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2015/0065 (CNS)

Proposal for a

COUNCIL DIRECTIVE

repealing Council Directive 2003/48/EC

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In 2003, the Council adopted a Directive on the taxation of savings income received in the form of interest payments (the Savings Directive). This Directive served two main purposes: avoiding distortions to the movement of capital and allowing effective taxation of interest payments made from paying agents established in one Member State to individuals resident in another Member State. The Savings Directive facilitates the taxation of this type of interest payment in accordance with the laws of the Member State of residence of the individual receiving the savings income, by way of requesting automatic exchange of information on the interest payments being made to those individuals. The provisions of the Directive became applicable on 1 July 2005, were extended to Bulgaria and Romania as an effect of the accession of these countries on 1 January 2007, and to Croatia as an effect of the accession of this country on 1 July 2013.

The Directive was the result of the Presidency Conclusions of the European Council of 19-20 June 2000, when Member States agreed that, in order to implement the principle that all citizens should pay tax due on all their savings income, exchange of information, “on as wide a basis as possible”, shall be the ultimate objective of the EU in line with international developments.

The Directive, as adopted in 2003, covered individuals’ savings income resulting from debt claims (either classical interest income or capital gains on debt securities) received either directly or through investment funds, or through some other intermediary untaxed entities. It introduced provisions on the automatic exchange of information on this savings income paid by paying agents established in one Member State to individuals resident in another Member State. All Member States except Belgium, Luxembourg and Austria immediately introduced systems for reporting information automatically. Belgium, Luxembourg and Austria were allowed during a transitional period to levy a withholding tax instead of providing information, at a rate of 15% for the first three years following the entry into force of the Directive (until 30 June 2008), at a rate of 20% for the following three years (until 30 June 2011), and at a rate of 35% thereafter. The rules stipulated that 75% of the revenue from this withholding tax be transferred to the investor’s Member State of residence. Belgium decided to stop applying the transitional withholding tax as of 1 January 2010 and to exchange information in the same way as other Member States. Luxembourg has done the same as of 1 January 2015.

Equivalent measures to those of the Savings Directive have been applied, from 1 July 2005, in five non-EU European countries, including Switzerland, in regard to savings income paid there to EU resident individuals. Measures identical to those of the Directive have been applied, from the same date, in ten dependent or associated territories of EU Member States (twelve following the dissolution of the Netherlands Antilles) through the implementation of bilateral agreements that each of these jurisdictions signed with each of the Member States. Following Saint-Barthélemy’s change of status, France has undertaken that Saint-Barthélemy will apply both the current and future provisions of both the Savings Directive and the Directive on Administrative Cooperation.

Following the first review of the Savings Directive, the Commission proposed a number of amendments in November 2008, with a view to closing existing loopholes and more effectively preventing tax evasion. The proposed amendments sought to improve the Directive by strengthening measures to ensure that interest payments were subject to taxation. The scope of the provisions on intermediate structures was therefore extended. The proposal

also extended the scope of the Directive to income from instruments equivalent to debt instruments, i.e. innovative financial products and certain life insurance products. The amendments were adopted by the Council under Directive 2014/48/EU of 24 March 2014¹ (the Amending Savings Directive). Article 2 of this Directive stipulates that Member States must adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 2016. Member States would be obliged to apply these provisions from 1 January 2017.

While asking the Council to proceed to the formal adoption of the Amending Savings Directive, the European Council of 21 March 2014 concluded that the Global Standard being developed by the Organisation for Economic Co-operation and Development (OECD) shall be the method for automatic exchange of information that the EU will apply within its borders. The European Council did so by inviting the Council to ensure that, with the further adoption by the end of 2014 of an amended text for the Directive on Administrative Cooperation, EU law is fully aligned with the new global standard.

On 12 June 2013, the Commission had actually proposed amendments to Directive 2011/16/EU on Administrative Cooperation in the field of Taxation. The main purpose of the proposal was to provide Member States with an appropriate EU-level legal basis for implementing the global standard on automatic exchange of information (the global standard) being developed by the OECD. The scope of the proposed Amending Directive is very broad, as it covers all types of financial products (with specific exemptions) held directly or indirectly by individuals or by “non-public” entities. This Amending Directive was adopted on 9 December 2014 – Council Directive 2014/107/EU² (the Amending Directive on Administrative Cooperation). Article 2 of this Directive stipulates that Member States must adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 31 December 2015. They are required to apply these provisions from 1 January 2016 and to start exchanging information by September 2017. Austria received a derogation under Article 2(2), on the grounds of structural differences, and is allowed to start applying the Directive up to one year later than other Member States. At the time of adopting the Directive, Austria announced that it would not make full use of the derogation. It would start exchanging information by September 2017 on a limited set of accounts (only new accounts opened during the period 1 October 2016 - 31 December 2016), while making use of the derogation for other accounts.

