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I

(Legislative acts)

DIRECTIVES

COUNCIL DIRECTIVE (EU) 2018/822

of 25 May 2018

amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 and 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 ⁽¹⁾,Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) In order to accommodate new initiatives in the field of tax transparency at the level of the Union, Council Directive 2011/16/EU ⁽³⁾ has been the subject of a series of amendments over the last few years. In this context, Council Directive 2014/107/EU ⁽⁴⁾ introduced the Common Reporting Standard ('CRS') developed by the Organisation for Economic Cooperation and Development (OECD) for financial account information within the Union. The CRS provides for the automatic exchange of information on financial accounts held by non-tax residents and establishes a framework for that exchange worldwide. Directive 2011/16/EU was amended by Council Directive (EU) 2015/2376 ⁽⁵⁾, which provided for the automatic exchange of information on advance cross-border tax rulings, and by Council Directive (EU) 2016/881 ⁽⁶⁾, which provided for the mandatory automatic exchange of information on country-by-country reporting of multinational enterprises between tax authorities. In light of the use that anti-money-laundering information can have for tax authorities, Council Directive (EU) 2016/2258 ⁽⁷⁾ placed an obligation on Member States to give tax authorities access to customer due diligence procedures applied by financial institutions under Directive (EU) 2015/849 of the European

⁽¹⁾ Opinion of 1 March 2018 (not yet published in the Official Journal).

⁽²⁾ Opinion of 18 January 2018 (not yet published in the Official Journal).

⁽³⁾ 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).

⁽⁴⁾ 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).

⁽⁵⁾ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18.12.2015, p. 1).

⁽⁶⁾ Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3.6.2016, p. 8).

⁽⁷⁾ Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16.12.2016, p. 1).

Parliament and of the Council ⁽¹⁾. Although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to react to aggressive tax planning, there is still a need to reinforce certain specific transparency aspects of the existing taxation framework.

- (2) Member States find it increasingly difficult to protect their national tax bases from erosion as tax-planning structures have evolved to be particularly sophisticated and often take advantage of the increased mobility of both capital and persons within the internal market. Such structures commonly consist of arrangements which are developed across various jurisdictions and move taxable profits towards more beneficial tax regimes or have the effect of reducing the taxpayer's overall tax bill. As a result, Member States often experience considerable reductions in their tax revenues, which hinder them from applying growth-friendly tax policies. It is therefore critical that Member States' tax authorities obtain comprehensive and relevant information about potentially aggressive tax arrangements. Such information would enable those authorities to react promptly against harmful tax practices and to close loopholes by enacting legislation or by undertaking adequate risk assessments and carrying out tax audits. However, the fact that tax authorities do not react to a reported arrangement should not imply acceptance of the validity or tax treatment of that arrangement.
- (3) Considering that most of the potentially aggressive tax-planning arrangements span across more than one jurisdiction, the disclosure of information about those arrangements would bring additional positive results where that information was also exchanged amongst Member States. In particular, the automatic exchange of information between tax authorities is crucial in order to provide those authorities with the necessary information to enable them to take action where they observe aggressive tax practices.
- (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 information on potentially aggressive tax-planning arrangements along the lines of Action 12 of the OECD Base Erosion and Profit Shifting (BEPS) Project. 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. It is also important to note that in the G7 Bari Declaration of 13 May 2017 on fighting tax crimes and other illicit financial flows, the OECD was asked to start discussing possible ways to address arrangements designed to circumvent reporting under the CRS or aimed at providing beneficial owners with the shelter of non-transparent structures, considering also model mandatory disclosure rules inspired by the approach taken for avoidance arrangements outlined within the BEPS Action 12 Report.
- (5) It is necessary to recall how certain financial intermediaries and other providers of tax advice seem to have actively assisted their clients in concealing money offshore. Furthermore, although the CRS introduced by Directive 2014/107/EU is a significant step forward in establishing a framework of tax transparency within the Union, at least in terms of financial account information, it can still be improved.
- (6) The reporting of potentially aggressive cross-border tax-planning arrangements can contribute effectively to the efforts for creating an environment of fair taxation in the internal market. In this light, an obligation for intermediaries to inform tax authorities of certain cross-border arrangements that could potentially be used for aggressive tax planning would constitute a step in the right direction. In order to develop a more comprehensive policy, it would also be necessary that as a second step, following the reporting, the tax authorities share information with their peers in other Member States. Such arrangements should also enhance the effectiveness of the CRS. In addition, it would be crucial to grant the Commission access to a sufficient amount of information so that it can monitor the proper functioning of this Directive. Such access to information by the Commission does not discharge a Member State from its obligations to notify any State aid to the Commission.
- (7) It is acknowledged that the reporting of potentially aggressive cross-border tax-planning arrangements would stand a better chance of achieving its envisaged deterrent effect where the relevant information reached the tax authorities at an early stage, in other words before such arrangements are actually implemented. To facilitate the work of Member States' administrations, the subsequent automatic exchange of information on such arrangements could take place every quarter.

⁽¹⁾ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

- (8) To ensure the proper functioning of the internal market and to prevent loopholes in the proposed framework of rules, the reporting obligation should be placed upon all actors that are usually involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or a series of such transactions, as well as those who provide assistance or advice. It should not be ignored either that, in certain cases, the reporting obligation would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary because, for instance, the taxpayer designs and implements a scheme in-house. It would thus be crucial that, in such circumstances, tax authorities do not lose the opportunity to receive information about tax-related arrangements that are potentially linked to aggressive tax planning. It would therefore be necessary to shift the reporting obligation to the taxpayer who benefits from the arrangement in such cases.
- (9) Aggressive tax-planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive countermeasures by the tax authorities. Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. Those indications are referred to as 'hallmarks'.
- (10) Given that the primary objective of this Directive concerning the reporting of potentially aggressive cross-border tax-planning arrangements should focus on ensuring the proper functioning of the internal market, it is critical not to regulate at the level of the Union beyond what is necessary to achieve the envisaged aims. This is why it would be necessary to limit any common rules on reporting to cross-border situations, namely those involving either more than one Member State or a Member State and a third country. In such circumstances, due to the potential impact on the functioning of the internal market, one can justify the need for enacting a common set of rules, rather than leaving the matter to be dealt with at the national level. A Member State could take further national reporting measures of a similar nature, but any information collected in addition to what is reportable in accordance with this Directive should not be communicated automatically to the competent authorities of the other Member States. That information could be exchanged on request or spontaneously according to applicable rules.
- (11) Considering that the reportable arrangements should have a cross-border dimension, it would be important to share the relevant information with the tax authorities in other Member States in order to ensure the maximum effectiveness of this Directive in deterring aggressive tax-planning practices. The mechanism for the exchange of information in the context of advance cross-border rulings and advance pricing arrangements should also be used to accommodate the mandatory and automatic exchange of reportable information on potentially aggressive cross-border tax-planning arrangements amongst tax authorities in the Union.
- (12) In order to facilitate the automatic exchange of information and enhance the efficient use of resources, exchanges should be carried out through the common communication network ('CCN') developed by the Union. In this context, information would be recorded in a secure central directory on administrative cooperation in the field of taxation. Member States should have to implement a series of practical arrangements, including measures to standardise the communication of all requisite information through the creation of a standard form. This should also involve specifying the linguistic requirements for the envisaged exchange of information and upgrading the CCN accordingly.
- (13) In order to minimise costs and administrative burdens both for tax administrations and intermediaries and to ensure the effectiveness of this Directive in deterring aggressive tax-planning practices, the scope of automatic exchange of information in relation to reportable cross-border arrangements within the Union should be consistent with international developments. A specific hallmark should be introduced to address arrangements designed to circumvent reporting obligations involving automatic exchanges of information. For the purposes of that hallmark, agreements on the automatic exchange of financial account information under the CRS should be treated as equivalent to the reporting obligations laid down in Article 8(3a) of Directive 2014/107/EU and in Annex I thereto. In implementing the parts of this Directive addressing CRS avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures, Member States could use the work of the OECD, and more specifically its Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary, as a source of illustration or interpretation, in order to ensure consistency of application across Member States, insofar those texts are aligned with the provisions of Union law.

