

Brussels, 16 January 2002

OPINION

of the

Economic and Social Committee

on the

Proposal for a Regulation of the European Parliament and of the Council

on administrative cooperation in the field of value added tax

and the

Proposal for a Directive of the European Parliament and of the Council

amending Council Directive 77/799/EEC concerning mutual assistance by the competent

authorities of the Member States in the field of direct and indirect taxation

(COM(2001) 294 final - 2001/0133 (COD) - 2001/0134 (COD))

On 9 July 2001, the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the

*Proposal for a Regulation of the European Parliament and of the Council on administrative cooperation in the field of value added tax and the
Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (COM(2001) 294 final - 2001/0133 (COD) - 2001/0134 (COD)).*

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 January 2002. The rapporteur was **Mr Walker**.

At its 387th plenary session (meeting of 16 January 2002), the Economic and Social Committee adopted the following opinion by 89 votes to one with five abstentions:

1. Introduction

1.1 There are two different legal bases for administrative co-operation between Member States where VAT is concerned; Directive 77/799/EEC¹ concerning mutual assistance by the competent authorities of the Member States in the fields of direct taxation and value added tax, and Regulation (EEC) No. 218/92² on administrative co-operation in the field of indirect taxation (VAT). When Directive 77/799/EEC was adopted, it covered taxes on income and capital only and did not include VAT. Directive 79/1070/EEC extends it to VAT³. The Directive creates a legal base for the exchange of information between Member States. However, it lays down that information exchange must be through the “competent authorities” and hence cannot take place directly between two services of two different Member States.

1.1.1 Three categories of information exchange are provided for: exchange on request concerning a particular case, automatic exchange and spontaneous exchange. The Directive makes no specific provisions where VAT is concerned in regard to the latter two categories of information exchange, merely referring to the possibility of concluding bilateral agreements between the Member States. However, very few bilateral agreements have been signed with a view to such exchanges in the field of VAT. The Directive also provides for Member States to authorise officials from the applicant Member State to participate in certain controls, but few Member States have availed themselves of this opportunity.

1 OJ L 336, 27.12.77, p. 15

2 OJ L 24, 1.2.92, p. 1

3 OJ L 331, 27.12.79, p. 8

1.1.1.1 The removal as from 1 January 1993 of tax borders between Member States necessitated the strengthening of administrative co-operation. Regulation (EEC) No. 218/92 was adopted to supplement the 1977 Directive and to put in place a strengthened system of information exchange for intra-Community supplies and acquisitions of goods. The main innovation of the 1992 Regulation was provision for an electronic database VAT Information Exchange System (VIES) and for automatic communication to all the other Member States of the total value of all intra-Community supplies to taxable persons identified in those Member States, together with the relevant VAT identification numbers. Where the information available in the database is insufficient, further information may be requested under Article 5 of the Regulation. The requested authority then has a period of three months in which to reply.

1.2 Although the VIES system and the strengthened administrative co-operation introduced by Regulation (EEC) No. 218/92 are regarded by the officials concerned as effective instruments of control, they exhibit the following weaknesses:

- the information exchanged automatically or on request from the recapitulative statements provided by taxable persons is not available early enough and cannot be exchanged sufficiently quickly, to be effective in fighting fraud;
- since the information exchanged under VIES is only available after six months, it can only be used for post-clearance checks, which are often too late and the provisions of Regulation (EEC) No. 218/92 were never intended to deal with individual cases of fraud, which are, by their nature, immediate;
- the Regulation does not cover all the transactions that could give rise to fraud, being limited to intra-Community supplies and acquisitions, whereas most VAT-fraud schemes concern both intra-Community and domestic transactions, forcing the tax authorities to make use of other legal instruments.

