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CCBE response to European Commission proposal to amend Directive 2011/16/EU as regards automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

The CCBE has been following closely the European Commission initiatives in international tax and in particular the most recent proposal to develop an EU-wide mandatory disclosure regime. The CCBE is pleased to see that effort has been made to take account of the position of lawyers in the administration of justice by respecting the rules of legal privilege and professional secrecy. That said, the drafting of the provision could be improved to accurately reflect how the rules operate and we have included some suggested language.

In addition, we have suggested other amendments with a view to mitigating over-reporting and accordingly making the regime workable (see in particular the changes proposed to the definitions of intermediaries and associated enterprises and the changes proposed to Annex IV).

Finally, as direct tax is a matter of competence for Member States, we consider that it is inappropriate for authority to amend the hallmarks (which are fundamental to the operation of the proposal) to be devolved to the Commission.

The CCBE therefore supports the following amendments to the proposal:

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Recital (1) and (4) (1) In order to accommodate new initiatives in the field of tax transparency at the level of the Union, Council Directive 2011/16/EU has been the subject of a series of amendments over the last years. In this context, Council Directive (EU) 2014/107 introduced a common reporting standard (CRS) for financial account information within the Union. The standard that was developed within the OECD Global Forum	 (1) In order to accommodate new initiatives in the field of tax transparency at the level of the Union, Council Directive 2011/16/EU has been the subject of a series of amendments over the last years. In this context, Council Directive (EU) 2014/107 introduced a common reporting standard (CRS) for financial account information within the Union. The standard that was developed within the OECD Global Forum

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prescribes for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for this exchange worldwide. Directive 2011/16/EU was amended by Council Directive (EU) 2015/2376 which provided for the automatic exchange of information on advance cross-border tax rulings and by Council Directive (EU) 2016/881 which provided for the disclosure and the mandatory automatic exchange of information on country-by-country reporting (CbCR) of multinational enterprises between tax authorities. Being aware of the use that anti-money laundering information can have for tax authorities, Council Directive (EU) 2016/2258 placed an obligation on to Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European Parliament and of the Council. Although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to fight against tax avoidance and evasion, there is still a need for reinforcing certain specific transparency aspects of the existing taxation framework.	prescribes for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for this exchange worldwide. Directive 2011/16/EU was amended by Council Directive (EU) 2015/2376 which provided for the automatic exchange of information on advance cross-border tax rulings and by Council Directive (EU) 2016/881 which provided for the disclosure and the mandatory automatic exchange of information on country-by-country reporting (CbCR) of multinational enterprises between tax authorities. Being aware of the use that anti-money laundering information can have for tax authorities, Council Directive (EU) 2016/2258 placed an obligation on to Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European Parliament and of the Council. Although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to fight against tax avoidance ~~and evasion~~, there is still a need for reinforcing certain specific transparency aspects of the existing taxation framework.
(4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market, the Commission has been called on to embark on initiatives on the mandatory disclosure of potentially aggressive tax planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS). In this context, the European Parliament has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion.	(4) Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance ~~and evasion~~ in the internal market, the Commission has been called on to embark on initiatives on the mandatory disclosure of potentially aggressive tax planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS). In this context, the European Parliament has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance ~~and evasion~~. ***Justification*** ***References to tax evasion should be deleted. The proposal (and more generally Directive 2011/16/EU) is designed to tackle tax***

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	avoidance, not evasion. As noted in the OECD's final report issued under Action 12 of the BEPS project, the types of transaction targeted for disclosure will generally not involve tax evasion. Evasion is illegal and should not be confused with avoidance. Using terminology interchangeably compounds the confusion between evasion and avoidance and tends to equate the two. This is unhelpful to overall debate and to tax authorities seeking to combat tax evasion effectively.
Article 1 21. "intermediaries" means any person that carries the responsibility vis-à-vis the taxpayer for designing, marketing, organising or managing the implementation of the tax aspects of a reportable cross-border arrangement, or series of such arrangements, in the course of providing services relating to taxation. "Intermediaries" also means any such person that undertakes to provide, directly or by means of other persons to which it is related, material aid, assistance or advice with respect to designing, marketing, organising or managing the tax aspects of a reportable cross-border arrangement. In order to be an intermediary, a person shall meet at least one of the following additional conditions: (a) be incorporated in, and/or governed by the laws of, a Member State; (b) be resident for tax purposes in a Member State; (c) be registered with a professional association related to legal, taxation or consultancy services in at least one Member State; (d) be based in at least one Member State from where the person exercises their profession or provides	21. "intermediaries" means any person that carries the responsibility vis-à-vis the taxpayer for designing, marketing, organising or managing the implementation of the tax aspects of a reportable cross-border arrangement, or series of such arrangements, in the course of providing services relating to taxation. "Intermediaries" also means any such person that undertakes to provide, directly or by means of other persons to which it is related, material aid, assistance or advice with respect to designing, marketing, organising or managing the tax aspects of a reportable cross-border arrangement. In order to be an intermediary, a person shall meet at least one of the following additional conditions: (a) be incorporated in, and/or governed by the laws of, a Member State; (b) be resident for tax purposes in a Member State; (c) be registered with a professional association related to legal, taxation or consultancy services in at least one Member State; (d) be based in at least one Member State from where the person exercises their profession or provides