- (14) While direct taxation remains within the competence of Member States, it is appropriate to refer to a corporate tax rate of zero or almost zero, solely for the purpose of clearly defining the scope of the hallmark that covers arrangements involving cross-border transactions, which should be reportable under Directive 2011/16/EU by intermediaries or, as appropriate, taxpayers, and about which the competent authorities should exchange information automatically. Moreover, it is appropriate to recall that aggressive cross-border tax-planning arrangements, the main purpose or one of the main purposes of which is to obtain a tax advantage that defeats the object or purpose of the applicable tax law, are subject to the general anti-abuse rule as set out in Article 6 of Council Directive (EU) 2016/1164 ⁽¹⁾.
- (15) In order to improve the prospects for the effectiveness of this Directive, Member States should lay down penalties against the violation of national rules that implement this Directive. Such penalties should be effective, proportionate and dissuasive.
- (16) In order to ensure uniform conditions for the implementation of this Directive and in particular for the automatic exchange of information between tax authorities, implementing powers should be conferred on the Commission to adopt a standard form with a limited number of components, including the linguistic arrangements. For the same reason, implementing powers should also be conferred on the Commission to adopt the necessary practical arrangements for upgrading the central directory on administrative cooperation in the field of taxation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁽²⁾.
- (17) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council ⁽³⁾. Any processing of personal data carried out within the framework of this Directive must comply with Directive 95/46/EC of the European Parliament and of the Council ⁽⁴⁾ and Regulation (EC) No 45/2001.
- (18) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (19) Since the objective of this Directive, namely to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements, cannot sufficiently be achieved by the Member States but can rather, by reason of the fact that it targets schemes which are developed to potentially take advantage of market inefficiencies that originate in the interaction amongst disparate national tax rules, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on 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, especially considering that it is limited to cross-border arrangements concerning either more than one Member State or a Member State and a third country.
- (20) Directive 2011/16/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2011/16/EU is amended as follows:

(1) Article 3 is amended as follows:

(a) point 9 is amended as follows:

(i) in the first subparagraph, point (a) is replaced by the following:

‘(a) for the purposes of Article 8(1) and Articles 8a, 8aa and 8ab, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. For the purposes of Article 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State;’;

⁽¹⁾ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L 193, 19.7.2016, p. 1).

⁽²⁾ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

⁽³⁾ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

⁽⁴⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

(ii) in the first subparagraph, point (c) is replaced by the following:

‘(c) for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a, 8aa and 8ab, the systematic communication of predefined information provided in points (a) and (b) of this point.’;

(iii) in the second subparagraph, the first sentence is replaced by the following:

‘In the context of Articles 8(3a), 8(7a) and 21(2), Article 25(2) and (3) and Annex IV, any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex I.’;

(b) the following points are added:

‘18. “cross-border arrangement” means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:

- (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;
- (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;
- (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
- (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

For the purposes of points 18 to 25 of this Article, Article 8ab and Annex IV, an arrangement shall also include a series of arrangements. An arrangement may comprise more than one step or part.

- 19. “reportable cross-border arrangement” means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV.
- 20. “hallmark” means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV.
- 21. “intermediary” means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.

It also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.

In order to be an intermediary, a person shall meet at least one of the following additional conditions:

- (a) be resident for tax purposes in a Member State;
 - (b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided;
 - (c) be incorporated in, or governed by the laws of, a Member State;
 - (d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.
22. “relevant taxpayer” means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

23. for the purposes of Article 8ab, “associated enterprise” means a person who is related to another person in at least one of the following ways:
- (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
 - (b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
 - (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;
 - (d) a person is entitled to 25 % or more of the profits of another person.

If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person 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 person.

24. “marketable arrangement” means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised.
25. “bespoke arrangement” means any cross-border arrangement that is not a marketable arrangement.”;

(2) the following Article is inserted:

‘Article 8ab

Scope and conditions of mandatory automatic exchange of information on reportable cross-border arrangements

1. Each Member State shall take the necessary measures to require intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within 30 days beginning:

- (a) on the day after the reportable cross-border arrangement is made available for implementation; or
- (b) on the day after the reportable cross-border arrangement is ready for implementation; or
- (c) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first.

Notwithstanding the first subparagraph, intermediaries referred to in the second paragraph of point 21 of Article 3 shall also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

2. In the case of marketable arrangements, Member States shall take the necessary measures to require that a periodic report be made by the intermediary every 3 months providing an update which contains new reportable information as referred to in points (a), (d), (g) and (h) of paragraph 14 that has become available since the last report was filed.

3. Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:

- (a) the Member State where the intermediary is resident for tax purposes;

- (b) the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
- (c) the Member State which the intermediary is incorporated in or governed by the laws of;
- (d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

4. Where, pursuant to paragraph 3, there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

5. Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6.

Intermediaries may only be entitled to a waiver under the first subparagraph to the extent that they operate within the limits of the relevant national laws that define their professions.

6. Each Member State shall take the necessary measures to require that, where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under paragraph 5, the obligation to file information on a reportable cross-border arrangement lie with the other notified intermediary, or, if there is no such intermediary, with the relevant taxpayer.

7. The relevant taxpayer with whom the reporting obligation lies shall file the information within 30 days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the competent authorities of more than one Member State, such information shall be filed only with the competent authorities of the Member State that features first in the list below:

- (a) the Member State where the relevant taxpayer is resident for tax purposes;
- (b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
- (c) the Member State where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;
- (d) the Member State where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

8. Where, pursuant to paragraph 7, there is a multiple reporting obligation, the relevant taxpayer shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

9. Each Member State shall take the necessary measures to require that, where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lie with all intermediaries involved in the same reportable cross-border arrangement.

