CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 9/2015

on the proposal COM(2015)135 on introducing automatic exchange of information on cross-border tax rulings and advance pricing agreements

Prepared by CFE Fiscal Committee

Submitted to the European Commission, the European Parliament and the EU Council in June 2015

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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Introduction

On 18 March 2015, the European Commission presented a proposal for an amendment of the Directive 2011/16/EU on administrative cooperation in the field of taxation[1]. The proposal contains an obligation of EU member states to report to other member states and the European Commission on a regular basis, for the future and for the ten years prior to the entering into force of the amendment, a defined set of information on advance cross-border tax rulings and advance pricing agreements (APAs) issued.

The following comments include observations from tax experts from 16 EU member states. If you should have any questions, please do not hesitate to contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, CFE Fiscal and Professional Affairs Officer, at brusselsoffice@cfe-eutax.org.

I. The scope of the Directive should be clearly defined

The tax advisers´ concern is that the burden from the automatic exchange provisions will reduce the tax administrations´ resources for issuing rulings or responding to taxpayers´ requests, and will discourage member states from issuing tax rulings or APAs. Rulings and APAs are key instruments in providing legal certainty which is essential for businesses whenever making investment decisions. We therefore see a need to include precise definitions of what has to be reported and to limit the reporting obligation to cases likely to cause significant corporate profit shifting.

We welcome that rulings without cross-border element and rulings issued to individuals have been excluded. We do however note that the definition of the cross-border element is very extensive and ambitious as it seems to catch rulings impacting parties other than the taxpayer. A just and equal application of such broad definition is however dependent on information which will in most cases not be available. We believe that this poses a threat to legal certainty as it opens the door to an arbitrary application of the law.

Member states offer very different ways of providing legal certainty on request of a taxpayer, differing e.g. in their individual or general nature or in their binding effect. The Directive should be clear and specify whether these different forms are covered by the information exchange or not.

1. Binding v. non-binding rulings

It should be clear whether the proposal only seeks to cover information, opinions or agreements by/with the tax administration which are legally binding.

Legally binding rulings would imply that the tax administration is not free to deviate from a ruling, unless the underlying legislation is changed or the position taken in the ruling is overturned by a court.

[1] Document COM(2015)135 (link)

In a number of member states, communications by tax authorities issued on the occasion of individual cases which are not legally binding but normally followed by tax authorities are common. Such communications play an important role in member states where "genuine" rulings can be obtained only in certain areas of law or where taxpayers want to avoid the administrative fees for obtaining a formal ruling, e.g.:

- In Austria, where "genuine" rulings pursuant to § 118 of the Federal Tax Code are only issued on specific legal questions related to planned arrangements concerning reorganisations, groups of companies and transfer prices, "bona fide rulings" not containing such limitation and "EAS (Express Answer Service) opinions" on international and cross-border matters, issued by the Ministry of Finance, play an important role. Both "bona fide" and "EAS" rulings are not legally binding but usually not deviated from.
- In Ireland, there are no binding tax rulings but opinions and confirmations from which the tax administration may deviate; however, it has been stated that it will normally not.

2. General v. individual rulings

It should also be clear whether the proposal seeks to cover information, opinions or agreements that are meant to cover more than one individual case, e.g.

- In the Czech Republic, the Ministry of Finance and the Chamber of Tax Advisers have established a forum to resolve complicated cases. Notes from these meetings are published and are *de facto* binding.

- In Poland, apart from individual tax rulings, there are "general" tax rulings that may also be issued on request of a taxpayer. These are fully published.

A definition limiting rulings to (1) legally binding and (2) individual communications would make the application of the information exchange much easier, as otherwise there would be the risk that any information given by tax authorities would be considered a ruling.

We suggest that for reasons of legal certainty, the Directive should contain a catalogue of the kind of decisions in each member state that are covered by the proposed information exchange regime.

