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COMMISSION STAFF WORKING DOCUMENT

Subsidiary Grid

Accompanying the document

Proposal for a Council Directive

amending Directive 2011/16/EU on administrative cooperation in the field of taxation

{COM(2022) 707 final} - {SEC(2022) 438 final} - {SWD(2022) 401 final} -
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1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
Article 115 of the Treaty on the Functioning of the European Union (TFEU) is the legal base for legislative initiatives in the field of direct taxation. Furthermore, given that the information exchanged under the Directive 2011/16/EU (hereinafter DAC) can be also used in the field of VAT and other indirect taxes, Article 113 of the TFEU is also included as a legal base.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of direct taxation as far as the proposal relates to the establishment or functioning of the internal market, the Union's competence is shared.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[1]: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

There has been an extensive consultation process while preparing the current proposal. As the proposed legislation amends existing provisions of the DAC, the "evaluate principle" was applied.

- Evaluations of existing legislation

In 2019, the Commission evaluated the effectiveness, efficiency, relevance, coherence and additional value of the Directive on administrative cooperation in the field of direct taxation. The evaluation concluded that cooperation brings about important benefits, yet there is still scope for improvement. It demonstrated that differences persist in the way Member States exploit the available tools of administrative cooperation. The information exchanged could be used more efficiently and the benefits of cooperation could be analysed in a more comprehensive manner.

In 2021, the European Court of Auditors (ECA) published its Special Report 03/2021 on the exchange of tax information in the EU. The ECA examined, firstly, how the Commission is monitoring the implementation and performance of the tax information exchange system; secondly, how Member States are using the information exchanged and how they are measuring the effectiveness of the system. The ECA found that the exchange of tax information between Member States was not yet sufficient to ensure fair and effective taxation throughout the internal market.

Building upon these findings, this legislative proposal presents a limited set of specific interventions to improve the functioning of administrative cooperation.

Furthermore, the Commission prepared an impact assessment to support this proposal. In this context the following consultation activities were carried out:

- Stakeholder consultations

On 10 March 2021 the European Commission launched a public consultation to gather feedback on the way forward for EU action on strengthening rules on administrative cooperation and expanding the exchange of information to crypto in the field of taxation. Stakeholders were asked to provide their feedback on the basis of a number of questions. In total, 33 respondents provided their feedback. In addition, the European Commission carried out targeted consultations with national administrations and private stakeholders. There was a consensus on the benefits of having a standardised EU legal framework for gathering and exchanging information regarding crypto-assets, as compared to several disparate national reporting rules.

- Consultation of Member States

The European Commission carried out a targeted consultations in November 2020 and March 2021 by organising Working Party IV meetings where Member States had the opportunity to debate a possible proposal for an amendment to the DAC. The meetings focused on the reporting and exchange of information on income earned through crypto-assets. It also looked at how to improve the compliance framework in DAC.

Overall, broad support was received for a possible EU initiative for the reporting and exchange of information on proceeds obtained by crypto-assets users.

- Outcome of consultations

Both public and targeted consultations seem to converge on the challenges that the new rules on reporting and exchange of information regarding crypto-assets should aim to tackle: underreporting in the crypto-assets EU market and inefficiencies in the current EU administrative cooperation framework, such as in the field of compliance measures.

The explanatory memorandum and the impact assessment include a section on the principle of subsidiarity, for details see question 2.2 below.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

The proposal fully observes the principle of subsidiarity as set out in Article 5 TFEU. It addresses administrative cooperation in the field of taxation. The proposal involves extending the scope of automatic exchange of information to crypto-asset service providers, hereinafter CASPs, placing an obligation on them to report on the transactions performed by users resident for tax purposes in the EU through their platforms. It also includes certain modifications in the rules to improve the functioning of the existing provisions that deal with cross-border cooperation between tax administrations from different Member States.

The increased use of crypto-assets as a source of important capital gains makes it necessary to set an EU framework to allow tax authorities to exchange the essential information to cross-check the correctness of taxpayers' declarations. While some Member States have imposed a reporting obligation in their national law and/or through administrative guidance, experience shows that national provisions against tax evasion cannot be fully effective, especially when the targeted activities are mainly carried out cross-border. The application of existing provisions of the DAC concerning compliance has shown significant discrepancies among Member States. For example, while some Member States have set high penalties for non-compliance others have no minimum amounts of penalties. Further, certain provisions have proved insufficient for addressing the needs of tax administrations in cooperating with other Member State(s) over time.

Legal certainty and clarity can only be ensured by addressing these inefficiencies through a single set of rules that apply to all Member States. The internal market needs a robust mechanism to address these loopholes in a uniform fashion and rectify existing distortions by ensuring that tax authorities receive appropriate information on a timely basis.