An intermediary shall be exempt from filing the information only to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another intermediary.

10. Each Member State shall take the necessary measures to require that, where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information in accordance with paragraph 6 be the one that features first in the list below:

- (a) the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;
- (b) the relevant taxpayer that manages the implementation of the arrangement.

Any relevant taxpayer shall only be exempt from filing the information to the extent that it has proof, in accordance with national law, that the same information referred to in paragraph 14 has already been filed by another relevant taxpayer.

11. Each Member State may take the necessary measures to require that each relevant taxpayer file information about their use of the arrangement to the tax administration in each of the years for which they use it.

12. Each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of this Directive. Intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020.

13. The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 12 of this Article shall, by means of an automatic exchange, communicate the information specified in paragraph 14 of this Article to the competent authorities of all other Member States, in accordance with the practical arrangements adopted pursuant to Article 21.

14. The information to be communicated by the competent authority of a Member State under paragraph 13 shall contain the following, as applicable:

- (a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- (b) details of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;
- (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
- (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
- (f) the value of the reportable cross-border arrangement;
- (g) the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;
- (h) the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

15. The fact that a tax administration does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of that arrangement.

16. To facilitate the exchange of information referred to in paragraph 13 of this Article, the Commission shall adopt the practical arrangements necessary for the implementation of this Article, including measures to standardise the communication of the information set out in paragraph 14 of this Article, as part of the procedure for establishing the standard form provided for in Article 20(5).

17. The Commission shall not have access to information referred to in points (a), (c) and (h) of paragraph 14.

18. The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed. The first information shall be communicated by 31 October 2020.;

(3) in Article 20, paragraph 5 is replaced by the following:

‘5. The Commission shall adopt standard forms, including the linguistic arrangements, in accordance with the procedure referred to in Article 26(2), in the following cases:

- (a) for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;
- (b) for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8ab before 30 June 2019.

Those standard forms shall not exceed the components for the exchange of information listed in Articles 8a(6) and 8ab(14), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a and 8ab, respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a and 8ab in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union.’;

(4) in Article 21, paragraph 5 is replaced by the following:

‘5. The Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8a(1) and (2) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December 2019 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ab(13), (14) and (16) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8ab(17). The necessary practical arrangements shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in Article 8a(1) and (2) and Article 8ab(13), (14) and (16) shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements.’;

(5) in Article 23, paragraph 3 is replaced by the following:

‘3. Member States shall communicate to the Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in Articles 8, 8a, 8aa and 8ab as well as the practical results achieved. The Commission shall, by means of implementing acts, adopt the form and the conditions of communication for that yearly assessment. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 26(2).’;

(6) Article 25a is replaced by the following:

‘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 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.’;

(7) Article 27 is replaced by the following:

‘Article 27

Reporting

1. Every five years after 1 January 2013, the Commission shall submit a report on the application of this Directive to the European Parliament and to the Council.

2. Every two years after 1 July 2020, the Member States and the Commission shall evaluate the relevance of Annex IV and the Commission shall present a report to the Council. That report shall, where appropriate, be accompanied by a legislative proposal.’;

(8) Annex IV, the text of which is set out in the Annex to this Directive, is added.

Article 2

1. Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

They shall apply those provisions from 1 July 2020.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 25 May 2018.

For the Council
The President
V. GORANOV

ANNEX

‘ANNEX IV

HALLMARKS

Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the “main benefit test”.

That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C can not alone be a reason for concluding that an arrangement satisfies the main benefit test.

Part II. Categories of hallmarks

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
 - (a) the amount of the tax advantage derived from the arrangement; or
 - (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.
3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
 - (a) the recipient is not resident for tax purposes in any tax jurisdiction;
 - (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
 - (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
 - (ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;

- (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
- (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;
- 2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
- 3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
- 4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

- 1. An arrangement which may have the effect of undermining the reporting obligation under the laws implementing Union legislation or any equivalent agreements on the automatic exchange of Financial Account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements. Such arrangements include at least the following:
 - (a) the use of an account, product or investment that is not, or purports not to be, a Financial Account, but has features that are substantially similar to those of a Financial Account;
 - (b) the transfer of Financial Accounts or assets to, or the use of jurisdictions that are not bound by the automatic exchange of Financial Account information with the State of residence of the relevant taxpayer;
 - (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of Financial Account information;
 - (d) the transfer or conversion of a Financial Institution or a Financial Account or the assets therein into a Financial Institution or a Financial Account or assets not subject to reporting under the automatic exchange of Financial Account information;
 - (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate reporting of one or more Account Holders or Controlling Persons under the automatic exchange of Financial Account information;
 - (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.
- 2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:
 - (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and
 - (b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and
 - (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

- 1. An arrangement which involves the use of unilateral safe harbour rules.
- 2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:
 - (a) no reliable comparables exist; and

- (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.'
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II

(Non-legislative acts)

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2018/823

of 4 June 2018

terminating the partial interim review of the countervailing measures applicable to imports of certain rainbow trout originating in the Republic of Turkey

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union ⁽¹⁾ ('the basic Regulation'), and in particular Article 19(4) thereof,

Whereas:

1. PROCEDURE

1.1. Measures in force

- (1) Following an anti-subsidy investigation ('the original investigation'), the Commission imposed, by means of Implementing Regulation (EU) 2015/309 ⁽²⁾, definitive countervailing duties on imports of certain rainbow trout originating in Turkey ('the measures in force').

1.2. Partial interim review request

- (2) On 13 March 2017, the Aegean Exporters Association ('the applicant') lodged a request for a partial interim review of the countervailing measures.
- (3) The request provided evidence that a change in the implementation of the direct production subsidies introduced in 2016 resulted in a substantial decrease of the level of subsidies to trout producers in Turkey and therefore, that the measures were no longer necessary to offset the subsidisation. The applicant also argued that the change was of a lasting nature. Therefore, according to the applicant, the measures in force had to be reviewed.

1.3. Initiation of a partial interim review

- (4) Having determined that sufficient evidence existed for the initiation of a partial interim review, the Commission announced, on 20 July 2017, by a notice published in the *Official Journal of the European Union* ('Notice of Initiation') ⁽³⁾, the initiation of a partial interim review pursuant to Article 19 of the basic Regulation.

⁽¹⁾ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

⁽²⁾ Commission Implementing Regulation (EU) 2015/309 of 26 February 2015 imposing a definitive countervailing duty and collecting definitely the provisional duty imposed on imports of certain rainbow trout originating in Turkey, (OJ L 56, 27.2.2015, p. 12.)

⁽³⁾ Notice of initiation of a partial interim review of the countervailing measures applicable to imports of certain rainbow trout originating in Turkey, (OJ C 234, 20.7.2017, p. 6).

