



Formal comments of the EDPS on a proposal for a Council directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

The above captioned legislative proposal (the "Proposal")¹ concerns administrative acts - tax rulings - issued by national administrations, which confirm to a company how a specific transaction will be taxed under existing legislation and therefore provide legal certainty for the structure put in place.

It also concerns advance pricing arrangements, a particular type of advance cross-border ruling used in the area of transfer pricing. Both types of rulings may lead to a low level of taxation of income in the Member State issuing the ruling and may leave only low amounts of income to be taxed in other Member States involved thus eroding their tax bases.

The purpose of the Proposal is to ensure that Directive 2011/16/EU (the "Directive") ensures comprehensive and effective administrative co-operation between tax administrations by providing for the mandatory automatic exchange of information regarding advance cross-border rulings and advance pricing arrangements, with a view to preventing tax avoidance, tax fraud and tax evasion.

We have assessed the content and the data protection implications of the Proposal and would like to formulate the following considerations:

- It is our understanding that, while the Directive regulated information exchange in relation to natural and legal persons alike, the Proposal reinforces administrative cooperation on tax rulings concerning mainly enterprises and legal person operating in a given Member State. In this respect, the new Article 8a(3) introduced by the Proposal in the Directive provides that "*Paragraph 1 [on the automatic exchange of information] shall not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons*".
- Apart from the specific provisions on the reporting of tax rulings, however, the Proposal also takes into consideration the personal data and the rights of natural persons, by introducing a "blanket limitation" of the rights of the data subjects. In this respect, the new paragraph 1a of Article 25 of the Directive provides that "*Regulation (EC) No 45/2001 applies to any processing of personal data under this Directive by the Union institutions and bodies. However, for the purpose of the correct application of this Directive, the scope of the obligations and rights provided for in Article 11, Article 12(1), Articles 13 to 17 of Regulation (EC) No 45/2001 is restricted to the extent required in order to safeguard the interests referred to in Article 20(1)(b) of that Regulation*".

¹ COM (2015) 135

We would like to recall that the right of individuals to data protection is fundamental. Though it is not absolute, any limitation to such a right should only take place provided that it respects the conditions set forth in Article 52(1) of the Charter. Any limitation must be provided for by law and respect the essence of those rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As exceptions to a fundamental right, these limitations must be interpreted in a restrictive way.

We note that in accordance with Article 13 of Directive 95/46/EC a limitation to data subjects' rights may be justified by, amongst others, objectives of general interest (including investigation, detection and prosecution of criminal offences) or by an important economic or financial interest of a Member State or of the EU (including taxation matters).

If, however, the data subject's rights need to be restricted, appropriate safeguards must be provided for in the law which sets forth such restrictions. We recommend that the Proposal specifies in more details in a substantive dedicated provision the conditions (assessed on a case-by-case basis) under which the data subjects' rights may be limited and the objective pursued.

Besides, we recommend introducing the following time limits and conditions: if, after a certain period after the exchange of information, it has been decided not to carry out an enquiry or that the alert given has not proven to be relevant, and provided that the individual concerned does not raise any suspicion, the data subject should be informed that a verification has been carried out and be able to exercise his/her rights of access and rectification.

Brussels, 17 June 2015