1.3 For these reasons, Member States mainly use Directive 77/779/EEC as a legal base for co-operation in fraud matters. However, as this Directive was originally designed for the exchange of information on direct taxation and has not been adapted for coping with the specific need for strengthened co-operation following the introduction of the current transitional system on 1 January 1993, it gives rise to the following shortcomings:

- the co-operation provided for is too centralised, not sufficiently intensive and inadequately defined;
- there is insufficient direct contact between local and national anti-fraud offices;
- the rule that communication must be between central liaison offices leads to inefficiency, under-use by officials and delays;

- apart from the VIES system, there are not enough automatic or spontaneous exchanges of information that could help in the detection or prevention of fraud in intra-Community trade;
- there are no clear rules in a whole host of areas (notably with regard to the presence of foreign officials during controls, the possibility of organising multilateral controls or the use to which information communicated by another Member State may be put).

1.4 In addition to the aforementioned shortcomings and loopholes, the existence of two different legal bases for administrative co-operation in the field of VAT has proved to be a source of complexity that hampers the smooth operation of the system. The Regulation applies only to intra-Community supplies and acquisitions of goods. The Directive must be referred to for intra-Community supplies of services and other VAT transactions but the two instruments have different operating rules. The time-limits for providing information in response to requests are different and the use to which the information received may be put are different. In accordance with the requirements of the Regulation, Member States have set up central liaison offices whose primary responsibility is the exchange of information under the Regulation. However, some Member States have put a different entity in charge of the exchange of information under the Directive. This means that there is no synergy between the Regulation and the Directive for VAT control purposes. The situation is exacerbated by the fact that certain transactions are considered as services in some Member States and as goods in others.

1.5 The report⁴ presented by the Commission on 28 January 2000 under Article 14 of Regulation (EEC) No. 218/92 and Article 12 of Regulation (EEC) No. 1553/89, and discussions by the Council's *ad hoc* group on tax fraud, stress that, if the present system is to be maintained, there must be a commitment to strengthen control and administrative co-operation. On 5 June 2000, the Council called on the Commission to present proposals at its earliest opportunity on all the recommendations that were unanimously approved by the *ad hoc* group.

1.6 A measure of the extent and seriousness of the problem is provided by the fact that, according to Commission figures⁵ Member States have to supervise intra-Community VAT-exempted transactions to a value of around EUR 930,000,000,000 per annum – a category of transaction that was subject to border controls before 1 January 1993 but now has to be controlled by tax authorities. Member States have to control about 24 million VAT traders, who deliver annually some 100 million declarations.

4 COM(2000) 28 final

5 Ibid, point 5.5

2. The Commission's proposals

2.1 In order to strengthen administrative co-operation in the field of VAT, the Commission proposes to tighten up the legal provisions of Regulation (EEC) No. 218/92 and incorporate the provisions of Directive 77/779/EEC to establish a single legal framework that sets out clear and binding rules governing co-operation between Member States. The framework provides for more direct contacts between services in different Member States with a view to making co-operation faster and more efficient. It will also facilitate swifter and more intensive exchanges of information between national administrations and between administrations and the Commission for the purpose of combating fraud more effectively.

2.2 The aim of this proposal is to establish an effective system of mutual assistance and information exchange in order to ensure the proper functioning of the VAT system. Although it confers the role of guardian of the proper functioning of administrative co-operation on the Commission, it does not assign to it any operational role in investigating or combating tax fraud.

2.2.1 Nevertheless, the Commission considers that VAT fraud within the Community must be met by a response at Community level and must be countered by joint action by the Member States and the Commission. While the Member States bear primary responsibility for the proper operation of the common system of VAT, the Commission feels that its role in this area should be one of co-ordination and stimulation.

2.2.2 Accordingly, the Commission will submit, under Article 280 of the EC Treaty, a separate proposal for a regulation laying down specific anti-fraud provisions that confer a role on the Commission in co-ordinating the exchange of information at Community level.

2.3 As it is necessary to replace Regulation (EEC) No. 218/92 in its entirety and Directive 77/779/EEC in relation to VAT, the latter is now excluded from the scope of the Directive. On the other hand, the scope of the Directive is extended to cover certain taxes on insurance premiums to take account of the need expressed by the Member States in the negotiations within the Council on the proposal amending Directive 76/308/EEC⁶.

