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

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Having regard to the opinion of the Committee of the Regions[(3)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The challenge posed by cross-border tax avoidance, aggressive tax planning and harmful tax competition has increased considerably and has become a major focus of concern within the Union and at global level. Tax base erosion is considerably reducing national tax revenues, which hinders Member States in applying growth-friendly tax policies. The issuance of advance tax rulings, which facilitate the consistent and transparent application of the law, is common practice, including in the Union. By providing certainty for business, clarification of tax law for taxpayers can encourage investment and compliance with the law and can therefore be conducive to the objective of further developing the single market in the Union on the basis of the principles and freedoms underlying the Treaties. However, rulings concerning tax-driven structures have, in certain cases, led to a low level of taxation of artificially high amounts of income in the country issuing, amending or renewing the advance ruling and left artificially low amounts of income to be taxed in any other countries involved. An increase in transparency is therefore urgently required. The tools and mechanisms established by Council Directive 2011/16/EU[(4)] need to be enhanced in order to achieve this.

(2) The European Council, in its conclusions of 18 December 2014, underlined the urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at global and Union levels. Stressing the importance of transparency, the European

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

Council welcomed the Commission's intention to submit a proposal on the automatic exchange of information on tax rulings in the Union.

(3) Directive 2011/16/EU provides for the mandatory spontaneous exchange of information between Member States in five specific cases and within certain deadlines. The spontaneous exchange of information in cases where the competent authority of one Member State has grounds for supposing that there may be a loss of tax in another Member State already applies to tax rulings that a Member State issues, amends or renews to a specific taxpayer regarding the interpretation or application of tax provisions in the future and that have a cross-border dimension.

(4) However, the efficient spontaneous exchange of information in respect of advance cross-border rulings and advance pricing arrangements is hindered by several important practical difficulties such as the discretion permitted to the issuing Member State to decide which other Member States should be informed. Therefore the information exchanged should, where appropriate, be accessible to all other Member States.

(5) The scope of the automatic exchange of advance cross-border rulings and advance pricing arrangements, issued, amended or renewed to a particular person or group of persons upon which that person or group of persons is entitled to rely, should cover any material form (irrespective of their binding or non-binding character and the way they are issued).

(6) For the purposes of legal certainty, Directive 2011/16/EU should be amended by including an appropriate definition of an advance cross-border ruling and advance pricing arrangement. The scope of these definitions should be sufficiently broad to cover a wide range of situations, including but not limited to the following types of advance cross-border rulings and advance pricing arrangements:

— unilateral advance pricing arrangements and/or decisions;

— bilateral or multilateral advance pricing arrangements and decisions;

— arrangements or decisions determining existence or absence of a permanent establishment;

— arrangements or decisions determining existence or absence of facts with a potential impact on the tax base of a permanent establishment;

— arrangements or decisions determining tax status of a hybrid entity in one Member State which relates to a resident of another jurisdiction;

— as well as arrangements or decisions on assessment basis for depreciation of an asset in one Member State that is acquired from a group company in another jurisdiction.

(7) Taxpayers are entitled to rely on advance cross-border rulings or advance pricing arrangements during, for example, taxation processes or tax audits under the condition that the facts on which the advance cross-border rulings or advance pricing arrangements are based have been accurately presented and that the taxpayers abide by the terms of the advance cross-border rulings or advance pricing arrangements.

(8) Member States will exchange information irrespective of whether the taxpayer abides by the terms of the advance cross-border ruling or advance pricing arrangement.

(9) The provision of information should not lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or disclosure of information which would be contrary to public policy.

(10) In order to reap the benefits of the mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements, the information should be communicated promptly after they are issued, amended or renewed, and regular intervals for the communication of the information should therefore be established. For the same reasons, it is also appropriate to provide for the mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements that were issued, amended or renewed within a period beginning five years before the date of application of this Directive and which are still valid on 1 January 2014. However, particular persons or groups of persons with a group wide annual net turnover of less than EUR 40 000 000 could be excluded, under certain conditions, from such mandatory automatic exchange.

(11) For reasons of legal certainty, it is appropriate, under a set of very strict conditions, to exclude from the mandatory automatic exchange bilateral or multilateral advance pricing arrangements with third countries following the framework of existing international treaties with those countries, where the provisions of those treaties do not permit disclosure of the information received under that treaty to a third party country. In these cases however, the information identified in paragraph 6 of Article 8a relating to the requests that lead to issuance of such bilateral or multilateral advance pricing arrangements should be exchanged instead. Therefore, in such cases, the information to be communicated should include the indicator that it is provided on the basis of such a request.