1.4. Review investigation period

- (5) The review investigation period covered the period from 1 July 2016 to 30 June 2017. In order to assess whether there was a decrease in subsidisation of trout producers since the original investigation, and whether the change was of a lasting nature, the Commission also analysed the evolution of the overall amounts of subsidies granted by Turkey to trout producers since the original investigation period (from 1 January to 31 December 2013).

1.5. Parties concerned by the investigation

- (6) The Commission advised the applicant, the known exporting producers in Turkey, the Union producers, users and traders known to be concerned, associations representing Union producers and the Turkish authorities of the initiation of the partial interim review.
- (7) Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the Notice of Initiation.
- (8) Two interested parties made a submission to defend the necessity to maintain the measures in force. One of the parties, the Danish Aquaculture Association (representing the complainant in the original investigation) was of a view that the conditions of Article 19 of the basic Regulation were not fulfilled. It claimed that the information contained in the request was incomplete and provided an inaccurate picture of the subsidisation to trout producers in Turkey and that the changes introduced by Turkey could not be considered as having 'a lasting nature'. The second party, a Spanish aquaculture association, also argued that the countervailing measures had to be maintained, and argued that the prices of Turkish imports are below the prices of the Union trout producers.

1.6. Sampling of exporting producers in Turkey

- (9) In view of the large number of exporting producers, the Commission stated, in the Notice of Initiation, that it might sample exporting producers, in accordance with Article 27 of the basic Regulation.
- (10) In order to decide whether sampling was necessary and, if so, to select a sample, the Commission asked all known exporting producers in Turkey to provide the information specified in the Notice of Initiation. In addition, it asked the mission of the Republic of Turkey to the European Union to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation. In total, the information specified in the Notice of Initiation was sent to more than seventy companies in Turkey.
- (11) Twenty-seven exporting producers provided the requested information and agreed to be included in the sample. In accordance with Article 27(1) of the basic Regulation, the Commission provisionally selected a sample of five exporting producers/groups of producers, which included three exporting producers/groups of producers with the largest volume of exports to the Union and two smaller exporting producers/groups of producers. The Commission deemed the proposed sample representative.
- (12) The Commission invited interested parties to comment on the provisional sample. Two groups of exporting producers, the KLC Group and the Sagun Group, requested to be included in the sample. Given the large size of its exports, the Commission decided to add the KLC Group to the sample in order to duly examine the effects of the modified scheme on the sector. However, in view of the limited time available for the investigation, the Commission decided to refuse the request for the inclusion into the sample by the Group Sagun ⁽¹⁾.
- (13) The final sample thus consisted of the following exporting producers/groups of exporting producers and their related companies:
- ADA SU Group;
 - ALIMA Group;
 - GMS Group;
 - KLC Group;
 - Mittos Su Ürünleri;
 - Özpekler Group.

⁽¹⁾ The size of exports of the Group Sagun to the Union in the RIP represented approximately one third of the exports to the Union by the KLC Group.

- (14) The final sample accounted for approximately 71 % of the volume of imports of the product under review exported to the Union during the review investigation period. The Commission considered that it was representative and would enable it to properly analyse effects of the changes by Turkey on all companies in that sector.

1.7. Questionnaires and verification visits

- (15) The Commission sought and verified all the information deemed necessary to evaluate the impact of the change in the implementation of the direct subsidies scheme introduced by Turkey.
- (16) The Commission sent questionnaires to the six sampled exporting producers/groups of producers, and to Turkey. Complete questionnaire replies were received from all those parties.
- (17) The Commission carried out verifications at the premises of one of the sampled groups of exporting producers, namely the Alima Group. The Commission also carried out a verification visit at the premises of the Turkish authorities. In view of the conclusions reached in Chapter 4.3.4, the Commission decided not to visit the remaining sampled companies.

1.8. Disclosure

- (18) On 21 February 2018, the Commission disclosed to all interested parties the essential facts and considerations of the investigation and invited them to submit written comments, and/or to request a hearing with the Commission and/or the Hearing Officer in trade proceedings by 18 March 2018.
- (19) Turkey, the applicant, the four sampled exporting producers and the Danish Aquaculture Association submitted comments after disclosure. A hearing between the Commission, Turkey and the applicant took place on 23 March 2018. A hearing between the Commission and the Danish Aquaculture Association took place on 16 April 2018.

2. PRODUCT UNDER REVIEW AND THE LIKE PRODUCT

- (20) The product under review is rainbow trout (*Oncorhynchus mykiss*):
- live weighing 1,2 kg or less each, or
 - fresh, chilled, frozen and/or smoked:
 - in the form of whole fish (with heads on), whether or not gilled, whether or not gutted, weighing 1,2 kg or less each, or
 - with heads off, whether or not gilled, whether or not gutted, weighing 1 kg or less each, or
 - in the form of fillets weighing 400 g or less each,

originating in Turkey and currently falling within CN codes ex 0301 91 90, ex 0302 11 80, ex 0303 14 90, ex 0304 42 90, ex 0304 82 90 and ex 0305 43 00 (TARIC codes 0301 91 90 11, 0302 11 80 11, 0303 14 90 11, 0304 42 90 10, 0304 82 90 10 and 0305 43 00 11) ('the product under review').

- (21) The Commission concluded in the original investigation that the products produced in the Union and the products produced in Turkey are like products within the meaning of Article 2(c) of the basic Regulation.

3. SUBSIDIES COUNTERVAILED IN THE ORIGINAL INVESTIGATION

- (22) In the original investigation, the Commission examined a number of measures from which the Turkish exporting producers of trout benefited or might have benefitted during the original investigation period (the year 2013) (see recital 37 of Commission Implementing Regulation (EU) No 1195/2014 ⁽¹⁾ imposing provisional countervailing duties).
- (23) The main subsidies from which the Turkish producers of trout benefited during the original investigation period were direct subsidies granted to all trout producers on a per kg basis, and ranging from 7 % to 9,6 %. In addition, two of the companies sampled in the original investigation benefited from subsidised loans. The amount of subsidisation through subsidised loans found by the Commission was of 0,1 % for one of the companies (Kilic) and of 0,3 % for the second company (Özpekler).

⁽¹⁾ Commission Implementing Regulation (EU) No 1195/2014 of 29 October 2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey (OJ L 319, 6.11.2014, p. 1).

- (24) The Commission found that benefits of all the other investigated subsidy measures in the original investigation period were none or negligible. Therefore, the measures imposed on trout producers mainly counterbalanced the direct subsidies.
- (25) In the original investigation period (the year 2013), direct subsidies to producers of trout were granted based on Decree No 2013/4463 of 7 March 2013 on agricultural subsidies in 2013 ('decree of 2013'). This decree related to trout produced in 2013.
- (26) Under the decree of 2013, subsidies were granted to all producers of trout possessing a valid production licence relating to a fish farming unit. A production licence could relate to a production in the sea, in a dam, or to a production situated inland. A trout producer could have several production licences (fish farming units) situated in the same dam or in the same area in the sea. Under the decree of 2013, production under each of these licences was eligible for subsidies up to the following limits: for each of its production licence, the producers of trout received 0,65 Turkish Lira ('TL') per kg of trout for the production up to 250 tonnes a year; for the production from 251 to 500 tonnes, trout producers received half of the amount (0,325 TL/kg); and no subsidy was received for the production above 500 tonnes.

