

Automatic information exchange comes to Italy

February 21, 2017

TP Week Contributor

Antonella Della Rovere and Filipa Correia of Valente Associati GEB Partners look at Directive 2015/2376/EU and its implementation in Italy.

In December 2016, the Italian Council of Ministers presented to Parliament the Draft Legislative Decree for the implementation of Directive 2015/2376/EU. The decree sets out automatic exchange of information in the field of taxation, in particular with respect to advance cross-border rulings and advance pricing agreements (APAs).

The directive, which essentially extended the scope of Directive 2011/16/EU, was issued in December 2015, as one of a number of measures set forth to curb tax fraud and tax evasion. The directive aims at enhancing transparency in relation to tax rulings issued by member states to enterprises regarding proper tax treatment of specific operations, activities or transactions.

Member states were expected to take legislative action to implement the directive by the end of 2016. Implementation of the directive in Italy was provided in Law No. 170/2016. Details on the implementation of the directive are included in the Draft Legislative Decree, on which the Italian Parliament should have expressed its opinion by January 25 2017.

The Draft Legislative Decree provides for the obligation to automatically exchange information on advance cross-border rulings, broadly defined. Hence, such obligation shall apply with respect to (i) preventive agreements for enterprises with international activities (APAs), (ii) preventive agreements in relation to patent box incentives, (iii) ordinary and anti-abuse rulings, (iv) rulings issued in the context of cooperative compliance, (v) advance rulings on new investments, and (vi) any other equivalent type of tax ruling, including preventive agreements regulated under legislation to be issued in the future.

The information on the tax ruling to be communicated to foreign tax authorities includes:

- Taxpayer identification;
- Summary of contents;
- Date of issuance, amendment and/or renewal;
- Effective period;
- Type of ruling;
- Value of the transaction/series of transactions forming the subject-matter of the ruling, provided that its text includes reference thereof;
- Description of the criteria applied to determine the appropriate transfer pricing method;
- Identification of any other member state for which the ruling might be relevant; and
- Identification of any legal persons located in other member states and for which the tax ruling might be relevant.

Furthermore, the Draft Legislative Decree includes provisions for the implementation of Art. 8a of Directive 2011/16/EU, as inserted by virtue of Art. 1 para. 3 of Directive 2015/2376/EU.

According to such article of the directive, the competent authorities of each member state shall communicate to the corresponding competent authorities of all other member states and to the European Commission, through the automatic information exchange channel, any information on the tax rulings they issue, amend or renew as of January 1 2017. Communication to the European Commission serves monitoring purposes and allows evaluation of the effectiveness of the automatic exchange of information regime.

In addition, they must so communicate information on tax rulings issued, amended or renewed within five years prior to the effective date of the directive, i.e., from January 1 2012 to December 31 2016.

In this regard, it is specified that tax rulings issued, amended or renewed in 2012 and 2013 (i.e., from January 1 2012 until December 31 2013) shall only be communicated if they were in effect on January 1 2014.

The above is not the case for tax rulings issued, amended or renewed between January 1 2014 and December 31 2016. Such rulings are subject to mandatory communication under the provisions of the directive, regardless of their validity or invalidity.

The directive seems to take a balanced approach, seeking to protect taxpayers' rights and interests. To this effect, the information communicated may not 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" (Art. 8a para. 6b of Directive 2011/16/EU, as amended by Art. 1 para. 3 of Directive 2015/2376/EU).

Finally, bilateral or multilateral APAs with non-EU countries on transfer pricing issues are excluded from the scope of automatic information exchange, where the tax treaties under which they were concluded, do not permit their disclosure to third parties. Such exemption is introduced with a view to ensuring legal certainty. Should the relevant non-EU countries consent to disclosure, the aforementioned exemption shall not apply.

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