The last subparagraph of the new Article 8(3a) introduced by the Amending Directive on Administrative Cooperation states clearly that the provisions contained in this paragraph (paragraph 3a) will take precedence over the revised Savings Directive. Since there is significant overlap between the two Directives, there would thus be only a few cases where the revised Savings Directive would still apply.

This small number of cases arises in essence for three reasons. Firstly, the Amending Directive on Administrative Cooperation sets reporting obligations on Financial Institutions that are entities as defined therein. Therefore, unlike the Savings Directive, it does not set reporting obligations on individuals (e.g. brokers) that may pay financial income. Secondly, there are some exemptions in the Amending Directive on Administrative Cooperation with regard to certain pension/retirement funds, credit card issuers, regulated tax-favoured accounts and similar financial institutions and products that pose a low risk for tax evasion.

¹ COUNCIL DIRECTIVE 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ L111, 15.4.2014, p. 50).

² COUNCIL DIRECTIVE 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L359, 16.12.2014, p. 1).

Thirdly, the paying agent on receipt approach in Article 4(2) of the Savings Directive covers also interest paid by a non-participating jurisdiction through a Member State's paying agent on receipt; in addition, the look-through approach under Article 2(3) and enhanced paying agent on receipt approach under Article 4(2) of the revised Savings Directive cover also income paid through "Active" non-financial entities, as long as they are tax-exempt. These residual cases exist as a result of slight differences in the approaches taken by the Savings Directive and the Amending Directive on Administrative Cooperation, and specific exemptions included in the two Directives. The effect of these residual cases being covered or not by the EU legislation under discussion here is marginal in the context of the overall scope of the Amending Directive on Administrative Cooperation. The international application of the global standard and the close supervision of its implementation by the Global Forum on Transparency and Exchange of Information will minimise any risks associated with these residual cases.

It follows that the benefit to be gained from keeping the two legal instruments operating in parallel would be minimal. While the above-mentioned carve-out provided for by the new Article 8(3a) introduced by the Amending Directive on Administrative Cooperation could have served to avoid the reporting under the Savings Directive in most of the cases, the co-existence of two legal instruments with a substantially similar scope is not in line with better regulation principles and the interest of clarity and legal certainty. In addition, keeping the two legal systems operating in parallel would mean having two sets of similar, but not fully aligned, customer due diligence rules, procedures and reporting systems — both in respect of financial institutions reporting to competent authorities, and of competent authorities exchanging information between themselves. The cost of this would greatly outweigh the benefits of the additional coverage given by the Savings Directive.

In order to make sure that there is only one applicable standard for automatic exchange of information within the EU, and to avoid situations where two standards are applied in parallel, the Savings Directive should be repealed.

In order not to leave any gaps in the reporting, the repeal of the Savings Directive needs to be well coordinated with the timing of the application of the Amending Directive on Administrative Cooperation, taking particular account of the extension of the timeline for application granted to Austria.

Since the objective of this proposal for a Directive, namely the repeal of the Savings Directive with the temporary exceptions necessary to protect the acquired rights and to take account of the derogation allowed to Austria under the Amending Directive on Administrative Cooperation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity and effectiveness required, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this proposal for a Directive does not go beyond what is necessary in order to achieve that objective.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The European Council Conclusions of 21 March 2014 and the Economic and Financial Affairs Council Statement of 9 December 2014 demonstrate Member States clear preference for having only one standard for the automatic exchange of information on financial income. This standard has now been fully implemented through the Amending Directive on Administrative Cooperation.

