



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Direct taxation, Tax Coordination, Economic Analysis and Evaluation  
**Direct Tax Policy & Cooperation**

Brussels, 13 November 2013

**CACT N° 036**

**TAXUD.D.2 (2013) Ares 3722968**

**WORKING DOCUMENT  
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**COMMITTEE ON ADMINISTRATIVE  
COOPERATION FOR TAXATION**

**MODEL INSTRUCTION FOR THE SPONTANEOUS EXCHANGE OF CROSS-BORDER RULINGS  
AND UNILATERAL ADVANCE TRANSFER PRICING AGREEMENTS**

**MEETING N° 7 OF 28-29 NOVEMBER 2013**

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## 1. INTRODUCTION

The purpose of this Model Instruction is to provide practical guidance with a view to improving the effectiveness of the arrangements for spontaneous exchanges of information. It is particularly focused on motivating tax officials to initiate spontaneous exchanges of information on cross-border rulings and unilateral advance transfer pricing agreements (APAs).

Information provided spontaneously is potentially very effective as the information selected by the (local) tax officials draws on their own practical experience regarding what will be relevant to the levying of taxes. Spontaneous exchange of information relies heavily on the active participation and co-operation of tax officials. Therefore it is important for all Member States to develop strategies that aim to encourage and promote the use of spontaneous exchange of information by their tax officials in accordance with Council Directive 2011/16/EU. This Model Instruction supports the implementation of such strategies in the Member States' internal guidelines, procedures and awareness programs for spontaneous exchange of information. It highlights the importance and suggests practical steps to facilitate the exchanges. This Model Instruction also emphasizes the importance of sending feedback on the effectiveness of the information provided.<sup>1</sup>

Although this Model Instruction specifically targets the spontaneous exchange of cross-border rulings and unilateral APAs, it should be stressed that this does not intend to convey that the spontaneous exchange of any other information that may be relevant to another Member State is less important. The general principles set out in this note (legal basis for spontaneous exchange, the use of the standard forms and the common communication network (CCN), time limits and other practicalities) also apply to spontaneous exchange on other issues, e.g. information detected during a tax audit or investigation.

When communicating with countries outside the EU, the bilaterally agreed procedures must be followed by the competent authority.

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<sup>1</sup> To localize this Model Instruction, the Member States can, if needed, add an additional paragraph to describe their own national procedures (how to contact the competent authority, notification procedure etc.).

## **2. LEGAL BASIS COUNCIL DIRECTIVE 2011/16/EU**

### **2.1. Article 9 Scope and conditions of spontaneous exchange of information**

- (1) The competent authority of each Member State shall communicate the information referred to in Article 1(1)<sup>2</sup> to the competent authority of any other Member State concerned, in any of the following circumstances:
- the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;
  - a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to a tax liability in the other Member State;
  - business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;
  - the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
  - information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.
- (2) The competent authorities of each Member State may communicate, by spontaneous exchange, to the competent authorities of the other Member States any information of which they are aware and which may be useful to the competent authorities of the other Member States.

### **2.2. Article 10(1) Time limits**

- (1) The competent authority to which information referred to in Article 9(1) becomes available shall forward that information to the competent authority of any other Member State concerned as quickly as possible, and no later than one month after it becomes available.

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<sup>2</sup> Article 1(1): "This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2".



### 3. BACKGROUND

#### 3.1. The Code of Conduct for Business Taxation and the Code of Conduct Group

The Code of Conduct for Business Taxation addresses harmful tax competition inside the EU. This is an important factor in reducing distortions in the single market and in preventing significant losses of tax revenue. It is a non-binding instrument of a political character containing political commitments. It was agreed by a "Resolution of the Member States meeting within the Council" in December 1997.

The Code of Conduct contains two central features:

- (1) The commitment from Member States to amend their laws and practices as necessary with a view to eliminating any harmful measures as soon as possible (rollback), and
- (2) The commitment from Member States to refrain from introducing any new tax measures which are harmful within the meaning of the Code (standstill).

In March 1998 the Code of Conduct Group was established to assess harmful business tax measures that may fall within the scope of the Code of Conduct for Business Taxation and to monitor their abolishment. It is a special high-level Council Working Group.