Therefore, the EU is better placed than individual Member States to address the problems identified and ensure the effectiveness and completeness of the system for the exchange of information and administrative cooperation. First, it will ensure a consistent application of the rules across the EU. Second, all CASPs in scope will be subject to the same reporting requirements. Third, the reporting will be accompanied with exchange of information and, as such, enable the tax administrations to obtain a comprehensive set of information regarding the capital gains obtained through crypto-asset transactions.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

One of the main problems which needs to be addressed with this initiative is under-reporting (or lack of reporting overall) of the proceeds obtained by crypto-asset users. At present, a sizeable amount of capital gains obtained via the services CASPs offer remains unknown to tax administrations and thus untaxed. The initiative is meant to improve the ability of Member States to detect and counter cross-border tax avoidance and tax evasion.

The distribution of capital gains across the Member States is uneven. Member States have different approaches when it comes to taxing realised capital gains, with some Member States not taxing them at all. Our estimates applying a 25% uniform tax rate on total capital gains from all crypto-assets in EU would reach around 1.7 Billion EUR. In 2020, the total realised capital gains by EU citizens from Bitcoin amounted to EUR 3.6 billion according to a study performed by A. Thiemann (2021).[2,3] The employed data had been tracked by Chainalysis (a blockchain data platform) that is considered a trusted source of information.[4] We have calculated all capital gains concerning all types of crypto-assets within Europe by assuming parts from the study mentioned above.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[5] or significantly damage the interests of other Member States?

National actions could potentially damage the interest of other Member States. National actions would not be sufficient to address the problem in its entirety as the legislative proposal introduces not only a reporting requirement for CASPs with respect to the transactions performed by its users, but also the mandatory exchange of this information in cross-border scenarios.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

[2] Thiemann (2021). Cryptocurrencies: An empirical view from a tax perspective, JRC Working Papers on Taxation and Structural Reforms, No 12.

[3] The analysis includes capital losses, but the aggregate outcome is positive (i.e. capital gains).

[4] Chainalysis has been commissioned by various governments, research agencies, financial institutions and insurance and cybersecurity companies worldwide, but even them experience limitations in collecting data (e.g. the use of VPN networks that hide the true location of transacting parties).

[5] https://europa.eu/european-union/about-eu/eu-in-brief_en

Member States can individually impose domestic reporting measures. However, in most Member States, there is no legislation for self-initiated third party reporting whatsoever. In addition, there are uncertainties as to whether reporting obligations based on domestic legislation can be enforced to CASPs that are neither registered nor have a permanent establishment in the regulating jurisdiction.
The Member States cannot unilaterally impose the appropriate measures for exchange of information and administrative cooperation. Therefore, the nature of the measure is not compatible with unilateral action at national level, which would not as such lead to

achievement of its objectives.

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

In case tax administrations decided to act on their own to try to tackle this problem by introducing national reporting requirements for CASPs regarding crypto-assets transactions, there would be fragmentation that may result in unnecessary burden on CASPs. The business environment becomes more complicated, with various national reporting models, which entails higher compliance and administrative costs, without sufficiently tackling the issue.

(e) Is the problem widespread across the EU or limited to a few Member States?

The problem related to the lack of reporting is widespread across the EU as the users are located and active in all Member States. Given the flexible and cross-border nature of the subject matter, this problem affects all other Member States, which cannot efficiently cooperate or exchange information amongst themselves.

(f) Are Member States overstretched in achieving the objectives of the planned measure?

As the proposed legislation seeks to improve the existing provisions on administrative cooperation and exchange of information, it is expected that the Member State will implement the proposed measures by building upon existing tools and systems.
The proposed legislation adds a reporting requirement for information on crypto-asset transactions performed through CASPs. Building upon existing tools and making those more efficient while, at the same time, standardising reporting obligations on crypto-asset transactions performed through CASPs, does not overburden the Member States.

(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?

All Member States agreed that the setting of a new reporting framework for crypto-assets transactions should be addressed via an amendment of Directive 2011/16/EU. A broad support was also provided for a possible EU initiative for enhancing some parts of the DAC including the clarification of the compliance framework of the Directive, but also clarifying rules regarding e-money.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

(a) Are there clear benefits from EU level action?