4. THE RESULTS OF THE INVESTIGATION

4.1. General information

- (27) Subsidies to trout production are regulated by a decree adopted by the Turkish Government on an annual basis. The decree provides for basic conditions and subsidy amounts to aquaculture production in Turkey. The procedures and principles regarding the implementation of the decree are then further determined by communiqués issued by the Ministry of Food, Agriculture and Livestock every year.
- (28) Since the review investigation period covered the second half of 2016 and the first half of 2017, the Commission first looked at the amounts and conditions of subsidies given or to be given to trout producers in 2016 and 2017 (see Chapter 4.2).
- (29) Second, the Commission analysed the overall evolution of the amounts of subsidies granted by Turkey since the original investigation till to date (see Chapter 4.3). Third, the Commission assessed whether there was a substantial change in the level of the subsidisation and whether the change could be considered as being of a lasting nature (see Chapter 4.4).

4.2. Subsidies granted to trout production in 2016 and in 2017

4.2.1. Subsidies to trout production in 2016

- (30) In 2016, subsidies to producers of trout were granted on the basis of Decree No 2016/8791 ⁽¹⁾ regarding the agricultural supports to be provided in 2016 ('decree of 2016'). Furthermore, Communiqué No 2016/33 ⁽²⁾ regarding aquaculture support detailed conditions of the subsidies to be granted.
- (31) Whilst the amount of subsidisation per TL/kg remained at the 2013 levels, a new Article 4.16 excluded from the subsidy farms with licences that were 'situated in the same potential area determined by the Ministry, in the same dam reservoir or in the regionalised dam reservoir located in the same zone'.
- (32) Pursuant to that Article and contrary to the situation during the original investigation period, in the case where a trout producer had more than one production licence (or 'fish farming unit') in the same potential zone in the sea, as defined by the Ministry, in the same reservoir (dam), or in the same reservoirs located in the same regions, which belonged to the same person or the same enterprise/company, those licences or fish farming units were

⁽¹⁾ Turkish Decree No 2016/8791 on agricultural subsidies in 2016, dated 25 April 2016 (implemented retroactively as of 1 January 2016).

⁽²⁾ The Communiqué named 'Communiqué on Aquaculture Support' numbered 2016/33 regarding the implementation of Decree No 2016/8791 was published in the Official Journal on 3 August 2016.

regarded as one single licence or unit belonging to that company, and the direct subsidy was to be paid according to that interpretation. The applicant argued that because of this Article, the volume of production eligible for the subsidies decreased and resulted in a significant decrease of subsidies received by trout producers. However, the Commission observed that this condition had two limitations.

- (33) First, the investigation showed that, according to the information provided by Turkey, the limitation provided for in Article 4.16 of the decree of 2016 only related trout production situated in dam reservoirs or in the sea, but not to the land production, which represented according to the information provided by Turkey around 20 % of all the trout production ⁽¹⁾. After disclosure, Turkey also confirmed that 65 % of the total production facilities (farms) are situated inland and only 35 % of production facilities (farms) are situated in dam reservoirs or in the sea.
- (34) Accordingly, the limitation provided for in Article 4.16 of the decree of 2016 did not have any impact on 20 % of the trout production, nor on 65 % of production facilities or farms. This was for instance the case for one of the sampled companies, Mittos, which had its own trout farm situated inland. Also, another sampled group of companies, the Özpekler group, had farms situated in different dam reservoirs. Consequently, according to the information provided by these companies/groups of companies (and verified at Government level), both were eligible to receive subsidies for the same number of production licences (six in one case, and three in the other case) in 2015 (before the legislative change) and in 2016 (when the new legislation was already in force). Therefore, the legislative change did not have any significant impact on those companies.
- (35) Second, the limitation applied per legal entity that is in the case of a group composed of related companies, each of the company could apply for subsidies up to the limits set in the decree. This meant that if a group of companies was composed of different legal entities having their production farms (licences) in the same zone, each company of the group could benefit from the subsidies on a separate basis even if it had farms in the same zone with its other related company. Turkey confirmed that this was the case of one of the sampled group, Alima Group. Both related companies within this group were eligible to ask subsidies although their farms were situated in the same zone.
- (36) Because of these features, the overall impact of the limitation did not reduce the number of recipients significantly. According to the information provided by Turkey, the number of farm licences eligible for the direct subsidy decreased from 947 farm licences in 2015 to 837 farm licences in 2016, and to 817 in 2017. As explained in recital 34, on an individual basis, while for some of the companies there was a decrease in the number of eligible licences between 2015 and 2016, for some of them, like for instance for the Özpekler Group or Mittos, the number of eligible licences remained the same before and after the change.
- (37) In addition to the legislative change introduced by Article 4.16 of the decree of 2016, with the same decree Turkey also implemented a new direct subsidy for closed system productions from 1 January 2016 ⁽²⁾. Article 4.16 of the decree stipulated that the goal was 'to benefit from the water resources available in the country in maximum level, purposing to ensure the cultivation of aquaculture products and different species at the locations where the water is restricted'.
- (38) The subsidy for closed system production could also be granted to producers of other fish species stipulated in the decree, such as sea bream and sea bass. The amount of the subsidy was set at 0,5 TL per kg of fish produced within this system, irrespective of the type of fish species produced.

4.2.2. Subsidies to be granted for the trout production of 2017

- (39) In line with the practice of adopting each year new decrees and communiqués governing the subsidies to trout producers, in 2017 the decree of 2016 was replaced by Decree No 2017/10465 ⁽³⁾ regarding the agricultural supports to be provided in 2017 ('the decree of 2017'). Furthermore, Communiqué No 2017/38 ⁽⁴⁾ regarding aquaculture support detailed conditions of the subsidies to be granted.

⁽¹⁾ At verification the Turkish authorities mentioned that 30 % of trout production was the land production and 70 % of the production was the production in dam reservoirs or in the sea. This information was corrected after disclosure.

⁽²⁾ 'A full controlled aquaculture system based on the principle of reuse in the cultivation system after being subjected to some processes like elimination of the water used during the production and elimination of excretion and food residues using series of mechanical and biological means, oxygen enrichment in respect of quality and chemical structure, evaporation of carbon dioxide, treatment with ozone and/or UV, and allowing less water utilization and ensuring an output higher than the unit volume, better growing and the possibility to benefit more from the food and having place and kind freeness and possibility to obtain products with less environmental impacts.' (Communiqué from Ministry of Food and Agriculture No 2016/33, Article 4 ç).