In meetings of the Commission expert group on the taxation of savings income, experts stressed the importance of having one system by which information is reported automatically for the purpose of direct taxation. They explained that the parties they represent — EU financial institutions and intermediaries — wished to avoid duplication of reporting systems. The expert group also reported that the sector was already introducing new or adapting existing IT systems in preparation for US Foreign Account Tax Compliance Act (FATCA) reporting and emphasised the need for future EU legislation on the automatic exchange of financial account information to be aligned with the OECD global standard on automatic exchange of information (which is itself based on customer due diligence principles developed in FATCA), in order to reduce compliance and administrative burdens.

As outlined above, repealing the Savings Directive will have a very marginal effect, if any, on the effectiveness of automatic exchange of information as resulting from the Amending Directive on Administrative Cooperation and essentially constitutes a measure of better regulation. Consequently, no impact assessment has been prepared.

3. LEGAL ELEMENTS OF THE PROPOSAL

Article 1 enacts the repeal of the Directive. It coordinates the repeal with the application of the Amending Directive on Administrative Cooperation by Member States.

Article 1(1)(a) and Article 1(1)(b) encompass the core reporting and information exchange obligations foreseen in Article 4(2) and, respectively, in Article 8 and Article 9 of the Savings Directive.

Article 1(1)(a) provides that economic operators and the Member States where those are established shall report and exchange the information that has been collected for 2015. That information relates to paying agents on receipt under Article 4(2) of the Savings Directive established in other Member States, to be reported under the same deadline as foreseen in Article 9, “within six months following the end of the tax year”. This deadline is 30 June 2016 for most Member States, but it is 5 October 2016 in the case of the United Kingdom. The extension of the application is therefore fixed to encompass also the United Kingdom deadline. The timeline is left open for any follow-ups and corrections after that date.

Article 1(1)(b) provides that economic operators and paying agents and the Member States where those are established shall report and exchange the information that has been collected for 2015, as provided in Article 9 “within six months following the end of the tax year”, which is 30 June 2016 for most Member States, but it is 5 October 2016 in the case of the United Kingdom. The extension of the application is therefore fixed to 5 October 2016 with a view to encompass also the United Kingdom deadline. The timeline is left open for any complements of information and corrections needed after that date.

Article 1(2) contains specific provisions to be implemented by Austria.

Austria will apply the Amending Directive on Administrative Cooperation with a delay that will in most cases be one year. Nevertheless, at the time of the adoption of the Directive on 9 December 2014, Austria committed to exchanging information already in 2017, albeit only on a limited set of accounts (only new accounts opened in the period 1 October 2016 – 31 December 2016), while retaining the derogation in other cases. Therefore, Austria will in general have to apply the Savings Directive for an additional year, except for the limited set of accounts that will be reported in 2017 under the Directive on Administrative Cooperation. Unlike Luxembourg, Austria has not indicated that it will apply automatic exchange of information under the Savings Directive before the end of the transitional period indicated in Article 10 therein. It is also not expected that the conditions for the end of that transitional

period will be fulfilled by the date of application by Austria of the Amending Directive on Administrative Cooperation. Therefore, for the purposes of Article 1 paragraph 2 it is assumed that Austria will continue to apply the transitional withholding tax under the Savings Directive during 2016, with the exception of the limited set of accounts that will be reported by Austria in 2017 under the Amending Directive on Administrative Cooperation.

Accordingly, there is a reference in Article 1(2)(a) to the obligations of Austria and the underlying obligations of paying agents established therein to transfer the withholding tax on interest payments withheld in 2016, in accordance with Article 12 of the Savings Directive.

Austria will also have to fulfil its obligations with regard to the reporting by its economic operators under the last subparagraph of Article 4(2) of the Savings Directive, in cases where the entity receiving an interest payment from those economic operators and referred to in Article 11(5) of the same Directive has formally agreed to its name, address and the total amount of interest paid to it or secured for it being communicated in accordance with the last subparagraph of Article 4(2) of that Directive. The relevant provision ensuring this is in Article 1(2)(b) of this Proposal.

In addition, should Austria provide for the procedure under Article 13(1)(a) of the Savings Directive, the obligations on Austria and the underlying obligations of the paying agents established therein to report under Chapter II of the Savings Directive would also have to be respected. The relevant provision ensuring this is in Article 1(2)(c) of this Proposal.

All the obligations foreseen in Article 1(2) should be fulfilled within six months of the end of the tax year in Austria, i.e. 30 June 2017.