An action at the level of the EU will bring an added value, as compared to individual Member State initiatives in the field. First, it will ensure a consistent application of the rules across the EU. Second, all CASPs in scope will be subject to the same reporting requirements. Third, the reporting will be accompanied with exchange of information and, as such, enable the tax administrations to obtain a comprehensive set of information regarding the capital gains obtained through cross-border transactions of crypto-assets.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

The initiative aims at ensuring a fair and consistent functioning of the internal market, where everyone pays its fair share of tax. Lack of a level playing field and different reporting requirements imposed by Member States at national level may distort the market allocation of services provided by CASPs. By imposing a reporting requirement on all CASPs, the transactional information of EU users will be reported to tax administrations creating a level playing field for all CASPs and traditional financial institutions.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

It is crucial to define the administrative cooperation standard and rules in a homogenous way. This will ensure consistent application across the EU and enable an efficient administrative cooperation and exchange of information framework.

Having a harmonized reporting requirement will create a simplified reporting system for the CASPs, thus reducing their administrative burden, and at the same time, ensure reporting of information on transaction of crypto-assets. The exchange of this information amongst Member States will help them to reduce tax evasion, tax avoidance and tax fraud, leading to better safeguarding their revenues.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Proceeds obtained through the transactions of crypto-assets are currently under-reported. This issue is even more acute when there is a cross-border element within the transaction. Better reporting and exchange of information should therefore have a positive impact on the revenues collected by tax administrations. The estimated benefits in terms of the collection of tax revenue and improved administrative cooperation resulting from an EU-level action outweigh the loss of competence of the Member States and the local and regional authorities.

(e) Will there be improved legal clarity for those having to implement the legislation?

The purpose of improving the existing provisions of the DAC is to provide legal clarity both for tax administrations and taxpayers. The standardised reporting of crypto-asset transactions will provide legal clarity because CASPs will have to comply with the same standard across the EU, as defined in the DAC. Besides, the proposal includes clarification of rules regarding e-money that will also improve legal clarity.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The proposal consists of improving existing provisions of the Directive and extends the scope of automatic exchanges to certain specific information reported by CASPs. The envisaged action does not go beyond what is necessary to achieve the objective of exchanges of information and more broadly, administrative cooperation. Considering that the identified distortions in the functioning of the internal market usually expand beyond the borders of a single Member State, EU common rules represent the minimum necessary for tackling the problems in an effective manner.
An EU approach to tax transparency on crypto-assets appears to be the best solution in order to avoid a patchwork of reporting requirements unilaterally implemented by some or all Member States. The information needs to reach the Member State where the income and revenues are due to be taxed. Nevertheless, the information is often likely to be held by intermediaries located in another Member State or even in third countries. The envisaged action does not go beyond what is necessary to achieve the objective of reporting and exchange of information and more broadly, administrative cooperation. Considering that the identified distortions in the functioning of the internal market usually expand beyond the borders of a single Member State, the proposed EU common rules represent the minimum necessary for tackling the problems in an effective manner.

Thus, the proposed rules contribute to a clearer, consistent and effective application of the DAC leading to better ways for achieving its objectives. The envisaged obligation of CASPs to report on the crypto-asset transactions of EU users offers a workable solution against tax evasion through the use of mechanisms for the exchange of information. In this vein, one can claim that the proposed initiative represents a proportionate answer to the identified inconsistencies in the DAC and also aims to tackle the problem of tax evasion.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The initiative is limited to add an EU-wide reporting obligation combined with mandatory automatic exchange of information among Member States concerning crypto-assets. National measures, when in force, have proved insufficient for addressing the identified problem. The initiative also clarifies and improves some provisions of the DAC, such as the compliance framework. The initiative does not cover aspects on how Member States should tax capital gains earned through crypto-asset transactions.
(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?
The policy intervention in the form of a directive ensures consistency and clarity in the most effective and simple way possible. It is also proportional to achieve the pursued objectives. The evidence collected shows that the regulatory option is the most appropriate way for meeting the objectives of EU action. The status quo or baseline scenario is the least effective, efficient or coherent option. Differently from the baseline scenario, an EU mandatory common standard would ensure that all EU tax administrations have the same tools for administrative cooperation and access to the same type of data. In other words, an EU regulatory action would put all tax authorities on an equal footing. This also allows for the automatic exchange of information at the EU level on the basis of common standards and specifications.
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
The proposal is limited to imposing minimum standards and the rules necessary to achieve the set objectives. The selected instrument is a directive, the adoption of which requires unanimity in the Council.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The initiative will create administrative costs that will be fully compensated with benefits tax authorities will obtain when running the new reporting and exchange of information framework. There will be costs for the Union as well as for national authorities to adapt current IT systems. There will also be costs for CASPs that will need to comply with due diligence rules, although mostly they already had to implement due to AML provisions. The costs incurred on CASPs are based on a range of assumptions and have been estimated based on those already borne by traditional financial institutions that are already subject to the obligations of the DAC.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
Not applicable.