2.4 The aim of this proposal is to reinforce co-operation between tax administrations, providing them with a simple and efficient legal framework to fight fraudsters on equal terms. The proposal is not designed to change in any way the obligations of taxpayers or the rules governing the application of VAT legislation. For this reason, the Commission is submitting it under Article 95 of the Treaty. In taking Article 95 of the Treaty as the legal base, the Commission is consistent with its proposal for Regulation (EEC) No. 218/92 of 19 June 1990 (COM (90) 183), in which it proposed Article 100a of the EC Treaty (now Article 95) as an appropriate legal base.

⁶

COM(1998) 364 final, COM(1999) 183 final

3. General comments

3.1 The Committee has, on numerous occasions⁷, pointed out the need for closer co-operation between Member States in the field of VAT and in other areas of law enforcement. It has repeatedly reiterated that the failure of Member States to avail themselves of the mechanisms for co-operation which currently exist is exacerbating the weaknesses of the transitional VAT system and facilitating the proliferation of systematic VAT fraud.

3.2 The report by the European Court of Auditors in 1998⁸ pointed out that the fight against fraud is characterised by the absence of an integrated strategy. It stressed that, for intra-Community transactions, there is a contradiction in that there exists a Single Market for fraud but not for law enforcement. The Court has estimated that the gap between actual VAT receipts collected annually and the theoretical amount, calculated on macro-economic figures, is as high as EUR 70,000,000,000, corresponding to 21% of the aggregate revenue of all Member States. The accuracy of this figure has been questioned but, even if the real figure is only half of the imputed amount, it represents a staggering loss of revenue for the Member States and a frightening picture of the way in which Member State administrations are managing or, rather, failing to manage, VAT controls.

3.3 The Committee agrees with the Commission that the present proposals constitute a measurable improvement on the *status quo* and would, if effectively implemented, put the VAT authorities in the Member States on a more equal footing with the criminal elements who are exploiting the loopholes in the current system. However, judging by past experience, the Committee very much doubts whether, left to themselves, the Member States will make any greater use of these powers than they have done hitherto. It would point out that the proposals essentially constitute enabling legislation; there is little or nothing which requires Member States to take advantage of the opportunities that they offer.

3.3.1 There is a general consensus that the existing instruments for co-operation have been grossly under-used and, in some cases, largely ignored. This under-use has been attributed, *inter alia*, to slow procedures and even an ignorance of existing instruments, in particular on the part of local authorities. Although most Member States express support for the idea of an intensified exchange of information, such information is rarely, in fact, exchanged. This situation will not be transformed merely by the introduction of new legislative instruments; it requires a fundamental change in the attitudes and priorities of Member State administrations.

3.3.2 The Commission has noted⁹ that there is a continuing and growing problem regarding the number of requests for assistance to which replies have not been given within the three-month

⁷ See e.g. OJ C 116, 20.04.2001

⁸ OJ C 349, 17.11.1998, p .15, 16, 17.

⁹ OJ C 349, 17.11.1998

deadline laid down by Regulation (EEC) No. 218/92. Furthermore, Member States have generally proved unwilling, with some exceptions, to use the possibilities offered by Article 12 of this Regulation to delegate powers to operational level. While it is clear that a balance must be maintained between the needs of local offices and central administrations, Central Liaison Offices (CLOs) must be used as a conduit rather than acting as a bottleneck. The CLOs also have a greater role to play in informing control officials of the possibility of exchange of information, particularly with regard to the control of special schemes, refunds under the 8th Directive procedure and services provided in accordance with Article 9(2)(e) of the 6th Directive. However, a number of CLOs have said that they have neither the powers nor the resources to fulfil this role.

3.3.3 For this reason, the Committee endorses the Commission's proposal that it should exercise a co-ordination and stimulation function and approves its intention to bring forward, under Article 280, a proposal for a regulation laying down specific anti-fraud provisions that confer a role on the Commission in co-ordinating the exchange of information at Community level.