For the limited set of accounts that will be subject to customer due diligence as of 1 October 2016 and will be reported in 2017 under the Directive on Administrative Cooperation as amended by the related Amending Directive, an exception to the extension of the application of the Savings Directive is added in Article 1(3).

The 27 Member States that will apply the Amending Directive on Administrative Cooperation as of 1 January 2016 will still have to grant to beneficial owners resident therein the certificate under Article 13(2) of the Savings Directive. Since the last date where that certificate would be applicable is the last date where Austria would apply withholding tax under the Savings Directive, the date is fixed in Article 1(1)(c) of this Proposal at 31 December 2016. As Luxembourg will apply the Savings Directive without levying a withholding tax as of 1 January 2015, Austria is the only Member State that will apply the withholding tax under the Savings Directive in 2015 and 2016.

The rules for the elimination of any double taxation that might result from the application of the transitional withholding tax levied under the Savings Directive would also have to extend beyond the date of application of the Amending Directive on Administrative Cooperation. Subject to the domestic rules in the specific Member State that is to provide the credit or refund according to Article 14 of the Savings Directive, the application of that provision may have to extend well beyond the last date when the withholding will be applied, which is 31 December 2016 for the withholding tax levied in Austria (see Article 1(1)(d) of this Proposal). This is a transitional measure protecting acquired rights of beneficial owners under Article 14 of the Savings Directive with regard to their Member State of residence.

Article 2 provides that the Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 3 provides that the Directive is addressed to the Member States.

4. BUDGETARY IMPLICATION

The proposal does not have any budgetary implications.

Proposal for a

COUNCIL DIRECTIVE

repealing Council Directive 2003/48/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Building on the consensus reached at the European Council of 20 June 2000 that relevant information should be exchanged for tax purposes on as wide a basis as possible, Council Directive 2003/48/EC³ has been applied in Member States since 1 July 2005 with the aim of enabling savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State, thus eliminating distortions in capital movements between Member States incompatible with the internal market.
- (2) The worldwide aspect of the challenges posed by cross-border tax fraud and evasion is a major focus of concern at a global level and within the Union. Unreported and untaxed income considerably reduces national tax revenues. The European Council on 22 May 2013 welcomed ongoing efforts made in the G8, G20 and the Organisation for Economic Co-operation and Development (OECD) to develop a global standard.
- (3) Directive 2011/16/EU⁴ provides for mandatory automatic exchange of certain information between Member States and for a step-by-step extension of its scope into new categories of income and capital, for the purpose of combating cross-border tax fraud and evasion.
- (4) On 9 December 2014, the Council adopted Directive 2014/107/EU⁵ amending Directive 2011/16/EU that extended automatic exchange of information to a full range of income in accordance with the Global Standard released by the OECD Council in

³ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ L 157, 26.6.2003, p. 38).

⁴ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1).

⁵ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16.12.2014, p. 1).

July 2014 and ensured a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of financial account information in the Internal Market.

- (5) Directive 2014/107/EU is generally broader in scope than Directive 2003/48/EC and provides that in cases of overlap of scope, Directive 2014/107/EU prevails. There are still residual cases in which only Directive 2003/48/EC would otherwise apply. These residual cases are a consequence of slight differences in approach between the two directives and of different specific exemptions. Where, in those limited instances, the scope of Directive 2003/48/EC lies outside the scope of Directive 2014/107/EU, the relevant provisions of Directive 2003/48/EC would continue to apply, resulting in dual reporting standards within the Union. The minor benefits of retaining such dual reporting would be outweighed by the costs.
- (6) On 21 March 2014, the European Council invited the Council to ensure that relevant Union law is fully aligned with the new single Global Standard of automatic exchange of information developed by the OECD. In addition, when adopting Directive 2014/107/EU, the Council invited the Commission to present a proposal to repeal Directive 2003/48/EC and to coordinate the repealing of that Directive with the date of application set forth in Article 2 of Directive 2014/107/EU with due regard to the derogation provided therein for Austria. Therefore, Directive 2003/48/EC should continue to apply to Austria during an additional one-year period. In the light of the position taken by the Council, the repeal of Directive 2003/48/EC would be needed in order to avoid dual reporting obligations and to save costs both for tax administrations and economic operators.
- (7) Under Article 2 of Directive 2014/48/EU⁶ amending Directive 2003/48/EC, Member States would have to adopt and publish, by 1 January 2016, the laws, regulations and administrative provisions necessary to comply with that Directive. They would have to apply those provisions as of 1 January 2017. With the repeal of Directive 2003/48/EC, Directive 2014/48/EU would no longer have to be transposed.
- (8) To ensure the seamless continuation of automatic reporting of financial account information, the repeal of Directive 2003/48/EC should enter into effect on the same day as the date of application set forth in Article 2 of Directive 2014/107/EU.
- (9) Notwithstanding the repeal of Directive 2003/48/EC, information gathered by paying agents, economic operators and by Member States until the date of the repeal should be processed and transferred as originally envisaged and obligations which arose prior to that date should be met.
- (10) In relation to withholding tax levied under the transitional period referred to in Article 10 of Directive 2003/48/EC, Member States should, in order to protect the acquired rights of beneficial owners, continue to give credit or refunds as originally envisaged and should issue certificates on request which would enable beneficial owners to ensure that withholding tax is not levied.
- (11) Account should be taken of the fact that, in view of structural differences, Austria has been allowed a derogation under Article 2(2) of Directive 2014/107/EU with a maximum delay of one year. On the adoption of that Directive, Austria announced that it would not make full use of the derogation. Instead, Austria will exchange information by September 2017, albeit on a limited set of accounts, while retaining the derogation in other cases. Therefore, specific provision should be made to ensure that