⁽³⁾ Turkish Decree No 2017/10465 on agricultural subsidies in 2017 dated 5 June 2017 (implemented retroactively as of 1 January 2017).

⁽⁴⁾ The Communiqué named 'Communiqué on Aquaculture Support' numbered 2017/38 regarding the implementation of Decree No 2017/10465 was published in the Official Journal on 14 October 2017.

- (40) The decree of 2017 maintained the provisions of Article 4.16 on the number of eligible licences. At the same time it introduced an increase of the amount of direct subsidies to trout production. The new amounts of subsidies were the following:
- up to the production of 250 tons, the subsidy was set at 0,75 TL/kg (compared to 0,65 TL/kg in 2016);
 - between 250 tons and 500 tons, the subsidy was set at 0,375 TL/kg (compared to 0,325 TL/kg in 2016);
 - no subsidies for the production above 500 tons.
- (41) The decree of 2017 also introduced new subsidies. According to the information provided by Turkey, those new subsidies partially replaced and complemented the direct subsidies countervailed in the original investigation and aimed to support the consumption of fish in Turkey, fulfilment of environmental standards, fight against diseases and food quality, diversification and traceability. The new subsidies were the following:
- Subsidies to trout over 1 kg;
 - Subsidies for fish labelling;
 - Subsidies for good farming practices.
- (42) The aim of subsidies for production of trout exceeding 1 kg was to promote product diversification. The subsidy amount was set at 0,25 TL/kg up to the production of 250 ton and half of the amount (0,125 TL/kg) for the production between 250 and 500 tons. The limitation of the eligibility criteria provided for in Article 4.16 and explained in recitals 32 to 35 also applied for this type of subsidy.
- (43) After disclosure, Turkey and the applicant argued that the subsidy for trout over 1 kg related to the product concerned only if its weight lies between 1 and 1,2 kg. They argued that the trout weighing over 1,2 kg did not fall under the definition of the product concerned anymore. Moreover, according to Turkey, the Ministry of Agriculture will limit the subsidy to trout weighing over 1,25 kg in the upcoming Communiqué defining the conditions of the subsidy schemes for the production of 2018. Therefore, the subsidy for trout over 1 kg should not be taken into account when assessing the evolution of subsidy amounts to trout producers in both 2017 and 2018.
- (44) The Commission agreed that a trout sold in the form of a whole fish weighing 1,2 kg or more was not the product concerned. Hence, subsidies given to a production of such fish, which would exclusively serve a different market, are not countervailable under the current measures.
- (45) However, production of trout weighing between 1 kg and 1,2 kg had been benefiting from the scheme in 2017 and fell under the product scope. Moreover, Article 4(f) of the Communiqué No 2017/38 grants the subsidy to a fish farmer 'when harvested'. Even if Turkey intended to restrict the subsidy for trout over 1,25 kg in 2018, there is no legal criterion in the decree excluding the subsidy when the trout is sold in another form. According to the information received, it is a common practice in the industry to process some of the big harvested trout and to sell it as the product concerned, for instance in the form of fillets. Therefore, the corresponding amount of the subsidy scheme benefits the product concerned. Furthermore, in its analysis the Commission can only rely on relevant final legislative and administrative acts fully in effect in the exporting country. Since the Communiqué defining the conditions for 2018 is not yet adopted, the intended conditions explained by Turkey cannot be taken into account at this stage. The Commission therefore refused to exclude this scheme from its overall analysis, and rather refined its findings with respect with the economic effect of the scheme (see recital 67).
- (46) Subsidies for fish labelling aimed to promote fish traceability and fish quality. The subsidy amount was 0,02 TL/pcs for the production up to 250 ton and half of the amount (0,01 TL) for the production between 250 and 500 tons. The limit applied per production licence. The limitation of the eligibility criteria provided for in Article 4.16 and explained in recitals 32 to 35 also applied for this type of subsidy. The subsidy for fish labelling could be granted also to producers of other fish species stipulated in the decree such as sea bream and sea bass. Interested parties did not contest that finding after disclosure.
- (47) Subsidies for good farming practices related to the fulfilment of some standards linked to the environment, food safety, welfare of fish and traceability. To be eligible for the subsidy, each company had to undergo an audit.

After the audit was completed, a certificate could be issued. The institutes controlling the fulfilment of the standards had to be certified by the Ministry. The deadline for application for companies to be eligible for the production of trout produced in 2017 was 31 March 2018. The subsidy amount was set at 0,25 TL/kg up to 250 ton of production. The limit applied per legal entity. Interested parties did not contest that finding after disclosure.

4.2.3. Conclusion

- (48) After the legislative change introduced by Article 4.16 of the decree of 2016, the volume of the trout production eligible for direct subsidies appears to have decreased. However, according to the information provided by Turkey as well as the information available on the record, the actual impact of the legislative change of 2016 in terms of volume and value of the eligible production in comparison with the system in force prior to the entry into force of that decree was difficult to determine, and depended on the production volumes produced under each of the licences.
- (49) The impact also differed at individual company level depending on the specific situation related to the production of each company. As of 2016, companies which had more than one licence in the same region or zone under the old regime could only receive direct subsidies for one of them. However, other companies with inland production (such as Mittos), or operating in different zones or regions (such as the Özpekler group) received direct subsidies at an equal or even higher level than prior to 2016 because they had more than one licence. In addition, since the limitation of Article 4.16 of the decree of 2016 applied per legal entity, the impact of the legislative change on a company group depended also on its structure. Therefore, while the groups of companies like GMS Group and KLC Group were the most affected by the legislative change, companies or groups of companies like Alima, Mittos and Özpekler and all the small companies representing more than 65 % of the companies were affected only to a limited extent or not at all.
- (50) Moreover, the Commission observed that in 2017, the actual amount of direct subsidies to trout producers increased (see recital 40). The decrees of 2016 and 2017 also introduced a number of new subsidies from which trout producers can benefit (see Chapters 4.2.1 and 4.2.2).
- (51) Therefore, while the limitations introduced in 2016 may have led to a decrease in subsidisation via the direct subsidies, Turkey simultaneously introduced new subsidies and/or amended existing subsidy measures. An important question was thus whether the increased amount of the direct subsidies and the newly introduced subsidies would not compensate for the limitation introduced in the decree of 2016. If this would be the case, the overall level of subsidisation could be equal or higher than the level of subsidisation calculated at the time of imposition of the original countervailing duties. Even if one producer received less benefit from the direct subsidies in 2016 because its various licences or fish farming units were considered as one, this change might not necessarily have had the effect of decreasing the overall level of subsidisation compared to situation before the legislative change in 2016 (see recitals 62 to 65).
- (52) Therefore, the Commission considered that it had to assess the impact of all subsidy measures that the trout producers in Turkey might have benefited from (or may benefit from in the future) as well as the overall level of subsidisation at a national scale. Hence, it did not examine the specific effects of the change of legislation in the investigation period for each of the sampled companies individually, but it rather made an assessment at a global level, whilst confirming its conclusions by reference to the information provided by the sampled exporting producers.
- (53) After disclosure, Turkey and the applicant argued that the Commission should have recalculated subsidy margins for the sampled companies on an individual basis. The Commission disagreed with the argument. The applicant requested to re-assess the decrease of the level of subsidies to all trout producers in Turkey following the legislative change in 2016. Absent the long lasting change of circumstances at national level, the Commission considered it inappropriate to calculate corresponding individual subsidy amounts. The changes made did not appear to be sufficient to demonstrate that the amount of subsidisation was altered substantially and was of a lasting nature. Moreover, the examination of the level of subsidisation at national level as well as the estimated subsidy amounts in 2018 confirmed the same conclusion.

