

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

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;
 - (c) for the purposes of all provisions of this Directive other than Articles 8(1), 8(3a) and 8a, the systematic communication of predefined information provided in accordance with points (a) and (b) of this point;
 - (b) The following points are added:
 - 14. “advance cross-border ruling” means any agreement, communication, or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions:
 - (a) is issued, amended or renewed by, or on behalf of, the government or the tax authority of a Member State, or the Member State's territorial or administrative subdivisions, including local authorities, irrespective of whether it is effectively used;
 - (b) is issued, amended or renewed, to a particular person or a group of persons, and upon which that person or a group of persons is entitled to rely;
 - (c) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of national laws relating to taxes of

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the Member State, or the Member State's territorial or administrative subdivisions, including local authorities;

- (d) relates to a cross-border transaction or to the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment; and
- (e) is made in advance of the transactions or of the activities in another jurisdiction potentially creating a permanent establishment or in advance of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place.

The cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling;

15. “advance pricing arrangement” means any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which meets the following conditions:

- (a) is issued, amended or renewed by, or on behalf of, the government or the tax authority of one or more Member States, including any territorial or administrative subdivision thereof, including local authorities, irrespective of whether it is effectively used;
- (b) is issued, amended or renewed, to a particular person or a group of persons and upon which that person or a group of persons is entitled to rely; and
- (c) determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.

Enterprises are associated enterprises where one enterprise participates directly or indirectly in the management, control or capital of another enterprise or the same persons participate directly or indirectly in the management, control or capital of the enterprises.

Transfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and “transfer pricing” is to be construed accordingly.

16. For the purpose of point 14 “cross-border transaction” means a transaction or series of transactions where:

- (a) not all of the parties to the transaction or series of transactions are resident for tax purposes in the Member

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State issuing, amending or renewing the advance cross-border ruling;

- (b) any of the parties to the transaction or series of transactions is simultaneously resident for tax purposes in more than one jurisdiction;
- (c) one of the parties to the transaction or series of transactions carries on business in another jurisdiction through a permanent establishment and the transaction or series of transactions forms part or the whole of the business of the permanent establishment. A cross-border transaction or series of transactions shall also include arrangements made by a person in respect of business activities in another jurisdiction which that person carries on through a permanent establishment; or
- (d) such transactions or series of transactions have a cross border impact.

For the purpose of point 15, “cross-border transaction” means a transaction or series of transactions involving associated enterprises which are not all resident for tax purposes in the territory of a single jurisdiction or a transaction or series of transactions which have a cross border impact.

- 17. For the purpose of point 15 and 16, “enterprise” means any form of conducting business.;
- (2) in Article 8, paragraphs 4 and 5 are deleted.
- (3) The following Articles are inserted:

Article 8a

Scope and conditions of mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements

1 The competent authority of a Member State, where an advance cross-border ruling or an advance pricing arrangement was issued, amended or renewed after 31 December 2016 shall, by automatic exchange, communicate information thereon to the competent authorities of all other Member States as well as to the European Commission, with the limitation of cases set out in paragraph 8 of this Article, in accordance with applicable practical arrangements adopted pursuant to Article 21.

2 The competent authority of a Member State shall, in accordance with applicable practical arrangements adopted pursuant to Article 21, also communicate information to the competent authorities of all other Member States as well as to the European Commission, with the limitation of cases set out in paragraph 8 of this Article, on advance cross-border rulings and advance pricing arrangements issued, amended or renewed within a period beginning five years before 1 January 2017.

If advance cross-border rulings and advance pricing arrangements are issued, amended or renewed between 1 January 2012 and 31 December 2013, such communication shall take place under the condition that they were still valid on 1 January 2014.

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If advance cross-border rulings and advance pricing arrangements are issued, amended or renewed between 1 January 2014 and 31 December 2016, such communication shall take place irrespective of whether they are still valid.

Member States may exclude from the communication referred to in this paragraph, information on advance cross-border rulings and advance pricing arrangements issued, amended or renewed before 1 April 2016 to a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a group-wide annual net turnover, as defined in point (5) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council⁽¹⁾, of less than EUR 40 000 000 (or the equivalent amount in any other currency) in the fiscal year preceding the date of issuance, amendment or renewal of those cross-border rulings and advance pricing arrangements.

- 3 Bilateral or multilateral advance pricing arrangements with third countries shall be excluded from the scope of automatic exchange of information under this Article where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties. Such bilateral or multilateral advance pricing arrangements will be exchanged under Article 9, where the international tax agreement under which the advance pricing arrangement was negotiated permits its disclosure, and the competent authority of the third country gives permission for the information to be disclosed.

However, where the bilateral or multilateral advance pricing arrangements would be excluded from the automatic exchange of information under the first sentence of the first subparagraph of this paragraph, the information identified in paragraph 6 of this Article referred to in the request that lead to issuance of such a bilateral or multilateral advance pricing arrangement shall instead be exchanged under paragraphs 1 and 2 of this Article.

- 4 Paragraphs 1 and 2 shall not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons.

- 5 The exchange of information shall take place as follows:
- a in respect of the information exchanged pursuant to paragraph 1 — within three months following the end of the half of the calendar year during which the advance cross-border rulings or advance pricing arrangements have been issued, amended or renewed;
 - b in respect of the information exchanged pursuant to paragraph 2 — before 1 January 2018.