(12) The mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements should in each case include the communication of a defined set of basic information that would be accessible to all Member States. The Commission should be empowered to adopt practical arrangements necessary to standardise the communication of such information under the procedure laid down in Directive 2011/16/EU (which involves the Committee on Administrative Cooperation for Taxation) for establishing a standard form to be used for the exchange of information. That procedure should also be used in the adoption of further practical arrangements for the implementation of the information exchange, such as the specification of linguistic requirements that would be applicable to the exchange of information using that standard form.

(13) In developing such a standard form for the mandatory automatic exchange of information, it is appropriate to take account of work performed at the OECD's Forum on Harmful Tax Practices, where a standard form for information exchange is being developed, in the context of the Action Plan on Base Erosion and Profit Shifting. It is also appropriate to work closely with the OECD, in a coordinated manner and not only in the area of the development of such a standard form for mandatory automatic exchange of information. The ultimate aim should be a global level playing field, where the Union should take a leading role by promoting that the scope of information

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

on advance cross-border rulings and advance pricing arrangements to be exchanged automatically should be rather broad.

(14) Member States should exchange basic information, and a limited set of basic information should also be communicated to the Commission. This should enable the Commission to monitor and evaluate the effective application of the mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements at any time. The information received by the Commission should not, however, be used for any other purposes. Such communication would moreover not discharge a Member State from its obligations to notify any State aid to the Commission.

(15) Feedback by the receiving Member State to the Member State sending the information is a necessary element of the operation of an effective system of automatic information exchange. It is therefore appropriate to underline that Member States' competent authorities should send, once a year, feedback on the automatic exchange of information to the other Member States concerned. In practice, this mandatory feedback should be done by arrangements agreed upon bilaterally.

(16) Where necessary, following the stage of mandatory automatic exchange of information under this Directive, a Member State should be able to rely on Article 5 of Directive 2011/16/EU as regards the exchange of information on request to obtain additional information, including the full text of advance cross-border rulings or advance pricing arrangements, from the Member State having issued such rulings or arrangements.

(17) It is appropriate to recall that Article 21(4) of Directive 2011/16/EU regulates the language and translation requirements applicable to requests for cooperation, including requests for notification, and attached documents. That rule should also be applicable in cases where Member States request additional information, following the stage of mandatory automatic exchange of basic information on advance cross-border rulings and advance pricing arrangements.

(18) Member States should take all reasonable measures necessary to remove any obstacle that might hinder the effective and widest possible mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements.

(19) In order to enhance the efficient use of resources, facilitate the exchange of information and avoid the need for Member States each to make similar developments to their systems to store information, specific provision should be made for the establishment of a central directory, accessible to all Member States and the Commission, to which Member States would upload and store information, instead of exchanging that information by secured email. The practical arrangements necessary for the establishment of such a directory should be adopted by the Commission in accordance with the procedure referred to in Article 26(2) of Directive 2011/16/EU.

(20) Having regard to the nature and extent of the changes introduced by Council Directive 2014/107/EU[(5)] and this Directive, the timeframe for the submission of information, statistics and reports provided for under Directive 2011/16/EU should be extended. Such an extension should ensure that the information to be provided can reflect the experience resulting from those changes. The extension should apply both to the

statistics and other information to be submitted by Member States before 1 January 2018 and to the report and, if appropriate, the proposal to be submitted by the Commission before 1 January 2019.

(21) The existing provisions regarding confidentiality should be amended to reflect the extension of mandatory automatic exchange of information to advance cross-border rulings and advance pricing arrangements.

(22) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to the protection of personal data and the freedom to conduct a business.

(23) Since the objective of this Directive, namely the efficient administrative cooperation between Member States under conditions compatible with the proper functioning of the internal market, cannot be sufficiently achieved by the Member States but can rather, by reason of the uniformity and effectiveness required, 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.

(24) 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 replaced by the following:

9. "automatic exchange" means,

(a) for the purposes of Article 8(1) and Article 8a, 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;

(b) for the purposes of Article 8(3a), the systematic communication of predefined information on residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals. In the context of Article 8(3a), Article 8(7a), Article 21(2) and Article 25(2) and (3) any capitalised term shall have the meaning that it has under the corresponding definitions set out in Annex I;