4.3. Evolution of the subsidies granted to trout production at national level

4.3.1. Subsidies granted to trout producers between 2013 and 2016

- (54) Between 2013 and 2016, the amounts of subsidies granted to producers of trout were the following:

Table

Direct subsidies to producers of trout

	Production year			
	2013 (original investigation period)	2014	2015	2016
Subsidy amount (TL)	62 992 720	53 599 382	50 093 952	39 762 389
<i>Index</i>	100	85	80	63
Volume of production (in tons)	128 059	112 345	106 598	104 356
<i>Index</i>	100	88	83	81

Source: Information provided by Turkey.

- (55) Between 2013 and 2016, the total amount of subsidies to trout production decreased by 37 %.
- (56) The biggest decrease (20 %) in the amount of subsidies occurred between 2013 and 2015, that is to say before the legislative change introduced in the decree of 2016. The decrease between those years was in line with the decrease in production of trout (17 %) in the same period.
- (57) The decrease in the amount of subsidies between 2015 and 2016 (before and after the change) was of 20,6 %.

4.3.2. Subsidies granted by Turkey in 2016

- (58) In 2016, the total actual amounts of direct subsidies granted to trout producers amounted to 39 762 389 TL.

4.3.3. Subsidies granted by the Turkey in 2017

- (59) The implementation of all of the subsidy measures of which the trout producers could benefit in 2017 was not yet finalised at the time of the verification. Therefore, the Commission based its preliminary findings on the budget for 2017 forecast for each of the measures at a global level.
- (60) The budget dedicated for direct subsidies in 2017 amounted to 52 500 000 TL. According to the preliminary information provided by Turkey at the time of the verification, 90 % of the budget was to be spent (47 250 000 TL).
- (61) In addition, the following budget was planned for the new subsidy measures introduced in 2017:
- Closed system production – 500 000 TL
 - Fish labelling – 10 000 000 TL
 - Good farming practices – 2 000 000 TL
 - Over 1 Kg trout production – 1 875 000 TL
- (62) The budget for closed system production, fish labelling and good farming principles included also subsidies for production of other species such as sea bream and sea bass. Based on the statistics provided by Turkey regarding total aquaculture production volume of 2016, the production of trout within the eligible fish production represented 41,2 %.
- (63) Based on the forecast budget, the spending ratio of 90 % and the fact that some of the measures were to benefit production of species other than trout, the Commission first estimated that the overall amount of subsidies to trout producers in 2017 could overpass 50 million TL. That estimate was based on the information provided by Turkey, according to which 90 % of the budget for the direct subsidies was expected to be spent. In addition,

the Commission applied the same percentage of budget spending to evaluate the subsidy amounts of the additional subsidy measures introduced in 2017 (see recital 61). Finally, for the budgetary lines including other eligible fish species (that is subsidies for closed system production, over 1 kg trout, fish labelling and good farming practices), the Commission applied the ratio of 41,2 % representing the trout production within the eligible fish production.

- (64) After disclosure, Turkey and the applicant argued that none of the Turkish trout producers benefitted from the subsidy for either closed system production or fish labelling in 2017 mainly because of the initial investment costs and impracticability of the two measures. The maximum benefit for good farming practices in 2017 could only be 592 250 TL and 83 % of the planned budget was actually spent compared to the 90 % initially estimated by the Turkish authorities.
- (65) The Commission agreed to reassess the overall amount of subsidies to trout producers based on the actual amounts received by trout producers in 2017 accordingly. Based on these new amounts of subsidy measures, the overall amount of subsidies to trout producers was around 48,5 million TL in 2017.
- (66) Furthermore, Turkey argued that the subsidy scheme for trout over 1kg should not be included in the calculation of the benefit for trout producers. According to its calculations presented in the hearing, the amount of subsidies given to the production of the product concerned would then amount to around 43 million in 2017.
- (67) However, the Commission observed that this scheme may benefit three different types of trout: (1) trout between 1 and 1,2 kg (2) trout over 1,2 kg which may end up as the product concerned after processing and (3) trout over 1,2 kg serving a different market than the product concerned. In the absence of precise figures on how to allocate the budget of the subsidy, the Commission was unable to calculate the precise amount for each of the three types. In any case, even assuming that 100 % of this subsidy would go to the third type only and thus have no impact on the product concerned, the overall conclusion would not change. Indeed, the amount of 43 million TL in 2017 would still represent an increase of 4 million TL compared to 2016. Such an increase would neutralise a significant part of the impact of the 2016 decrease identified by the applicant as the change justifying the review of the measures.

4.3.4. Conclusion

- (68) Between the original investigation period (2013) and 2016, the subsidies to trout producers decreased by 37 %. The decrease in the subsidy amounts since 2013 was however not only related to the legislative change in 2016 but it was also a result of the overall decrease in trout production (see Table in recital 54). After 2016, the level of subsidies to trout producers increased again.
- (69) In 2017, the total amount of the subsidies to trout producers reached between 43 and 48,5 million TL. The Commission therefore concluded that the amount of subsidies after 2016 is approaching the amount before the legislative change.
- (70) The Commission thus concluded that the decrease of existing subsidies after the legislative change in 2016 was temporary and that the overall subsidy amounts as well as the level of production support per ton have increased again since 2016.

4.4. Lasting nature of the changes

- (71) In view of the conclusions reached in Chapter 4.3.4 the Commission therefore maintained that the decrease in subsidisation of trout producers in 2016 was only temporary. It also maintained that, since the conditions and amounts of subsidies were reviewed by Turkey on an annual basis, the introduced changes could not be considered as long lasting, in particular because:

- the amount of direct subsidy per ton increased in 2017;
- four new types of subsidy measures were introduced in 2017;
- and a new subsidy to fight diseases of juvenile fish (baby fish) was introduced in 2018.

Further, the Commission estimated that the total subsidies to trout producers may reach up to 56 million TL in 2018, i.e. around 6 million TL above the amount of 2015 – which is the year before the legislative change ⁽¹⁾.

