

Supplementary note prepared by the OECD and the Slovak Presidency

## **Towards a more certain tax environment: fighting BEPS, improving certainty and fighting tax crime and terrorism**

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1. Challenges such as tax avoidance, tax evasion as well as tax fraud and more recently financing of terrorism require a coordinated response and have pressed tax legislators and administrations to adapt. This also needs to be taken into account by businesses including multinationals.
2. In recent years governments have joined forces on a global scale to update and strengthen the international tax system accordingly, in particular in two areas:
3. First, newly developed standards and tools on tax transparency and exchange of information are being implemented to counter tax evasion, notably automatic exchange of information. Secondly, instruments to address Base Erosion and Profit Shifting (BEPS) have been successfully developed through the OECD/G20 BEPS Project and translated into several hard law initiatives at EU level, providing tax administrations and tax policy-makers with better instruments to fight tax avoidance. Tax administrations will now be better equipped to deal with global taxpayers, helping to level the playing field between domestic and multinational enterprises.
4. Second, the G20 requested the Financial Action Task Force (FATF) and the Global Forum on Transparency and Exchange of Information for Tax Purposes to make initial proposals by the G20 October 2016 meeting on ways to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information, and international exchange thereof. These initiatives will not only better equip tax administrations, but will also seek to support cooperation between different government agencies involved in the fight against financial crimes both domestically and internationally.
5. The EU has been a frontrunner both of these areas, namely in implementing the BEPS measures, notably with Anti-tax Avoidance Directive adopted in July 2016 as well as automatic exchange of tax rulings (DAC 3) and Country-by Country reporting (DAC 4) and the pending initiative on access to Beneficial Ownership information (DAC 5) and upcoming proposal on Hybrid mismatches.
6. With these two envisaged pillars to strengthen the international tax system, it is important to keep a balanced approach keeping in mind that tax policies contribute to domestic revenue raising, increased fairness and enhanced growth. Central to this balanced approach will be the need to improve tax certainty for businesses and investors. Following the G20 Tax policy Symposium held in Chengdu, China, on 23 July 2016, the G20 has agreed to focus in particular on tax policies that increase certainty to promote investment and trade. The OECD working with the IMF was mandated to propose ways to reduce tax uncertainty,

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both from a macro-economic perspective, and at a practical level, such as enhancing dispute resolution mechanisms, including arbitration. Germany confirmed that tax certainty will be an important theme in the tax work of their G20 Presidency with a number of expected deliverables for March 2017.

7. Against this background, the Slovak Presidency of the Council would like to launch a debate at the EU level on ways to improve tax certainty in support of the EU's attractiveness as a place for business, investment and economic growth. The Slovak Presidency is determined in particular to ensure the swift and consistent implementation of the OECD BEPS Package at the EU level so that the EU remains a frontrunner in addressing BEPS. It will in particular take up the work on dispute resolution, hybrid mismatches and a common EU corporate tax base as soon as the corresponding initiatives, expected in the autumn, are proposed by the Commission.

8. In another context, recent terror attacks show a need for an ever closer co-operation between law enforcement, anti-money laundering (AML) and other authorities such as tax and customs authorities both domestically and cross border. An effective functioning of fiscal administrations is in this respect all the more important, notably with regard to tax transparency, given the ever increasing integration of the world economy and the increased complexity of tax and customs rules. The issue of tax certainty might be relevant also in these fields.

### **NEED TO IMPROVE TAX CERTAINTY**

9. Tax uncertainty directly affects domestic investment as well as cross-border trade and investment, as uncertainty means risks and increases the cost of capital. Concerns about tax uncertainty are increasing as the world's economy and business models are changing with global value chains, increased business activity across countries, more digitalisation and intangible assets, and changes in international tax rules to reduce double non-taxation as well as double taxation. Uncertainty will always exist with permanent economic change, but governments can better design tax policies and tax administration strategies to reduce tax uncertainty.