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legal, taxation or consultancy services.	legal, taxation or consultancy services. **For the avoidance of doubt, no employee of an intermediary shall themselves be regarded as an intermediary**. ***Justification*** ***As currently drafted, the definition of intermediary appears to be capable of including both firms of intermediaries and their employees. We expect that it is intended that the requirements are designed to apply to the firms who are engaged to provide advice and not to each of the employees on an individual basis. To obviate the risk of double penalties applying, it should be clarified that if the provisions apply to a firm, they will not separately apply to the employees of that firm.***
Article 1 23. "associated enterprise" means a taxpayer who is related to another taxpayer in at least one of the following ways: (a) a taxpayer participates in the management of another taxpayer by being in a position to exercise a significant influence over the other taxpayer; (b) a taxpayer participates in the control of another taxpayer through a holding that exceeds 20% of the voting rights; (c) a taxpayer participates in the capital of another taxpayer through a right of ownership that, directly or indirectly, exceeds 20% of the capital. If the same taxpayers participate in the management, control or capital of more than one	23. "associated enterprise" means a taxpayer who is related to another taxpayer in at least one of the following ways: (a) a taxpayer participates in the management of another taxpayer by being in a position to exercise a significant influence over the other taxpayer; (b) a taxpayer participates in the control of another taxpayer through a holding that exceeds ~~20%~~ **50%** of the voting rights; (c) a taxpayer participates in the capital of another taxpayer through a right of ownership that, directly or indirectly, exceeds ~~20%~~ **50%** of the capital. If the same taxpayers participate in the management, control or capital of more than one

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taxpayer, all taxpayers concerned shall be regarded as associated enterprises. In indirect participations, the fulfilment of requirements under points (b) and (c) shall be determined by multiplying the rates of holding through the successive tiers. A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%. An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single taxpayer.	taxpayer, all taxpayers concerned shall be regarded as associated enterprises. In indirect participations, the fulfilment of requirements under points (b) and (c) shall be determined by multiplying the rates of holding through the successive tiers. ~~A taxpayer holding more than 50% of the voting rights shall be deemed to hold 100%.~~ An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single taxpayer. ***Justification*** ***The relationship threshold included in the associated enterprise definition is too low to be workable. It should be replaced with a higher threshold, reflecting the threshold more commonly used in directives agreed on tax matters.***
Article 8aaa 2. Each Member State shall take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement or series of such arrangements where they are entitled to a legal professional privilege under the national law of that Member State. In such circumstances, the obligation to file information on such an arrangement or series of arrangements shall be the responsibility of the taxpayer and intermediaries shall inform taxpayers of this responsibility due to the privilege.	2. Each Member State shall take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement or series of such arrangements where they are ~~entitled to a~~ **precluded from disclosing such information under** legal privilege **or professional secrecy rules in the client-lawyer relationship** ~~under the national law of that Member State~~. In such circumstances, the obligation to file information on such an arrangement or series of arrangements shall be the responsibility of the taxpayer ~~and intermediaries shall inform taxpayers of this responsibility due to the privilege~~. **The client cannot be required to provide information which is covered by professional secrecy or legal privilege.** ***Justification***