#### 3.2. Definition of a cross-border ruling and examples of cross-border rulings to be sent spontaneously

The Code of Conduct spells out, inter alia, five criteria for assessing whether a tax measure is harmful. One of these criteria is lack of transparency. This element has been given particular emphasis by the Code of Conduct Group in its considerations with respect to the advance interpretation or application of tax provisions by a tax administration to a specific fact pattern of a specific taxpayer (tax rulings). While recognising the potentially positive aspects of such administrative practices, the Code of Conduct Group also agreed on the need to improve the exchange of relevant information specifically for cross-border rulings that may affect tax bases of other Member States. Therefore, in June 2010 the Code of Conduct Group established the following general guidance:

If a Member State provides advance interpretation or application of a legal provision for a cross-border situation or transaction of an individual taxpayer (hereafter: cross-border ruling), which is likely to be relevant for the tax authorities of another Member State, the tax authorities of the first Member State will spontaneously exchange the relevant information regarding this cross-border ruling in accordance with Community law provisions with the latter Member State in order to assure coherent overall taxation.

By means of a non-exhaustive list, this would specifically concern the following types of cross-border rulings:

- (1) MS 1 gives clearance on the absence of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (2) MS 1 gives clearance on specific items related to the tax base of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (3) MS 1 gives clearance on the tax status of a hybrid entity resident in MS 1 which is controlled by residents of MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (4) MS 1 gives clearance to a company resident in MS 1 regarding the tax value for depreciation for an asset that is acquired from a group company in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation).

### **3.3. Definition of unilateral advance transfer pricing agreements to be sent spontaneously**

Advance transfer pricing agreements are a specific type of cross border ruling relating to transfer pricing.

For the purposes of this document a unilateral advance pricing agreement is any agreement between a single Member State (or its political sub-divisions or local authorities) and a taxpayer that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing or the transfer price itself for those controlled transactions over a fixed period of time. This includes an agreement between a MS and a taxpayer on how profits of a permanent establishment should be determined over a fixed period of time.

## **4. NATIONAL ORGANIZATION AND ENSURING EFFECTIVE EXCHANGE REGARDING CROSS-BORDER RULINGS AND UNILATERAL APAS**

This Model Instruction covers cross-border rulings involving companies and unilateral APAs. Examples of the cross-border rulings to be exchanged spontaneously can be found in paragraph 3.2 of this Model Instruction. The cross-border rulings and unilateral APAs as well as feedback (please see paragraph 6) shall be sent by using standard electronic forms. National procedures will indicate who is responsible for filling in those forms in the Member States (for example the decision maker preparing the cross-border ruling or the competent authority). For sending the cross-border rulings and unilateral APAs, the general parts A and B, and specifically section C3 "Other spontaneous information", should be used in the electronic form for spontaneous exchange of information (SIF). To assist the use of the electronic forms, the Commission has together with the Member States prepared



an eLearning program on the use of the electronic forms. Please find an empty scanned SIF attached to this document.

Information exchanged shall, as far as possible, be provided by electronic means using the common communication network (CCN) between the competent authorities. Timing of the exchanges has to be in line with Article 10 of the Council Directive 2011/16/EU.

Member States shall ensure that cross-border rulings and unilateral APAs that fulfil the criteria detailed in Article 9 (1) of the Council Directive 2011/16/EU are exchanged with other Member States. The process for exchanging should follow Article 4 of Council Directive 2011/16/EU. It will be the responsibility of the receiving authority to ensure information reaches the correct person. In order to ensure that each Member State has sufficient national procedures in place, the following criteria are to be followed:

- (1) Each Member State ensures that their resource availability, procedures and network for spontaneous exchange of information allows fulfilment of the requirements of the Council Directive 2011/16/EU, in particular that:
  - The national network for spontaneous exchange of information in general provides the possibilities for effective exchange regarding cross-border rulings and unilateral APAs;
  - There is a clear communication channel from the decision maker to the competent authority that sends the information to another Member State.
- (2) Each Member State ensures that good quality training is organized and national guidance is prepared for the decision makers who prepare cross-border rulings and/or unilateral APAs.
  - The decision makers must have knowledge about the requirements set by Article 9 (1) of Council Directive 2011/16/EU and thus be able to identify relevant cross-border rulings and unilateral APAs that are to be exchanged. They will also be informed and have knowledge of any additional clarifications and practical arrangements to spontaneous exchange of information regarding cross-border rulings and unilateral APAs such as this instruction;
  - The decision makers must have sufficient knowledge on the national information exchange procedure to be able to transfer a relevant cross-border ruling and unilateral APA to another Member State through the designated national competent authorities.
- (3) Each Member State will take all reasonable measures to overcome any additional obstacles that might hinder the effective exchange of information on cross-border rulings and unilateral APAs, in particular that:
  - This instruction gives a definition of cross border rulings and examples of cross-border rulings to be sent spontaneously in paragraph 3.2 and a definition of unilateral APAs in paragraph 3.3, but those definitions should not be interpreted too narrowly. If

there is some doubt as to whether or not the definitions are met the default position of the decision maker should be to exchange if the conditions of spontaneous exchange conditions (under Article 9(1) Council Directive 2011/16/EU) are otherwise met.