4. Specific comments

4.1 The Committee approves the fact that, in future, Member States will be required to designate a single Central Liaison Office to be responsible for co-operation but fears that this may still constitute a barrier to communication if these bodies operate in the same way that they have done in the past. It notes that Article 3(4) stipulates that: "The provisions of this Regulation shall not preclude direct contacts, exchange of information or co-operation ... between the different Member States' officials other than those referred to in paragraph 3 ..." (CLO officials) but would have preferred a more positive approach which required such contacts rather than simply not precluding them.

4.2 The Committee considers that Article 36 gives Member States too many pretexts for failing to provide the information requested and thereby limits the effect of Article 5(3), which stipulates that the requested authority must proceed as though acting on its own account or at the request of another authority within its own country in obtaining the information requested.

4.3 The Committee notes that, under Article 10, the deadline for providing requested information remains at three months, or one month where the information is already available to the requested authority. Given the need for rapid action to pursue enquiries where suspicions of fraud have been aroused, it feels that these deadlines may be too extended to be effective in many cases and believes that consideration should be given to curtailing them.

4.4 The Committee notes with approval that the permission of the taxable person will no longer be required for the presence of foreign officials during controls but fails to understand why Article 14 prevents them from participating in searches of premises or the formal questioning of persons under criminal law. It feels that these are unnecessary restrictions, which can only serve to hamper investigations into cross-border VAT fraud.

4.5 Article 15 stipulates that Member States shall independently conduct simultaneous controls in their own territory of one or more persons "who are of common or complementary

interest.” The Committee considers that this wording is too vague and that a more precise definition of these terms is required.

4.6 Article 22 specifies that, “The competent authorities of the Member States may in any case spontaneously forward to each other, without prior request, the information referred to in Article 1 of which they are aware.” The Committee would have preferred this Article to stipulate that, “The competent authorities of the Member States **shall** ...”.

4.7 The Committee approves the fact that Article 37 lays down that the information provided may be used in all circumstances in connection with judicial or administrative proceedings that may involve sanctions, initiated as a result of infringements of tax law, notwithstanding that such information may be confidential in nature.

4.7.1 The Committee also approves that Article 37(3) no longer requires that the consent of the Member State furnishing information must be obtained by the recipient Member State before it can be made available to other Member States.

4.7.2 The Committee welcomes the fact that there will no longer be a requirement for the taxable person involved in an investigation to be notified of the exchange of information.

4.8 The Committee notes that, under Article 42, the frequency of the Commission’s report to the European Parliament and the Council is reduced from every two to every three years. The Committee considers that it would have been preferable to have maintained the two-year interval.

4.9 The Committee agrees with the Commission’s use of Article 95 of the Treaty as the legal base for this proposal.

4.10 The Committee notes that the Commission has not carried out an impact assessment for this proposal. While it would normally wish to see impact assessments conducted and published as a matter of course, it accepts that, in this case, the degree of uncertainty concerning the extent to which Member States will avail themselves of these new instruments makes it difficult to determine what impact they may have.

5. **Conclusions**

5.1 The Committee reiterates the concern which it has previously expressed about the horrifying scale of revenue losses resulting from VAT fraud and the lack of co-operation between Member State administrations, which is facilitating, and even encouraging, this criminal activity. The abolition of border checks, which is an indispensable concomitant of the Single Market, requires the existence of comprehensive control procedures and their effective implementation by the tax authorities of the Member States, regardless of the system of taxation in force. That situation does not pertain today and it is difficult to escape the conclusion that the present system of administrative co-operation is not an adequate substitute for the physical controls which it replaced.

5.2 The Committee considers that the Commission proposals constitute a step in the right direction but feels that they do not go far enough to correct the manifest weaknesses and loopholes in the current situation; however, it accepts that they are probably at the limit of what is politically attainable. To this extent, it approves the proposals but has serious reservations about their ability to make a significant impact in the fight against fraud without a fundamental change in the attitudes of Member State administrations and national tax authorities. It calls upon the Member States to do their part in stemming the tide of lost revenue by accepting these proposals and by putting in place the necessary measures to ensure their effective implementation.

Brussels, 16 January 2002.

The President
of the
Economic and Social Committee

The Secretary-General
of the
Economic and Social Committee

Göke Frerichs

Patrick Venturini
