Dutch and German Governments sign Memorandum of Understanding on spontaneous exchange of information with respect to tax rulings

Executive summary

On 14 July 2015, the Ministries of Finance of both Germany¹ and the Netherlands² published press releases announcing that they have signed a Memorandum of Understanding (MoU) regarding the spontaneous exchange of information with respect to cross-border tax rulings, including rulings on measures such as innovation or patent boxes. It should be noted that the press releases refer to the spontaneous and not the automatic exchange of information on tax rulings, the parameters of which continue to be debated at the European Commission as part of their work on tax transparency.

Detailed discussion

According to the press releases, both countries wish to be fully transparent where it concerns cross-border tax rulings made between tax authorities and businesses, where such a ruling may have an impact on the other country. The countries have therefore agreed to spontaneously exchange rulings, with the exchange of information taking place via the designated competent authorities of the tax authorities of both countries.

Under the agreement, signed by the Ministers of Finance of both countries, Germany and The Netherlands may exchange information with each other spontaneously, meaning that a prior request is no longer required. Both countries state that they will take an active role in this respect. The press releases also note that the MoU does not go as far as to require the countries to exchange information automatically.
While the press releases note that the MoU is applicable to rulings granted from 1 January 2015 onwards, no information was included on whether rulings concluded in 2014, but that come into force in 2015 or later would be in scope. The press releases do note, however, that upon mutual agreement between the countries, information exchange may also cover rulings related to prior years. In this respect it should be noted that the legislative language of existing Directive 2011/16/EU (The Directive on Administrative Cooperation or DAC) does already allow for spontaneous exchange.

As noted in a recent EY Global Tax Alert,³ on 18 March 2015, the European Commission (The Commission) presented a package of tax transparency measures. Under the Transparency Package proposal, Member States would be required to automatically exchange information on their tax rulings, with the Commission proposing a strict timeline whereby, every three months, all Member States would be obliged to report to all other Member States and the Commission on the cross-border tax rulings they have issued in that period. This report, sent via a secure email system, would contain a pre-defined, standard set of information. The recipient Member States also would have the right to request more detailed information on any of the rulings documented, where the information is relevant to the administration of the tax laws of the Member State. Each year, Member States would have to provide statistics to the Commission on the volume of information exchange on tax rulings.

On 8 June, 2015, the Presidency of the EU Council (Latvia) sent a report to the Permanent Representatives Committee and the European Council.⁴ The report set out the current state, as well as a number of open issues and questions regarding the 18 March 2015 proposal for a Council Directive amending the DAC (the legislative vehicle in which the transparency package measures would be carried) regarding the mandatory automatic exchange of tax information.

In the report, the European Council is asked to discuss a number of questions in relation to the scope and timing of the exchange of tax rulings, as well as potentially excluding from the proposed Directive the information exchanged with third countries when agreeing to bilateral or multilateral APAs with third countries, which have been agreed to before the entry into force of this Directive, under existing international treaties, where those treaties foresee stricter confidentiality standards than would be provided for in Directive 2011/16/EC.

The Presidency hopes that the report will help the drafting of a compromise text for the DAC that could eventually be tabled for the political agreement of the Council in the autumn of 2015.

Implications

The signing of the MoU applicable to rulings granted from 1 January 2015 onwards demonstrates that Germany and The Netherlands wish to be viewed as front runners among European nations in regard to the exchange of information relating to cross-border tax rulings and the signing of the MoU is a clear statement of expectation that other countries should follow their lead.

In regard to the provisional start date of the exchange of new rulings under a revised DAC, many Member States have argued that at least 12 months would be required to transpose any new rules into national legislation. Therefore, the Presidency deemed it appropriate to bind the starting date of mandatory exchange of information (which was originally set to be 1 January 2016) with the transposition deadline, which would be 12 months from entry into force of the new amending Directive. It is therefore reasonable to expect that other countries will follow the lead of Germany and the Netherlands in signing bilateral agreements of this type.
Endnotes


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