3. Exchange of past tax rulings/APAs

According to the proposed Article 8a (2), information on APAs and tax rulings issued within the last ten years should be exchanged to the extent they are still valid. There is a practical problem with the validity criteria. Usually, tax rulings are issued without a limitation in time[2] and are often not formally

[2] In Italy, the effects of preliminary agreements for international transactions in certain areas (e.g. transfer pricing, interest and royalties, transfer of residence, permanent establishment) are limited to five years (Art.31ter of Presidential Decree n. 600/1973). In Malta, the application of rulings is generally limited to five years or two years in case of subsequent changes of the underlying legislation (Art.52 (8) of the Income Tax Act). A law in Luxembourg of 19 December 2014 limits the duration of a ruling to 5 years.

revoked. The draft Article 8a (2) would require from the tax administrations an individual assessment of the validity of each ruling issued, requiring substantial effort which, in many cases, will be superfluous, where it concerns rulings or APAs that may still be formally valid but have become obsolete, as since their issuing, the taxpayer has decided not to make use of the ruling (any longer).

4. Introducing a threshold

The members of the CFE Fiscal Committee have considered various options for thresholds that could be introduced to limit the burden for member states´ tax administrations and prevent that the reporting obligation will discourage member states from issuing cross-border rulings or APAs. There has been no clear preference for either monetary thresholds or material criteria to filter out irrelevant tax rulings.

In favour of material criteria, it has been mentioned that for tax rulings, a monetary threshold would often be very difficult to apply and for APAs, such threshold is not necessary, as for amounts below a threshold that could be considered relevant, APAs are seldom requested. It has also been mentioned that taxpayers could avoid a monetary threshold by modifying their planning accordingly and that it would have the effect that some smaller countries would have hardly any rulings to report.

One suggestion is that only cross-border activities already identified as profit shifting or tax avoidance (involving loopholes, treaty shopping, mismatches etc.) should be reportable. Another suggestion has been to limit the exchange to intra-group transactions.

In favour of monetary thresholds, it was mentioned that a threshold relating to the content of the ruling/APA would require an individual assessment of the relevance of each ruling/APA and could hardly be applied in a consistent manner across the EU, as it contains a discretionary element.

It has also been suggested that rulings issued for SMEs should be excluded. While it seems possible to have a threshold referring to the size or to the overall volume of international transactions of the company (group) asking for a ruling, such solution should also be able to capture fast-growing enterprises, like internet start-ups.

Another possible limitation would be the exclusion of matters linked to national sovereignty, such as defence.

II. Procedural aspects

1. Standardised format

We welcome the proposal to provide for a standardised format for the information to be exchanged. This format however should contain only the most relevant points of the ruling.

Accordingly, it should be made clear that “the content of the advance cross-border ruling or APA”, as mentioned in the proposed Art.8a (5) b) should not be understood as requiring the full text of the

ruling/APA, which should be exchanged only upon demand (Art. 8a (8)). As data sharing always entails a risk for data security, and it is a fact that data leakages also occur in tax authorities, unnecessary sharing of unsolicited data should be avoided.

We believe that it would be useful to include a mention of the relevant provisions of national law in the standard form.

2. Language

We note that the proposal fails to address the biggest obstacle to a workable exchange of information: the question in which language(s) the exchange should take place and whether the Commission expects member states to make use of translation technology and/or proposes a system of ticking boxes to categorise different types of rulings.

We believe that a legislative proposal should suggest a solution to this issue, as otherwise, a proper discussion on the expected effect of the proposed legislation is not possible.

III. Transparency should also benefit the taxpayer

We believe that transparency should work in both ways and also benefit the taxpayer.

The proposed framework for automatic exchange of information on tax rulings presents a number of opportunities to improve legal certainty for the taxpayer. We would like to encourage the Commission, the European Parliament and the member states to reflect on these.

1. Publication of tax rulings: Legal certainty and equal treatment v. confidentiality

In the current policy discussion on tax rulings, there have been opinions demanding publication of information on tax rulings.

In a number of member states, tax rulings are already published.[3] In all of these countries, this takes place in anonymous form, meaning the name of the taxpayer and all other facts that may allow identification of the taxpayer will be deleted before publication. Other EU countries do not publish tax rulings[4]. When considering publication of tax rulings, the benefits and risks of such publication must be considered.

