



Brussels, 13.4.2016
COM(2016) 201 final

2016/0109 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Following the adoption of Council Directive 2003/48/EC, the Savings Directive, and in order to preserve a level playing field for economic operators, the EU signed Agreements with Switzerland, Andorra, Liechtenstein, Monaco and San Marino providing for measures equivalent to those laid down in the Directive. The Member States also signed agreements with the dependent territories of the United Kingdom and the Netherlands.

More recently, the importance of automatic exchange of information as a means of combating cross-border tax fraud and tax evasion by ensuring full tax transparency and cooperation between tax administrations worldwide has also been recognised at the international level. The Organisation for Economic Cooperation and Development (OECD) was mandated by the G20 to develop a single global standard for automatic exchange of financial account information ('Global Standard'). The Global Standard was published by the OECD Council in July 2014.

Following the adoption of a proposal to update the Savings Directive, on 17 June 2011 the Commission adopted a recommendation for a mandate to initiate negotiations with Switzerland, Liechtenstein, Andorra, Monaco and San Marino, in order to upgrade the EU's agreements with those countries in line with international developments and to ensure that those countries continue to apply measures equivalent to those in the EU. On 14 May 2013, the Council reached an agreement on the negotiating mandate by concluding that negotiations should be aligned with the recent developments at global level where it was agreed to promote automatic exchange of information as an international standard.

In its communication of 6 December 2012 setting out an Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters.

On the basis of a proposal presented by the Commission in June 2013, on 9 December 2014 the Council adopted Directive 2014/107/EU amending Directive 2011/16/EU and extending the mandatory automatic exchange of information between EU tax authorities to a full range of financial items in accordance with the Global Standard. The amendment ensures a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of financial account information in the internal market.

As Directive 2014/107/EU is generally broader in scope than Directive 2003/48/EC and provides that in cases of overlap of scope, Directive 2014/107/EU prevails, on 10 November 2015 the Council, on the basis of a Commission proposal of 18 March 2015, adopted Directive (EU) 2015/2060 repealing Directive 2003/48/EC.

In order to minimise costs and administrative burdens both for tax administrations and for economic operators, it is crucial to ensure that the amendment of the existing Savings Agreement with Monaco is in line with EU and international developments. This will increase tax transparency in Europe and will be the legal basis for implementing the OECD Global Standard on automatic exchange of information between Monaco and the EU.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

The legal basis for this proposal is provided by Article 115 of the Treaty on the Functioning of the European Union, in conjunction with Article 218(6)(b) and (8), second subparagraph. The substantive legal basis is provided by Article 115 TFEU.

Article 1(1) of the Amending Protocol annexed to this Proposal for a Council Decision changes the title of the existing Agreement in order to better reflect the contents of the Agreement as amended by that Amending Protocol.

Article 1(2) of the Amending Protocol replaces the existing articles and annexes of the existing Agreement with a new set of provisions comprising 10 articles, an Annex I that reflects the OECD Common Reporting Standard which is part of the Global Standard, an Annex II that reflects important parts of the OECD Commentaries on the Global Standard, an Annex III that reflects the additional data protection safeguards to be put in place as regards data collection and exchanges under the Agreement, and an Annex IV that lists the competent authorities of Monaco and of each Member State. The new articles reflect the articles of the OECD Model Competent Authority agreement for the implementation of the Global Standard, with minor adaptations to reflect the particular legal context of an EU Agreement. Article 5 includes a full set of provisions on exchange of information upon request that follows the latest text of the OECD Model Tax Convention. Article 6 includes a detailed set of provisions on data protection, also taking into account the absence of an adequacy decision concerning the level of data protection in Monaco when compared to the EU requirements. Article 7 provides for an additional stage of consultation before any Member State or Monaco undertakes to suspend the Agreement. Article 8 features provisions on amendments to the Agreement, including a quick mechanism for provisional application by one of the Contracting Parties of amendments to the Global Standard, subject to the consent of the other Party. Article 10 defines the territorial scope.

Annex I follows both the OECD Common Reporting Standard (CRS) and Annex I to the Directive on Administrative Cooperation. Annex II implements key parts of the OECD Commentaries to the CRS (CRS Commentaries) and corresponds to Annex II to the Directive on Administrative Cooperation. The minor deviations from Annex I or II to the Directive on Administrative Cooperation are justified by the re-alignment of the text on the CRS requested by Monaco's negotiators, and by the fact that Monaco, like Switzerland and Andorra, has undertaken at international level to implement the CRS one year later than nearly all the Member States (only Austria is allowed a similar delay, which is provided for in Section X of Annex I to the Directive). Leaving aside matters relating to application dates, the differences concern the following points:

1. In Section I(E) the reference to the reporting of place of birth is realigned on the CRS.
2. Some relevant options provided for in the CRS Commentaries and in the Directive on Administrative Cooperation have been left to the discretion of each Member State and Monaco and are not included directly in the Agreement. Instead, the Member States and Monaco are required to notify each other and the Commission of any option they choose to exercise.