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	Legal privilege means to protect the fundamental rights of the citizens and not the lawyers. This provision, while welcome in principle, should be redrafted to reflect that advisers are precluded from disclosing client information under legal privilege rules rather than being entitled to claim legal privilege.[1] ***In addition, professional secrecy rules exist under national rules. In this regard, a common approach in all language versions should be adopted to respect and preserve the legal privilege and other professional secrecy rights of clients and professional secrecy rules to which lawyers and other intermediaries are bound.*** ***Second, the reference to 'national' law appears inappropriate where for example legal professional privilege is enshrined in constitutional rights and given that an intermediary may be operating in one or more jurisdiction.*** ***Third, the CCBE is greatly concerned with the inclusion of an obligation on the part of an intermediary to inform a client of the obligation to disclose the particular arrangements. The breach of any obligation of the intermediary is, under the current draft, within the scope of the penalty provisions in Article 25a. Including an obligation of notification by a lawyer which can be penalised if breached undermines the protection afforded to legal privilege and professional secrecy elsewhere in the draft. Including such an obligation seems to implicitly permit third parties to enquire into whether a lawyer has complied with the provision. This presumably would involve an examination of the correspondence between the client and the intermediary, thereby effectively overriding legal privilege / professional secrecy.*** ***Fourth, the CCBE considers that the inclusion of the scope of tackling 'tax evasion' means***

[1] The CCBE would like to underline that some language versions seem to use different concepts which have different legal implications. Therefore, the different language versions should be carefully reviewed.

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	that the terms of this clause may lead to a breach of the rights of taxpayers not to self-incriminate through disclosure of transactions.
Article 25a Penalties Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8aaa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.	Penalties Member States shall lay down the rules on penalties applicable to infringements of national provisions **<u>in relation to disclosure obligations</u>** adopted pursuant to this Directive and concerning Articles 8aa and 8aaa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. ***Justification*** ***The CCBE is of the view that penalties, where they are to apply, should only apply in the context of non-disclosure by the party with whom the obligation rests. There should be no penalties applying to any other party and, in particular, to any intermediary or lawyer who is precluded from disclosing under legal privilege and / or professional secrecy rules. The application of a penalty to a lawyer opens up the scope for a new sanction against lawyers that would firstly potentially enable interference with the principle of legal privilege and professional secrecy and secondly would open the lawyer to additional sanctions that exist in a civil context (by action from the client) and under national legislation generally. This potential additional sanction is at best wholly unnecessary and at worst an unacceptable dilution of legal privilege and professional secrecy rules.*** ***The suggested application of penalties in the case of an alleged omission by a lawyer, the application of which may represent a penal sanction, ignores the varying role of lawyers throughout the EU. The sanctions, applied through potential interference with the legal privilege and professional secrecy rights (that would necessarily follow from an***

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	investigation on whether there was compliance by a lawyer), represent an unacceptable attack on the administration of justice that is not justified.
Recital 14, Article 26a, Article 26aa (14) In order to supplement or amend certain non-essential elements of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in connection with updating the hallmarks in order to include in the list of hallmarks potentially aggressive tax planning arrangements or series of arrangements in response to updated information on those arrangements or series of arrangements which is derived from the mandatory disclosure of such arrangements. Article 26a Exercise of the delegation 1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article. 2. The power to adopt delegated acts referred to in Article 23aa shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Directive. 3. The delegation of power referred to in Article 23aa may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the	 ~~(14) In order to supplement or amend certain non-essential elements of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in connection with updating the hallmarks in order to include in the list of hallmarks potentially aggressive tax planning arrangements or series of arrangements in response to updated information on those arrangements or series of arrangements which is derived from the mandatory disclosure of such arrangements.~~ ~~Article 26a~~ ~~Exercise of the delegation~~ ~~1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.~~ ~~2. The power to adopt delegated acts referred to in Article 23aa shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Directive.~~ ~~3. The delegation of power referred to in Article 23aa may be revoked at any time by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the~~

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validity of any delegated acts already in force.	~~validity of any delegated acts already in force.~~
4. As soon as it adopts a delegated act, the Commission shall notify it to the Council.	~~4. As soon as it adopts a delegated act, the Commission shall notify it to the Council.~~
5. A delegated act adopted pursuant to Article 23aa shall enter into force only if no objection has been expressed by the Council within a period of two months of the notification of that act to the Council or if, before the expiry of that period, the Council has informed the Commission that it will not object. That period shall be extended by two months at the initiative of the Council.	~~5. A delegated act adopted pursuant to Article 23aa shall enter into force only if no objection has been expressed by the Council within a period of two months of the notification of that act to the Council or if, before the expiry of that period, the Council has informed the Commission that it will not object. That period shall be extended by two months at the initiative of the Council.~~
Article 26aa	~~Article 26aa~~
Informing the European Parliament	~~Informing the European Parliament~~
The European Parliament shall be informed of the adoption of delegated acts by the Commission, of any objective formulated to them and of the revocation of a delegation of powers by the Council.	~~The European Parliament shall be informed of the adoption of delegated acts by the Commission, of any objective formulated to them and of the revocation of a delegation of powers by the Council.~~
	Justification
	The hallmarks are fundamental to how this proposal operates. They cannot accurately be described as a non-essential element and as such it is inappropriate to devolve authority to amend the hallmarks to the Commission. Further, given direct tax is a matter of competence for Member States, it is entirely inappropriate to suggest that hallmarks could be amended without input or approval from all Member States acting unanimously. Articles 26a and 26aa along with recital 14 ought to be deleted in full.
Annex IV	**Initial Comment:** ***The CCBE regrets the complete lack of legal certainty that will follow from the introduction of the hallmark descriptions. In addition to the specific comments below on the text of the hallmarks, it is wholly inappropriate that a penal sanction will follow for non-compliance by taxpayers with reporting obligations that are vague and uncertain in application.***

