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2015/0244 (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 Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Following the adoption of Council Directive 2003/48/EC, the Savings Directive, and in order to preserve the level playing field of 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. 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 to combat 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 released by the OECD Council in July 2014.

Following the adoption of a proposal to update the Savings Directive, the Commission adopted on 17 June 2011 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 containing 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, the Council on 9 December 2014 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 18 March 2015 the Commission adopted a proposal to repeal 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 San Marino is in line with EU and international developments. This will increase tax transparency in Europe and will be the legal basis for implementing the OCDE Global Standard on automatic exchange of information between San Marino 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(5) 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 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 to 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 San Marino 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. In Article 1 there is no definition of Tax Identification Number (TIN), since there is already a definition of TIN in Section VIII(E)(5) of Annex I. 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 more detailed set of provisions on data protection, taking also into account the absence of an Adequacy Decision concerning the level of data protection in San Marino when compared to the EU requirements. Article 7 provides for an additional stage of consultation before any Member State or San Marino 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, on the condition of consent by 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 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 to the CRS requested by the San Marino negotiators. Those include the following:

1. In Section I(D) the reference to the reporting of place of birth is realigned to the CRS.
2. Some relevant options provided for in the CRS Commentaries and in the Directive on Administrative Cooperation have been left at the discretion of each Member State and San Marino and are not exercised directly in the Agreement. There is instead an obligation on Member States and San Marino to notify each other and the Commission whether they have exercised any particular option.
3. The definitions of “International Organisation” and “Central Bank” in Section VIII(B)(3) and (4) have been realigned to the CRS in order to enable them to apply also in the context of the exemption from the look-through 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 to the CRS Commentaries in order to cover cases where the residence of another Financial Institution should be determined, e.g. for the look-through for Passive NFEs.

Annex III was included to complement with additional data protection safeguards the provisions of Article 6, in the absence of an Adequacy Decision concerning the level of data protection in San Marino when compared to the EU requirements.

Article 2 of the Amending Protocol includes provisions on the entry into force and application. The Parties have agreed to comply with their international commitments as regards the timing of automatic exchange of information under the Global Standard, as these commitments were conveyed to the Global Forum, that is first exchanges in 2017 for information collected in 2016 (with the exception of Austria, which will undertake such exchanges one year later). Given the difficulty of ensuring that the procedure for formal entry into force set forth in Article 2(1) of the Amending Protocol is put in place in a timely manner for ensuring the respect of these commitments, the Parties have agreed in Article 2(2) on a provisional application of the Amending Protocol as of 1 January 2016 subject to notification by each Party of the completion of their respective internal procedures necessary for such provisional application, which within the EU are provided by Article 218(5) TFEU. The following paragraphs of Article 2 of the Amending Protocol deal with issues on the transition from the existing Agreement to the amended Agreement, with regard to requests for information, credits available to beneficial owners for withholding tax, final payments of withholding tax by San Marino to Member States and final exchanges of information under the voluntary disclosure mechanism.

Article 3 lists the languages in which the Amending Protocol is signed.

The revised Agreement is supplemented by six Joint Declarations of the Contracting Parties.

The first and second Joint Declarations make a link respectively to the Commentaries to the Global Standard and Article 26 of the OECD Model Tax Convention on Income and on Capital. The third Declaration regards the interpretation of the term "TIN", in order to take account of the domestic legislation of San Marino in this field. The fourth Declaration consists in an acknowledgement by the EU of the progress made by San Marino as regards the international process for transparency and tax cooperation, as well on its efforts on the implementation of the EU acquis. The fifth Declaration clarifies that the definition of "Central Bank" set forth in Annex I, Section VIII.B encompasses the Central Bank of San Marino. The final Declaration addresses the practical aspects of the provisional application provided for in Article 2(2) of the Amending Protocol.

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

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

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

EU Member States have also been consulted and informed during the negotiations between the Commission and San Marino, including on the request from San Marino for a Joint Declaration (the fourth one described above) on its relations with the EU. The Commission reported to the European Council at its meetings in March and December 2014 on the state of play of the negotiations with San Marino.

The European Data Protection Supervisor has been consulted during the negotiations with San Marino and has provided useful advice notably on the detailed content of Article 6 and Annex III of the Agreement as amended by the Amending Protocol.

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),

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 2015/XXX/EC², the Amending Protocol to the Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (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 negotiations, duly reflects the negotiating directive issued by the Council as it aligns the Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments³ (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 Republic of San Marino have actively participated in the work of the Global Forum of the OECD for supporting the development and implementation of that 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 Republic of San Marino.
- (3) The Amending Protocol should be approved,

¹ Consent of [date], OJ C , , p. .

² OJ...

³ OJ L 381, 28.12.2004, p.33.

HAS ADOPTED THIS DECISION:

Article 1

The Amending Protocol to the Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments is hereby approved on behalf of the European Union.

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

Article 2

- (1) The President of the Council shall, on behalf of the Union, give the notification provided for in Article 2 (1) of the Amending Protocol.
- (2) The Commission shall notify the Republic of San Marino and the Member States of the notifications received in accordance with Article 1 (1) (d) of the Agreement as resulting from the Amending Protocol.

Article 3

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

Done at Brussels,

*For the Council
The President*