



New EU rules on automatic exchange of information on tax rulings

Background

In March 2015, the European Commission (EC) announced a major legislative initiative regarding the automatic exchange of cross border tax rulings (including APAs) as part of a package of measures to fight tax avoidance and evasion and tackle harmful tax competition between EU Member States.

The EC proposed amendments to EU Directive 2011/16 on administrative co-operation between Member States in the field of taxation to introduce the new framework on tax rulings. The new framework provides for the mandatory exchange of information on tax rulings issued by a Member State to other States to enable them to ascertain their position and protect their own tax base and deal with aggressive tax planning.

On October 6, 2015 the ECOFIN Council reached agreement on the details of the new framework. Certain amendments have been made to the original EC proposal. The new rules were formally approved by the ECOFIN Council on December 8, 2015.

The new framework on the automatic exchange of tax rulings

Key Points

- The new rules apply from January 1, 2017 (not 2016);
- The obligation to exchange relates to rulings issued, amended or renewed from January 1, 2012 (subject to exceptions detailed below);
- Information disclosed will be accessible by ALL 28 EU Member States;
- The EC will have very limited access to the information disclosed (nothing on the substance of the ruling) and will not be able to use the information for State aid investigation purposes.

The framework covers two types of rulings:

- Advance Cross-Border Rulings (ACBRs)
- Advance Pricing Arrangements (APAs)

ACBRs and APAs are defined (Art. 3–point 9) however the scope of these definitions should be interpreted sufficiently broadly to cover a wide range of situations including for example:

- 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
- 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

The new framework in principle requires the exchange of information on ACBRs and APAs issued, amended or renewed from January 1, 2012. However, if they were issued, amended or renewed between January 1, 2012 and December 31, 2013, they will only need to be communicated, if they were still valid on January 1, 2014; if they were issued, amended or renewed between January 1, 2014 and December 31, 2016, they will need to be communicated irrespectively of whether they are still valid.

The tax ruling information to be communicated shall include the following:

- The person concerned, other than an individual person, and where appropriate the group of persons to which it belongs
- Summary of the content of the ACBR or APA, including a description of relevant business activities or transactions or series of transactions provided in abstract terms, not leading to disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy
- The dates of issuance, amendment or renewal of the ACBR and APA
- The start and end date of the period of validity of the ACBRs and APAs, if specified
- The type of the ACBRs and APAs
- The amount of the transaction or series of transactions involved, if specified
- The description of the criteria used to determine transfer pricing in the case of an APA
- The method used to determine transfer pricing in the case of an APA
- The other Member States, if any, likely to be concerned by the ACBRs and APAs
- Any person, other than an individual person, in other Member States, if any, likely to be affected by the ACBRs and APAs (indicating to which Member States the affected persons are linked)

Member States may, subject to certain conditions, request additional information, including the full text of the relevant ACBR or APA.

The relevant information will be submitted through a secure email network and will be stored in a secure directory/database.

The exchange of information for ACBRs and APAs issued, amended or renewed after December 31, 2016 shall take place within three months following the end of the half of the calendar year during which the ACBRs and APAs have been issued, amended or renewed. Information on ACBRs and APAs issued, amended or renewed before that date will be communicated before January 1, 2018.

Any Member State concerned shall confirm, if possible by electronic means, the receipt of the information by the sender immediately and no later than seven working days. This measure shall be applicable until the envisaged directory/database becomes operational. The EC shall provide the directory and relevant logistical support by

December 31, 2017. All Member States shall have access to the information recorded in this directory. The EC will have limited access.

Important Exceptions

There are some exceptions for the obligation to exchange:

1. Member States have the right to exclude from exchange ACBRs or APAs to certain persons (other than persons conducting mainly financial or investment activities) issued, amended or renewed before April 1, 2016, where such persons have a group wide annual turnover of less than €40m annual turnover in the previous fiscal year;
2. Bilateral or multilateral APAs with third countries shall be excluded from exchange in case the international tax agreement under which they were negotiated does not permit its disclosure to third parties; however, the relevant information included in the (taxpayer) request that led to the issuance of such APAs shall be automatically exchanged instead. Bilateral or multilateral APAs with third countries issued under international tax agreements that permit their disclosure, and where the competent authority of the third country gives permission for the information to be disclosed, will be exchanged under the lighter regime of Article 9 (spontaneous exchange) of the Directive; and
3. ACBRs that exclusively concern and involve the tax affairs of one or more individuals do not need to be exchanged.

Concluding remarks

Even though the EC cannot use any information exchanged to launch State aid investigations, the new framework is well designed to ensure transparency and could enable Member States to establish and operate their tax rulings system on the basis of information which was not available to them before.

Contact Us

Please get in touch with one of the contacts below for further details of how KPMG member firms can help you.

Michail Papadakis

Senior Manager, KPMG in the UK

tel: +44 207 311 2580

michail.papadakis@KPMG.co.uk

Robert van der Jagt

Chairman, KPMG's EU Tax Centre and

Partner, Meijburg & Co

vanderjagt.robert@kpmg.com

Barry Larking

Director, EU Tax Services, KPMG's EU Tax Centre

Director, Meijburg & Co

tel: +31 88 909 1465

larking.barry@kpmg.com

www.kpmg.com/eutax

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