⁶ Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ L 111, 15.4.2014, p. 50).

Austria and the paying agents and economic operators established therein continue to apply the provisions of Directive 2003/48/EC during the period of derogation, except for those accounts which have been made subject to Directive 2014/107/EU amending Directive 2011/16/EU.

- (12) This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to the protection of personal data, and nothing in this Directive shall reduce or eliminate those rights.
- (13) Since the objective of this Directive, namely the repeal of Directive 2003/48/EC with the temporary exceptions necessary to protect the acquired rights and to take account of the derogation allowed to Austria under Directive 2014/107/EU, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity and effectiveness required, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (14) Directive 2003/48/EC should therefore be repealed,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. Directive 2003/48/EC is repealed with effect from 1 January 2016.
However, the following obligations under Directive 2003/48/EC, as amended by Directive 2006/98/EC⁷, shall continue to apply:
 - (a) the obligations of Member States and economic operators established therein under the second subparagraph of Article 4(2) of Directive 2003/48/EC shall continue to apply until 5 October 2016 or until those obligations have been fulfilled;
 - (b) the obligations of paying agents under Article 8 and of Member States of paying agents under Article 9 shall continue to apply until 5 October 2016 or until those obligations have been fulfilled;
 - (c) the obligations of Member States of residence for tax purposes of the beneficial owners under Article 13(2) shall continue to apply until 31 December 2016;
 - (d) the obligations of Member States of residence for tax purposes of the beneficial owners under Article 14, with regard to withholding tax levied during 2016 and previous years, shall continue to apply until those obligations have been fulfilled.
2. Notwithstanding paragraph 1 of this Article, Directive 2003/48/EC, as amended by Directive 2006/98/EC, shall continue to apply in its entirety with regard to Austria until 31 December 2016, with the exception of:
 - (a) the obligations of Austria and the underlying obligations of the paying agents and economic operators established therein under Article 12, which shall continue to apply until 30 June 2017 or until those obligations have been fulfilled;

⁷ Council Directive 2006/98/EC of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania (OJ L 363, 20.12.2006, p. 129).

(b) the obligations of Austria and economic operators established therein under the second subparagraph of Article 4(2), which shall continue to apply until 30 June 2017 or until those obligations have been fulfilled;

(c) any obligations of Austria and the underlying obligations of the paying agents established therein arising directly or indirectly from the procedures referred to in Article 13, which shall continue to apply until 30 June 2017 or until those obligations have been fulfilled.

3. Notwithstanding paragraph 2 of this Article, Directive 2003/48/EC, as amended by Directive 2006/98/EC, shall not apply after 1 October 2016 to interest payments with regard to accounts for which the reporting and due diligence obligations included in Annexes I and II to Directive 2011/16/EU have been fulfilled and for which Austria has communicated by automatic exchange the information referred to in Article 8(3a) of Directive 2011/16/EU within the deadline laid down in Article 8(6)(b) of Directive 2011/16/EU.

Article 2

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 3

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President