10. One of the goals of the OECD/G20 BEPS Project was to increase tax certainty, by agreeing a comprehensive package of measures to be implemented in a coordinated way to update the international tax rules.

11. The OECD/G20 Inclusive Framework on BEPS brings together over 100 countries and jurisdictions to collaborate on the implementation of the BEPS Package. Members of the Inclusive Framework will develop a monitoring process for the four BEPS minimum standards as well as put in place the review mechanisms for other elements of the BEPS Package. The monitoring of the four minimum standards will ensure that all members, as well as jurisdictions of relevance, will comply with the standards in order to ensure a level playing field. With regard to review mechanisms, they may differ depending on the Actions and will take into account countries' specific circumstances.

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12. Some of the BEPS action items have been implemented through EU hard law, but others will be implemented through soft law. In addition, in the absence of minimum standards for all BEPS actions, some OECD recommendations have been, or may be, implemented in different ways or may not be implemented at all by some of the EU's economic partners. The EU could promote a consistent and coordinated implementation and administration of the package of BEPS measures at the global scale which could further promote tax certainty.

13. The effectiveness of tax administrations themselves could also be considered. Tax administrations have indeed a key role to play in promoting tax certainty, both as regards implementation and interpretation of the rules. This may concern in particular the way tax administrations handle tax rulings and advance pricing agreements, but also the technical expertise of tax officials to tackle BEPS challenges.

14. In this context, the Presidency considers that eliminating uncertainty does not mean that the rules should not change and that tax certainty across the EU could be further enhanced through:

- a) cross-border harmonisation of tax rules, at EU or even preferably at global level;
- b) mandatory, effective and swift cross-border dispute resolution mechanisms;
- c) binding tax rulings and advance pricing agreements (APAs);
- d) training of tax administration officials enabling them to deal with the new global challenges;
- e) cooperative compliance programmes.

15. There are already several initiatives under way, which may enhance the tax certainty within the EU. This include:

- a) Draft guidelines on the conditions and rules for the issuance of tax rulings by EU Member States – work undertaken under the EU Code of Conduct Group.
- b) The European Commission is also preparing legislative proposals with regard to dispute resolution and hybrid mismatches in relation to 3rd countries as well as a relaunch of a new CCCTB legislative proposal.

**NEED FOR A COMPREHENSIVE COOPERATION BETWEEN VARIOUS ADMINISTRATIONS:  
FIGHTING TAX EVASION, TAX CRIMES AND TERRORISM**

16. The "Panama Papers" revelations brought unprecedented media attention to the widespread promotion of structures involving off-shore jurisdictions (offshore structures) designed to avoid or evade taxes. In response to these revelations government tax officials are working together in the context of the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) to explore possibilities of cooperation and information-sharing, identify tax compliance risks and agree collaborative action. The practical experience of tax administrations in dealing with offshore tax evasion, at national, European and international level has shown the need to go further and it is here that the EU can and should take the lead.

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17. During the discussion on the "Panama Papers" revelations held at the informal ECOFIN meeting in Amsterdam on 22 April 2016, Member States underlined the critical importance of continuing and intensifying action in this field at national, EU and global level, in particular regarding the EU list of non-cooperative jurisdictions, the Mandatory Disclosure Rules and the implementation of the internationally agreed standards on transparency and exchange of information developed by the OECD.

### **i) Improving the effectiveness of inter-agency and international cooperation**

18. In order that tax administrations in the EU cooperate effectively with each other and with other agencies, a horizontal governmental approach to fight tax evasion and financial crimes, including combating the financing of terrorism (CFT), should be put in place at national level. The Commission in its Communication of 5 July 2016 has already foreshadowed possible steps in this direction, including by proposing a Directive to enhance the availability of AML/CFT information to tax authorities (DAC5), as well as by subjecting intermediaries to greater scrutiny. We can now build on that momentum.

19. The effectiveness of inter-agency and international cooperation to tackle tax evasion, tax crimes and terrorism financing could be improved in two ways.