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Generic hallmarks and specific hallmarks under category B may only be taken into account where they fulfil the "main benefit test". Main benefit test The test will be satisfied where the main benefit of an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured.	Generic hallmarks and specific hallmarks under category B**, C and E** may only be taken into account where they fulfil the "main benefit test". Main benefit test The test will be satisfied where the main benefit of an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the **main** outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured. ***Justification*** ***The main benefit test is fundamental to how existing mandatory disclosure regimes operate. It ensures that the regime only requires transactions having as their main purpose the avoidance of tax to be reported. The absence of a main benefit test for categories C and E will inevitably lead to over-reporting and ultimately to an unworkable regime (for taxpayers, intermediaries and tax authorities).***
Annex IV B. Specific hallmarks which may be linked to the main benefit test 1. An arrangement or series of arrangements whereby the taxpayer uses losses to reduce their tax liability, including through the transfers of those losses to another jurisdiction or by the acceleration of the use of those losses.	B. Specific hallmarks which may be linked to the main benefit test 1. An arrangement or series of arrangements whereby the taxpayer ~~uses~~ **without incurring any economic loss creates tax** losses to reduce their tax liability, including through the transfers of those losses to another jurisdiction or by the acceleration of the ~~use~~ **availability** of those losses. ***Justification*** ***It is unreasonable to regard the use of losses as a hallmark of aggressive tax avoidance. Tax losses arise where a taxpayer incurs an economic loss and it is a basic element of***

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	every tax system that once a taxpayer who was previously loss-making begins to become profitable they should be permitted to offset tax losses against future taxable income. The hallmark should more appropriately target the artificial creation of tax losses.
Annex IV E. Specific hallmarks concerning transfer pricing 1. An arrangement or series of arrangements which does not conform with the arm's length principle or with the OECD transfer pricing guidelines, including the allocation of profit between different members of the same corporate group. 2. An arrangement or series of arrangements which falls within the scope of the automatic exchange of information on advance cross-border rulings but which is not reported or exchanged.	E. Specific hallmarks concerning transfer pricing 1. An arrangement or series of arrangements which **to the taxpayer's and / or intermediary's knowledge** does not conform with the arm's length principle or with the OECD transfer pricing guidelines, including the allocation of profit between different members of the same corporate group. 2. An arrangement or series of arrangements which falls within the scope of the automatic exchange of information on advance cross-border rulings but which **to the taxpayer's and / or intermediary's knowledge** is not reported or exchanged. ***Justification*** ***Hallmark E1 will be difficult to apply in practice. As the Commission is aware, transfer pricing is not an exact science. When intra-group arrangements are put in place, taxpayers and tax advisers generally do their best to ensure that the pricing is in accordance with the arm's length standard. From time-to-time, tax authorities disagree with taxpayers and with one another on what the arm's length price should be. Given the complexity of this area, it often takes years to resolve those disputes. Taxpayers, in most cases, are unlikely to know if the pricing agreed on intra-group arrangements will be challenged at a later date and should not be faced with potential penalties for non-reporting of such arrangements (which may arise where a tax authority disputes the***

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	treatment). Such an outcome may give rise to a double penalty for taxpayers/ intermediaries. This hallmark should only apply in cases where the taxpayer and / or intermediary is actually aware that the pricing is not in accordance with the arm's length principle. ***In respect of hallmark E2, it should be noted that exchange of information in respect of cross-border rulings is solely within the authority of Member States and not taxpayers or intermediaries. It is unreasonable to impose reporting obligations on intermediaries and / or taxpayers where a Member State is in breach of its obligation to exchange information (a matter in respect of which the intermediary and / or taxpayer has no authority). This hallmark should only apply if an intermediary and / or taxpayer has actual knowledge of the Member State's failure in its obligation.***