rulings and APA is highly critical with regard to data protection.

We believe that the confidentiality risks and the wide scope of the proposal will most likely decrease transparency rather than increase it. If details of rulings and APA would be provided to all Member States irrespective of relevance, there is a serious risk that commercial and industrial secrets and sensitive business data will be disclosed. The risk of disclosing commercial and industrial secrets would deter businesses from applying for advance rulings. Informal agreements with tax administrations might be encouraged, which is a less transparent option than formal advance rulings. As a result, the proposal could result in less transparency, which is contrary to the purpose of the proposal. Also, dealing with the amount of rulings and APA that would automatically be exchanged would tie up valuable administrative resources. If these are not sufficiently supplied, the proposal would also result in mock transparency rather than real transparency.

For the reasons mentioned above, businesses would be discouraged from using advance ruling mechanisms. Thus businesses would not be able to dissolve complex legal matter prior to an investment. The increased uncertainty would have a serious impact on much needed business investments and growth within the EU. It might even constitute a cross border trade obstacle and thus would be contrary to the purpose of the EU and the internal market.

II. New Transparency Requirements for Companies (Country-by-Country-Reporting)

As part of the Transparency Package issued on 18 March 2015 the Commission also announced its intention to assess the impact of possible public disclosure requirements for multinational companies, which could require them to make certain corporate tax information public (country-by-country reporting; CbCR). Companies disclose tax relevant information to the competent tax authorities of the affected countries as a matter of course. We believe that sharing information between the competent tax authorities should be the way forward. We therefore strongly reject any further public disclosure requirements for companies for a number of reasons:

- We believe that no new EU proposals on the CbCR should be undertaken until the OECD's recommendations in this area have been implemented by Member States´ governments. Only then it will be possible to understand how those proposals address some of the concerns and thus take the necessary conclusions.
- In fact, Article 48 of the Accounting Directive 2013/34/EU mandates the European Commission already to holistically review the existing scope of the CbCR and to provide a related report to European Parliament and Council until 21 July 2018. The European Parliament, Council and Commission have just recently reconfirmed the need for this review before taking further steps in the Directive on non-financial disclosures 2014/95/EU of 22 October 2014 (CSR Directive). An outcome of this CbCR review should not be anticipated and the political agreement not overwritten.
- We emphasise the need for confidentiality of CbCR as agreed by the OECD and endorsed by the G20, since the lack of harmonised international taxation rules and the lack of comparability will lead to (mis-)interpretations by stakeholders and the public.
- We are convinced that any deviation from the principle agreed at the OECD level risks creating an unlevelled playing field for European companies. Therefore a multilateral and coordinated approach is essential to the principle of country-by-country reporting. Placing EU-based companies on an unlevelled playing field compared to their competitors will damp European competitiveness and undermine the EU investment strategy focused on jobs and growth creation.
- In addition, from the accounting side, the reports will not have any information benefit for tax authorities, investors or the general public since companies would report according to differing accounting standards and using differing methodologies. The different accounting regimes would distort important figures and would, as a consequence, distort the comparison between companies. Additionally, the figures are likely to be misinterpreted in a public context.

We kindly ask you to consider our concerns in the following discussions and please do not hesitate to contact us if you have any questions.

Sincerely,

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