- Improvements to the information exchange architecture allowing for faster and more effective co-operation between tax administrations, for instance on information provided by leaks and whistle-blowers and taking the next step for aligning all of our agencies to more holistically and effectively tackle crimes, including terrorism financing; and
- The introduction of mandatory disclosure rules (MDR) on intermediaries such as banks, advisors and other service providers.

### **ii) Improving the information exchange architecture**

20. Practice has shown that the current exchange of information framework, which requires that the sending tax authority meets the standard of "foreseeably relevant," is put under significant strain in cases where this judgment may be difficult to exercise for the sending country. This can create a "Catch 22" situation where important information fails to be exchanged because the tax administration in possession of the information cannot make this determination, and the tax authority that could make the determination is not in possession of the information. This may, for instance, be the case, where a tax administration receives information from a third party informant. In this process it will necessarily use its own judgments and techniques which by definition will be far inferior to the collective expertise of a joint operation.

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21. Against that background, the EU could develop a legal basis that provides legal certainty for such enhanced forms of information sharing which together with disclosure rules (described below) could be included in a revision of the Directive on Administrative Cooperation in tax matters (DAC). Further work could also be undertaken with a view to improving domestic interagency cooperation, including between tax, customs, AML/CFT and judicial authorities and adopting a horizontal government approach towards tackling financial crimes, including terrorism financing.

**iii) The introduction of mandatory disclosure rules (MDR) on intermediaries such as banks, advisors and other service providers.**

22. There have already been significant advances at the EU level in the area of tax transparency, notably through amendments to the DAC implementing the common reporting standard (CRS), exchange on tax rulings and country by country (CbC) reporting. The last remaining element of disclosure and transparency that has not been addressed by the EU is in the area of MDR. The Commission Communication of 5 July 2016 included the possibility of work in this area with the launch of a public consultation on the issue by the autumn.

23. Offshore structures have a number of common and readily identifiable features that are designed to protect the anonymity of the beneficial owners while preserving their control over the entity. These features could be the basis for developing “hallmarks” for offshore schemes that would trigger disclosure requirements for any person involved in the promotion, design or implementation of such a scheme.

24. Similarly to protect the integrity of the CRS, disclosure obligations could be imposed on intermediaries seeking to profit from the promotion, design or implementation of schemes designed to circumvent the CRS.

25. The introduction of these mandatory disclosure rules could be made through a legislative proposal for an amendment to the DAC requiring EU member states to introduce MDR into their domestic law. The rules would be based on the modular framework set out in the Action 12 Report (thus leaving room to member states to tailor the disclosure requirements to their specific circumstances and compliance risks) but could include a minimum standard that would require the disclosure of any scheme that:

- a) Circumvents the application of the CRS, i.e. was designed to circumvent reporting under the CRS; or
- b) Has the hallmarks of a passive offshore structure, i.e. contains the same structural features as the types of offshore structures detailed in the "Panama Papers".

26. The disclosure of these types of offshore schemes would fit easily within the framework of MDR set out in the Action 12 Report. In particular the primary obligation to disclose these schemes (and provide related information on taxpayers which have used them),

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would fall on the promoters, advisors and intermediaries that play a material role in the design, organisation, management or promotion of the scheme. The promoter would provide this disclosure to the local tax authority. The information provided to the local tax authority would subsequently be exchanged with other tax administrations within the exchange framework of the EU (as well as outside of the EU under applicable international agreements).

27. Taking concrete and timely action would significantly disrupt the supply side of the market for such schemes, echo the recent calls from EU leaders in the European Council to adopt measures against intermediaries that enable tax evasion or aggressive tax planning and would take up suggestions made by the Commission.

28. Adopting a revision of the DAC in the Council as set up above would be another powerful proof of the EU's ability to act and respond to citizen's worries following the Panama Papers by taking international cooperation in tax matters to the next level.