3. The definitions of ‘international organisation’ and ‘central bank’ in Section VIII(B)(3) and (4) have been realigned on the CRS so that they can also apply in the context of the exemption from the look-through approach for passive non-financial entities (NFEs) in Section VIII(D)(9)(c).

4. In Annex II the definition of ‘residence of a financial institution’ is aligned on the CRS Commentaries in order to cover cases where the residence of another financial institution needs to be determined, e.g. for the look-through approach for passive NFEs.

Annex III was included to add data-protection safeguards to those provided for in Article 6, in the absence of an adequacy decision concerning the level of data protection in Monaco compared to the EU requirements.

Article 2 of the Amending Protocol contains provisions on entry into force and application. The Parties have agreed that Monaco will comply with its international commitments as regards the timing of automatic exchange of information under the Global Standard, since these commitments have been sent to the Global Forum, and that the first exchanges will take place in 2018 for information collected in 2017. Given the difficulty of ensuring that the procedure for formal entry into force set forth in Article 2(1) and (2) of the Amending Protocol is put in place in a timely manner to ensure adherence to these commitments, the Parties agreed in Article 2(3) on provisional application of the Amending Protocol from 1 January 2017, subject to notification by each Party that they have completed the respective internal procedures necessary for such provisional application, provided for, within the EU, in Article 218(5) TFEU. The next paragraph of Article 2 of the Amending Protocol deals with issues on the transition from the existing Agreement to the amended Agreement as regards requests for information, credits available to beneficial owners for withholding tax, final payment of withholding tax by Monaco to Member States and final exchanges of information under the voluntary disclosure mechanism.

Article 3 includes a Protocol on additional safeguards related to the exchange of information on request. The text specifies that exchanges on the basis of a group request are not ruled out. The Protocol on additional safeguards is in line with the Global Forum’s Terms of Reference for the exchange of information on request.

Article 4 lists the languages in which the Amending Protocol is signed.

The revised Agreement is supplemented by four Joint Declarations of the contracting parties.

The first Declaration reaffirms the compliance with the Global Standard of Directive 2014/107/EU amending Directive 2011/16/EU and of the revised Agreement between the EU and Monaco and the four other revised Agreements already signed between the EU and Switzerland, Liechtenstein, Andorra and Monaco.

The second and third Declarations make a link the Agreement with the Commentaries to the Global Standard and with Article 26 of the OECD Model Tax Convention on Income and on Capital respectively.

The fourth Declaration addresses practical aspects of the provisional application provided for in Article 2(3) of the Amending Protocol.

The proposal does not go beyond what is necessary or appropriate to achieve the objectives.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

The Amending Protocol implements the Global Standard between EU Member States and Monaco. The different stakeholders were already consulted on various occasions during the development of the OECD Global Standard.

EU Member States were also consulted and informed during the negotiations between the Commission and Monaco. The Commission reported to the European Council at its meetings in March and December 2014 on the state of play of the negotiations with Monaco.

The European Data Protection Supervisor was consulted during the negotiations with San Marino and provided useful advice, in particular on the detailed content of Article 6 of and Annex III to the Agreement as amended by the Amending Protocol. Account was also taken of this advice when drawing up the corresponding parts of the revised Agreement with Monaco.

The Commission has also consulted the new Expert Group on automatic exchange of financial account information that provides advice to ensure that EU legislation on automatic exchange of information in direct taxation is effectively aligned and fully compatible with the OECD Global Standard. The Expert Group includes representatives from organisations representing the financial sector and organisations campaigning against tax evasion and tax avoidance.

4. BUDGETARY IMPLICATIONS

The proposal does not have any budgetary implications.

5. OTHER ELEMENTS

None

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 in conjunction with Article 218(6)(b) and the second subparagraph of Article 218(8) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament¹,

After consultation of the European Data Protection Supervisor,

Whereas:

- (1) In accordance with Decision 2016/XXX/EU², the Amending Protocol to the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC (‘the Amending Protocol’) was signed on XX XXXX 2015, subject to its conclusion at a later date.
- (2) The text of the Amending Protocol which is the result of the negotiations, duly reflects the negotiating directives issued by the Council as it aligns the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC³ (the ‘Agreement’) with the latest developments at international level concerning automatic exchange of information, namely, with the Global Standard for automatic exchange of financial account information in tax matters developed by the Organisation for Economic Cooperation and Development (OECD). The Union, its Member States and the Principality of Monaco have actively participated in the work of the Global Forum of the OECD to support the development and implementation of this Standard. The text of the Agreement, as amended by this Amending Protocol, is the legal basis for implementing the Global Standard in the relations between the European Union and the Principality of Monaco.
- (3) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council⁴.

¹ Consent of [date], OJ C [...], [...], p. [...].

² OJ [...].

³ OJ L 19, 21.1.2005, p. 55.

⁴ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(4) The Amending Protocol should be approved,

HAS ADOPTED THIS DECISION:

Article 1

The Amending Protocol to the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC is hereby approved on behalf of the European Union.

The text of the Amending Protocol is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to give, on behalf of the Union, the notification provided for in Article 2(1) of the Amending Protocol, in order to express the consent of the European Union to be bound by it.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

*For the Council
The President*