It can be argued that the publication of tax rulings may help to increase legal certainty for taxpayers and contribute to the equal treatment of taxpayers: Although a ruling is an individual communication that concerns exclusively the taxpayer for which it has been requested, it may have a factual precedent value for other cases, as the tax administration is obliged to treat comparable situations equally. In Belgium, this is recognised to the extent that even courts, in their decisions, make reference to published rulings in other cases.

[3] e.g., Belgium, Finland (only rulings issued by the Central Tax Board), Italy, Luxembourg (announced for the future), Poland, Portugal, Spain (only tax rulings considered of greater importance and impact).
[4] e.g., Austria, Czech Republic, France, Germany, Ireland, Malta, Netherlands, Slovakia, Slovenia.

Tax advisers from countries where publication of tax rulings exists have considered this a useful means for taxpayers and tax advisers to assess how tax authorities will view a certain activity, structure or arrangement.

Others have argued that the benefits should not be over-estimated, as a ruling relates only to the very specific circumstances of a case and allows few conclusions on other cases.

There will be cases in which it will not be possible to anonymise a tax ruling or APA because the taxpayer can be identified by the facts of the case. This may be the case e.g. for large companies, in small countries, in sectors in which only few operators exist, or simply because the application for the ruling requires a comprehensive description of the situation. If there is any doubt, a ruling should not be published, to protect any sensitive business information of the taxpayer. In cases where a ruling concerns a situation that is so specific that comparable cases are very unlikely, the likelihood that the taxpayer can be identified is high while the potential benefit for other taxpayers seems low.

2. Taxpayers deserve to know what has been exchanged

Taxpayers should receive a copy of the set of information which has been exchanged, and be informed of any member state´s request for the full text of the ruling (Art.8a (a)). Knowing the information another member state has received will facilitate communication with its tax authorities.

3. Member states should not have the right to keep a ruling/APA confidential

Member states should not be allowed to restrict taxpayers from forwarding the ruling or APA obtained to other parties, in particular foreign group companies. There are examples (e.g. Luxembourg) where this is often not permitted. We do not see any legitimate interest of member states in keeping their decisions confidential.

4. More consistency in the content of tax rulings

We expect that a common format for the information on rulings to be exchanged could be a first step to a common standard of information that should be included in a ruling. We believe that rulings should, apart from a precise description of the facts, also mention the legal background of the decision (e.g. the relevant provisions of law and case-law). There should also be a mention of any limitation in time, where applicable, or the circumstances under which it may be revoked.

5. Consider automatic exchange of information on changes in tax law

It should also be considered to introduce a mandatory exchange of information on changes of tax legislation between member states and the Commission. Such mutual notification would allow the Commission and other member states to monitor member states´ compliance with EU law, in

particular the EU Directives dealing with taxation, state aid rules and the fundamental freedoms, and to identify potentially harmful tax competition at an early stage.

This information should be published. Improving taxpayers´ information on tax rules in other member states would facilitate their compliance and investment decisions. It could also facilitate cross-border tax advisory services by smaller tax firms that do not operate in an international network.

IV. Explore cross-border rulings test cases for corporate income tax

In 2013, the European Commission initiated a pilot project on cross-border VAT rulings in which to date, 15 member states have agreed to participate. Taxable persons planning cross-border transactions between two or more participating member states can ask for such a ruling with regard to transactions they envisage. The relevant tax authorities will then consult each other with a view to delivering a common view of how the VAT rules apply to the transaction.
This project has recently been extended until 2018. Being a member of the Commission´s VAT Expert Group, the CFE highly welcomes this extension.

Where a cross-border tax ruling concerning corporate income taxes is requested, the usefulness of coordination between the tax administrations involved, with the aim of preventing both double taxation and unintended double non-taxation, is not less evident than in VAT.
The proposed information exchange mechanism according to which a member state will have to indicate other member states which might be affected by a cross-border ruling would provide a good starting point for such coordination. The CFE therefore suggests that the European Commission initiates a pilot project similar to the VAT cross-border rulings test case for corporate income taxes.