
If adopted, the Proposal will provide for a specific requirement for Member States to automatically communicate, on a quarterly basis and following a standard format, a predefined set of information on all of their advance cross-border tax rulings and advance pricing arrangements, including those which were issued during the last 10 years but remain valid on 1 January 2016.

Exchange of tax rulings under the current Administrative Cooperative Directive

Under the current Administrative Cooperation Directive, information on tax rulings is exchanged on a spontaneous basis under certain circumstances. Such a spontaneous communication can be required from a Member State if (i) the country has grounds for assuming that, for example, there may be a loss of taxation in another Member State and (ii) this information would be foreseeable relevant for the enforcement of the income tax law of that other Member State.

The Member State granting the tax ruling is, however, the only one to decide whether, and for whom, this information may be relevant. Moreover, it can refuse to spontaneously exchange information on the basis of its commercial secrecy laws or public policy.

According to the EU Commission, statistics demonstrate the ineffectiveness of the spontaneous exchange of information with respect to tax rulings.
Scope and timing of the Proposal

The Proposal aims to establish a clear and unequivocal set of rules regarding information that has to be exchanged and the timing related thereto:

- as from 1 January 2016, Member States issuing or amending an advance cross-border tax ruling ("ACTR") or an advance pricing arrangement ("APA") shall have to communicate such information to the competent authorities of all other Member States, as well as to the European Commission, within one month following the end of the quarter during which the ACTR or APA was issued or amended;
- on 31 December 2016 at the latest, Member States shall also have to communicate information to all other Member States and the European Commission on all of their ACTRs and APAs which were issued, at the earliest, on 1 January 2006, but remain valid until 1 January 2016.

For the purpose of the Proposal, the general concept of “ruling” is broadly defined in order to prevent divergent interpretations which could enable Member States to circumvent their obligations (i.e. any agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit).

The automatic exchange does not cover purely domestic transactions.

Information to be provided

The predefined information to be communicated by a Member State pursuant to the Proposal shall, at least, include the following information:

- the identification of the taxpayer and, if appropriate, the group of companies to which it belongs;
- the content of the ACTRs or APAs, including a description of the relevant business activities or transactions or series of transactions.

In view of the Commission staff working document accompanying the Proposal, we note that the EU Commission considers that requesting an exchange of extensive and detailed information on ACTRs and APAs would be disproportionate in terms of administrative burden and compliance costs. This “content” requirement could thus be interpreted by the EU Commission as referring to the type of matters addressed in the ACTRs and APAs;

- the description of the set of criteria used for the determination of the transfer pricing, or the transfer price itself in case of APAs;
- the identification of the other Member States likely to be directly or indirectly concerned by the ACTRs or APAs;
- the identification of any person in the other Member States likely to be directly or indirectly affected by the ACTRs or APAs (apart from natural persons).

Following receipt of the abovementioned information, other Member States will have the possibility to request additional information (including the full text...
of the relevant ACTRs or APAs) through the exchange of information upon request procedure provided for in the Administrative Cooperation Directive.

**Impact on the commercial secrecy laws or public policy**

The Administrative Cooperation Directive provides for a general limitation, according to which the provision of information may be refused by Member States where it would lead 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.

Under the Proposal, the aforementioned limitation shall not apply with respect to the exchange of information on ACTRs or APAs.

**Impact of the Proposal from a procedural angle**

The Belgian tax authorities have, in principle, three years from 1st January of the assessment year to investigate the income tax situation of a taxpayer and to issue an additional tax assessment. The ordinary assessment period of three years can be extended to seven years in case of fraud. The ordinary investigation period of three years can also be extended to seven years provided that, prior to the investigation during this additional period, the taxpayer is accurately informed in writing of the indications of fraud which exist against him or her.

Moreover, the tax authorities may also make use of a special assessment period when ‘evidential data’ (e.g. received from another domestic or a foreign tax administration) show that taxable income has not been declared in the course of the five years prior to the year in which the tax authorities came to the knowledge of such data. This special assessment period, which is not an investigation period, covers 12 months, starting from the date on which the tax authority came to the knowledge of the evidential data.

As all ACTRs and APAs issued during the last 10 years must be exchanged, important questions arise concerning the impact of the Proposal as to the applicable investigation and assessment periods. Can, for instance, an automatically exchanged ruling constitute an indication of fraud and thus give rise to an extension of the ordinary investigation period? Can an automatically exchanged ruling be seen as evidence of fraud and thus give rise to an extension of the ordinary assessment period? Can an automatically exchanged ruling be seen as ‘evidential data’ which opens the special assessment period of twelve months? What if the tax authorities want to conduct further investigations on that basis? What rules do they have to comply with?

The fact that exchanged ACTRs or APAs relate to a period for which the ordinary three year assessment and investigation period has lapsed, does not necessarily mean that these rulings can no longer affect the Belgian taxpayer’s situation.

It is therefore recommended conducting a sanity check of tax structures for which an ACTR or APA has been granted in other EU jurisdictions. Forewarned is forearmed.
Draft EU Directive on mandatory automatic exchange of tax rulings

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