- 6 The information to be communicated by a Member State pursuant to paragraphs 1 and 2 of this Article shall include the following:
- a the identification of the person, other than a natural person, and where appropriate the group of persons to which it belongs;
 - b a summary of the content of the advance cross-border ruling or advance pricing arrangement, including a description of the relevant business activities or transactions or series of transactions provided in abstract terms, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy;
 - c the dates of issuance, amendment or renewal of the advance cross-border ruling or advance pricing arrangement;

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- d the start date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- e the end date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- f the type of the advance cross-border ruling or advance pricing arrangement;
- g the amount of the transaction or series of transactions of the advance cross-border ruling or advance pricing arrangement if such amount is referred to in the advance cross-border ruling or advance pricing arrangement;
- h the description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement;
- i the identification of the method used for determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement;
- j the identification of the other Member States, if any, likely to be concerned by the advance cross-border ruling or advance pricing arrangement;
- k the identification of any person, other than a natural person, in the other Member States, if any, likely to be affected by the advance cross-border ruling or advance pricing arrangement (indicating to which Member States the affected persons are linked); and
- l the indication whether the information communicated is based upon the advance cross-border ruling or advance pricing arrangement itself or upon the request referred to in the second subparagraph of paragraph 3 of this Article.

7 To facilitate the exchange of information referred to in paragraph 6 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 6 of this Article, as part of the procedure for establishing the standard form provided for in Article 20(5).

8 Information as defined under points (a), (b), (h) and (k) of paragraph 6 of this Article shall not be communicated to the European Commission.

9 The competent authority of the Member States concerned, identified under paragraph 6(j), shall confirm, if possible by electronic means, the receipt of the information to the competent authority which provided the information without delay and in any event no later than seven working days. This measure shall be applicable until the directory referred to in Article 21(5) becomes operational.

10 Member States may, in accordance with Article 5, and having regard to Article 21(4), request additional information, including the full text of an advance cross-border ruling or an advance pricing arrangement.

Article 8b

Statistics on automatic exchanges

1 Before 1 January 2018, Member States shall provide the Commission on an annual basis with statistics on the volume of automatic exchanges under Articles 8 and 8a and, to the extent possible, with information on the administrative and other relevant costs and benefits relating to exchanges that have taken place and any potential changes, for both tax administrations and third parties.

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- 2 Before 1 January 2019, the Commission shall submit a report that provides an overview and an assessment of the statistics and information received under paragraph 1 of this Article, on issues such as the administrative and other relevant costs and benefits of the automatic exchange of information, as well as practical aspects linked thereto. If appropriate, the Commission shall present a proposal to the Council regarding the categories and the conditions laid down in Article 8(1), including the condition that information concerning residents in other Member States has to be available, or the items referred to in Article 8(3a), or both.

When examining a proposal presented by the Commission, the Council shall assess further strengthening of the efficiency and functioning of the automatic exchange of information and raising the standard thereof, with the aim of providing that:

- a the competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2019 concerning residents in that other Member State, on all categories of income and capital listed in Article 8(1), as they are to be understood under the national legislation of the Member State communicating the information; and
 - b the lists of categories and items laid down in Articles 8(1) and 8(3a) be extended to include other categories and items, including royalties..
- (4) In Article 20, the following paragraph is added:

5. A standard form, including the linguistic arrangements, shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2) before 1 January 2017. The automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a shall be carried out using that standard form. This standard form shall not exceed the components for exchange of the information listed in Article 8a(6) and other relating fields linked to these components necessary to achieve the objectives of Article 8a.

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

- (5) Article 21 is amended as follows:

- (a) paragraph 3 is replaced by the following:
3. Persons duly accredited by the Security Accreditation Authority of the Commission may have access to that information only in so far as it is necessary for the care, maintenance and development of the directory referred to in paragraph 5 and of the CCN network.;

- (b) the following paragraph is added:

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 paragraphs 1 and 2 of Article 8a 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

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shall also have access to the information recorded to that directory, however within the limitations set out in Article 8a(8). 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 paragraphs 1 and 2 of Article 8a shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements..

(6) Article 23 is amended as follows:

(a) 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 Article 8 and Article 8a as well as the practical results achieved. The form and the conditions of communication of that yearly assessment shall be adopted by the Commission in accordance with the procedure referred to in Article 26(2)..

(b) Paragraphs 5 and 6 are deleted.

(7) The following Article is inserted:

Article 23a

Confidentiality of information

1 Information communicated to the Commission pursuant to this Directive shall be kept confidential by the Commission in accordance with the provisions applicable to Union authorities and may not be used for any purposes other than those required to determine whether and to what extent Member States comply with this Directive.

2 Information communicated to the Commission by a Member State under Article 23, as well as any report or document produced by the Commission using such information, may be transmitted to other Member States. Such transmitted information shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.

Reports and documents produced by the Commission, referred to in the first subparagraph, may be used by the Member States only for analytical purposes, and shall not be published or made available to any other person or body without the express agreement of the Commission..

(8) In Article 25, the following paragraph is inserted:

1a. Regulation (EC) No 45/2001 applies to any processing of personal data under this Directive by the Union institutions and bodies. However, for the purpose of the correct application of this Directive, the scope of the obligations and rights provided for in Article 11, Article 12(1), Articles 13 to 17 of Regulation (EC) No 45/2001 is restricted to the extent required in order to safeguard the interests referred to in point (b) of Article 20(1) of that Regulation..

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- (1) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).⁷.