## **5. CONTENT OF INFORMATION TO BE SENT SPONTANEOUSLY**

### **5.1. Cross-border rulings**

When sending spontaneous information on cross-border rulings, the sending Member State should take into consideration some obstacles, which may result in limited use of such information such as language barrier and complexity of the cross-border ruling. Therefore information, which will finally be sent, should be as clear and comprehensive as possible.

Firstly it should be remembered that the purpose of this information is to give the receiving Member State sufficient facts to take a decision as to whether or not the case is potentially significant. Therefore, it is strongly recommended that when sending information about cross-border rulings the sending Member State adheres to the set of principles and guidance contained in this Model Instruction.

At this stage it is up to the sending Member State to determine which information, for example the full text of the cross-border ruling in the original language or any other material, would be considered useful. However at a minimum it is important that a short summary, preferably in English or any other language bilaterally agreed, should be provided and should contain the following information(in the free text box in the SIF Part C Section C3):

- (1) Reference number of the cross-border ruling where available;
- (2) Details of the issue for which the taxpayer requires an answer;
- (3) Administration's response and reasoning. In the case when an administration publishes rulings on its website, inserting a direct link to such ruling would facilitate the work of the receiving Member State;
- (4) Information on whether or not the ruling is binding;
- (5) In the case that it is a binding ruling, information should be supplied regarding who is bound by this ruling (administration and/or taxpayer), and whether this ruling is final (accepted by both parties) or if the ruling can be still appealed against by the taxpayer. As an appeal period may vary from Member State to Member State, the sending Member State should decide whether information about the ruling should be exchanged immediately when the ruling is issued or when the ruling is considered to be final. In making this decision it should be borne in mind that time limit restrictions may be an issue for the recipient Member State of the information;



Finally, the sending Member State should consider limitations arising from Article 17(4)<sup>3</sup> of the Directive.

## 5.2. Unilateral APAs

The exchange of information is intended to work as a two-step process. The first stage would be a spontaneous exchange of important information about the unilateral APA which should enable the receiving Member State to decide whether a request for additional information under stage 2 was appropriate. To this end the initial spontaneous exchange should include the following information;

- (1) The name, address and tax registration number of the taxpayer to which the unilateral APA is granted;
- (2) The name, address and if available the tax registration number of the other participant to the controlled transaction for which the unilateral APA is granted including why it is considered as being a related party;
- (3) The period covered by the unilateral APA;
- (4) Information on all entities directly involved in the controlled transaction for which the unilateral APA is granted;
- (5) A short description of the transaction/business activity covered by the unilateral APA;
- (6) The transfer pricing method used and the price/margin agreed, as well as any other relevant terms of the unilateral APA, and;
- (7) The estimated value of the transactions covered by the unilateral APA.

Finally, the sending Member State should consider limitations arising from Article 17(4)<sup>4</sup> of the Directive.

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<sup>3</sup> Article 17(4): "The provision of information may be refused 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."

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## 6. FEEDBACK

If the sending Member State has requested feedback, the decision maker/auditor in the receiving Member State shall provide feedback to its competent authority. The competent authority shall send feedback as soon as possible and no later than three months after the outcome of the use of the requested information is known (article 14(1))<sup>5</sup>.

Even if the sending Member State has not requested feedback, it is good practise to always send feedback to the sending Member State. Feedback on information sent will encourage administrative cooperation between Member States.

## 7. MONITORING

The Member States are responsible for providing statistics in line with the existing guidelines for statistics on spontaneous exchange of information which provide for an efficient and transparent analysis of the number of cross-border rulings and unilateral APAs sent and received per Member State.

The Commission, based on statistical data provided by the Member States, will prepare summary tables on cross-border rulings and unilateral APAs. Tables will be made available to the Member States for the purpose of discussion in the Code of Conduct group.

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<sup>5</sup> Article 14(1): "Where a competent authority provides information pursuant to Articles 5 or 9, it may request the competent authority which receives the information to send feedback thereon. If feedback is requested, the competent authority which received the information shall, without prejudice to the rules on tax secrecy and data protection applicable in its Member State, send feedback to the competent authority which provided the information as soon as possible and no later than three months after the outcome of the use of the requested information is known. The Commission shall determine the practical arrangements in accordance with the procedure referred to in Article 26(2)."