⁽¹⁾ The estimation was done on the basis of the volume of production of 2017 by applying spending ratio of 83 % of 2017. For measures that were foreseen to benefit other species the Commission applied ratio of 43,6 % representing the share of trout production within the eligible species.

- (72) After disclosure, Turkey and the applicant argued that the subsidy to fight diseases for juvenile production introduced in 2018 did not relate to the product concerned. They however did not substantiate their claim. In the Commission's view, there was no particular reason why the subsidy would not relate to the product concerned. Strikingly, even the Ministry of Agriculture presented the new subsidy measure as a subsidy to trout producers at the verification. The Commission therefore rejected the claim.
- (73) After disclosure, Turkey and the applicant also argued that the subsidies for closed production and the fish labelling should be excluded from the assessment because they were not used in 2017 and because it was costly and impracticable to use them (see recital 64). The Commission observed in this respect that the subsidy amount for fish labelling was 0,02 TL/piece for production up to 250 tons in 2017 but seemed to increase to 0,03 TL/piece in 2018 ⁽¹⁾. It thus seems that Turkey is making the measures more attractive. Therefore, the Commission rejected the argument that these new subsidy measures should be excluded from the estimates of the subsidies in 2018 and near future.
- (74) Moreover, according to the information at the Commission's disposal, the trout producers need to make initial investments and/or undergo audits in order to align their business practices with the eligibility criteria of the newly introduced subsidy measures. Therefore, even if the budget for those measures is not spent in the first year(s) of application, it is likely that it will be used to a higher extent in the following years once the companies have rendered their activities eligible for funding.
- (75) Turkey and the applicant finally argued that the Commission should have taken into account the depreciation of the Turkish lira of 90 % over the past years. According to them, the depreciation was of a lasting nature.
- (76) The Commission disagreed with the claim. The depreciation of the Turkish lira, a freely convertible currency with a fluctuating exchange rate, cannot be attributed to Turkey. Moreover, currency exchange rates may follow a certain trend over a given period of time but may also be reversing in different period of time. The necessary stability and predictability is therefore missing to constitute a change of circumstance of a lasting nature.

4.5. Conclusion

- (77) In view of those considerations, the Commission maintained that the system of implementation of direct subsidies is characterised with constant changes in the legal basis, the eligibility criteria and in the actual amounts of subsidisation. Even if the actual amounts of 2018 depart from the Commission's estimates, the system of implementation of subsidy measures is constantly changing so such changes cannot be deemed to be of a lasting nature. In this context, the Commission also maintained that the decrease in subsidisation established between 2013 and 2016 was only of a temporary nature as the subsidy amounts for 2017 and 2018 were estimated to reach a comparable level of subsidisation as in 2013. Consequently and contrary to the assertion made by the applicant, the Commission concluded that the decrease observed in 2016 could not be considered as having a lasting nature.

5. TERMINATION OF THE PARTIAL INTERIM REVIEW

- (78) On the basis of the conclusions reached by the Commission on the changes in the implementation of the direct subsidies to trout producers in Turkey and in the absence of a lasting nature of those changes, the request for a partial interim review was considered unfounded and the partial interim review investigation should therefore be terminated.
- (79) Therefore, the measures in force imposed by Implementing Regulation (EU) 2015/309 should be maintained.
- (80) All parties were informed of the essential facts and considerations on the basis of which it was intended to terminate the investigation. They were also granted a period to submit comments subsequent to that disclosure. The submissions and comments were duly taken into considerations where warranted.

⁽¹⁾ Turkish Decree No 2018/11460 on agricultural subsidies in 2018 dated 21 February 2018 (implemented retroactively as of 1 January 2018).

- (81) The Regulation is in accordance with the opinion of the Committee established by Article 15(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council ⁽¹⁾,

HAS ADOPTED THIS REGULATION:

Article 1

The partial interim review of the countervailing measures applicable to imports of certain rainbow trout originating in Turkey is hereby terminated without amending the level of the countervailing measures in force.

Article 2

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 June 2018.

For the Commission
The President
Jean-Claude JUNCKER

⁽¹⁾ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 21).

DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2018/824

of 4 June 2018

terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Ukraine

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ⁽¹⁾ ('the basic Regulation'), and in particular Article 9(1) thereof,

Whereas:

A. INITIATION

- (1) On 2 August 2017, the European Commission ('the Commission') initiated an anti-dumping investigation with regard to imports into the Union of ferro-silicon originating in Egypt and Ukraine and published a notice of initiation to this effect in the *Official Journal of the European Union* ⁽²⁾.
- (2) The investigation was initiated following a complaint lodged by Euroalliages ('the complainant') on behalf of four Union producers, namely Ferropem, Ferroatlántica SL, OFZ and Huta Laziska SA, representing more than 90 % of the total Union production of ferro-silicon. The complaint contained prima facie evidence of injurious dumping that was considered sufficient to justify the initiation.
- (3) The Commission informed the complainant, the known exporting producers in Egypt and Ukraine, the known importers and users and any other parties known to be concerned, as well as representatives of Egypt and Ukraine of the initiation of the investigation. Interested parties were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (4) Verification visits were carried out between December 2017 and February 2018 at the premises of the four Union producers, the cooperating exporting producers in Egypt and Ukraine respectively, and one cooperating related importer in the Union.

B. WITHDRAWAL OF THE COMPLAINT AND TERMINATION OF THE PROCEEDING

- (5) By email of 27 February 2018, the complainant informed the Commission that it withdrew its complaint.
- (6) In accordance with Article 9(1) of the basic Regulation, proceedings may be terminated where the complaint is withdrawn, unless such termination would not be in the Union interest.
- (7) The investigation has not brought to light any considerations showing that such termination would be against the Union interest. Therefore, the Commission considered that the present investigation should be terminated.
- (8) Interested parties were informed accordingly and were given an opportunity to comment. However, the Commission received no comments which would justify that such termination would not be in the Union interest.
- (9) The Commission therefore concludes that the anti-dumping proceeding concerning imports into the Union of ferro-silicon, a ferro-alloy containing by weight 20 % or more but not more than 96 % of silicon and 4 % or more of iron, originating in Egypt and Ukraine, should be terminated without the imposition of measures.
- (10) This Decision is in accordance with the opinion of the Committee established by Article 15(1) of the basic Regulation,

⁽¹⁾ OJ L 176, 30.6.2016, p. 21.

⁽²⁾ OJ C 251, 2.8.2017, p. 5.

HAS ADOPTED THIS DECISION:

Article 1

The anti-dumping proceeding concerning imports of ferro-silicon, a ferro-alloy containing by weight 20 % or more but not more than 96 % of silicon and 4 % or more of iron, originating in Egypt and Ukraine, currently falling within CN codes 7202 21 00, 7202 29 10 and 7202 29 90, is hereby terminated.

Article 2

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

Done at Brussels, 4 June 2018.

For the Commission

The President

Jean-Claude JUNCKER

