European Economic and Social Committee

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Direct and indirect taxes / Mutual assistance by competent authorities

Brussels, 30 October 2003

OPINION

of the European Economic and Social Committee
on the
Proposal for a Directive of the European Parliament and of the Council amending Directive 77/799/EEC concerning mutual assistance by competent authorities of the Member States in the field of direct and indirect taxation
(COM(2003) 446 final/2 – 2003/0170 (COD))

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On 5 September 2003, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

> *Proposal for a Directive of the European Parliament and of the Council amending Directive 77/799/EEC concerning mutual assistance by competent authorities of the Member States in the field of direct and indirect taxation*
> (COM(2003) 446 final/2 – 2003/0170 (COD)).

In view of the urgency of the work, the EESC decided at its 403rd plenary session on 30 October 2003 to appoint **Mr Pezzini** as rapporteur-general and adopted the following opinion with 45 votes in favour, no dissenting votes and three abstentions.

1. Introduction

1.1 The ground rules for mutual assistance and exchange of information by competent authorities of Member States for the purpose of ensuring effective application of national tax laws were laid down in 1977.

1.2 Increase in fraud

1.2.1 The need for such rules arose out of the ever increasing risk posed by tax evasion and fraud beyond national boundaries, which led to significant losses of revenue for Member States.

1.2.2 This situation jeopardised the principles of fair taxation, the free movement of capital, and free competition, and caused the internal market to work, to say the least, imperfectly.

1.2.3 However, the system of bilateral agreements between Member States proved ineffective at combating all the types of tax evasion and fraud, which were multinational in nature, reflecting an increase in international trade and in the mobility of people and capital across borders.

1.3 Structure of the Directive

1.3.1 The current Directive makes provision for three types of information exchange – information on request, automatic exchange and spontaneous exchange. Limits and safeguards apply to the exchange of such information by competent authorities of Member States in order to ensure respect and consideration for the rights of taxpayers and for the secrecy of the information supplied.

1.3.2 Administrations of Member States must also constantly monitor the exchange procedures.

1.4 **Scope of the Directive**

1.4.1 Initially, the Directive applied only to direct taxes. Only later was its scope expanded to cover value added tax (VAT) and excise duties, partly because those areas were not yet covered elsewhere.

1.4.2 However, the peculiarities specific to this particular field subsequently led the Commission to regulate the exchange of information about VAT separately[1]. A proposal exclusively concerning excise duties is expected in the near future.

1.5 **The need for revision**

1.5.1 The social, economic and political context has changed radically since the Directive was first drafted and adopted. The size of the internal market and the amount of trade between Member States have changed. There is no doubt that the very concept of the internal market, as an extension of national borders, is now fully accepted – in practice as well as in theory - by an ever increasing number of operators. Although this development is in itself highly satisfying, it has brought with it exponential growth in intra-Community transactions and ever-better knowledge of the various national tax systems, which has led to a commensurate increase in tax evasion and fraud, exploiting any deficiencies in European legislation and in tax inspection systems generally. In this context, there is a clear need to modernise, strengthen and simplify administrative cooperation and exchange of information between Member States, and to make them more efficient.

2. **The Commission's proposal**

2.1 The proposed changes to the current Directive are listed in Article 1.

2.2 The first proposed change, which would become the third subparagraph of Article 2 of the current Directive, sets out the practicalities of information exchange on request. In particular, it states that in order to respond to a request received from another Member State, the competent authority of the Member State receiving the request should proceed as if it were acting on its own account.

2.2.1 This amendment is totally uncontroversial, as it aims to eliminate the dilatory effects on enquiries of national regulations that require the competent authority to notify the taxpayer that a request for information about him has been received from the competent authority of another Member State. Such obligations do not exist when Member States are operating on their own account. The very fact that the requesting authority was outside the country used to slow down the investigations. This discrimination, which was prejudicial both towards the Member State requesting the information

1 COM(2001) 294 final

and towards the working of the internal market, must thus be eliminated. This amendment is perfectly in line with that contained in the proposal on VAT[2].

2.3 The second amendment proposed concerns the second indent of the second subparagraph of Article 7(1). It concerns the way in which information received from another Member State by the competent authority of a Member State may be used. This information must be treated confidentially, in the same way as information collected in accordance with national legislation.

2.3.1 The current text of the Directive has given rise to differences in interpretation. In fact, although there is universal agreement that information received from another Member State should only be divulged if this latter does not object, some Member States maintain that specific authorisation (from the competent authority that supplied the information) is required before using such information in judicial proceedings. Conversely, other Member States hold the view that tacit approval can be assumed unless a specific objection has been raised.

2.3.2 The Committee agrees with the need to amend the Directive and with the proposed wording, given that the new text aims to eliminate any ambiguity, thus speeding up and clarifying the procedure. In future, information received will be able to be used in the course of public hearings or sentencing, provided that the competent authority of the Member State that supplied the information did not express an objection when it first supplied it. It will therefore no longer be necessary to adjourn judicial proceedings in order to wait for explicit authorisation from the competent authorities of Member States who considered such a procedure to be necessary.

2.4 The next proposed amendment consists of a redrafting of Articles 8(1) and 8(3) of the current directive, which sets out the limits to the exchange of information.

2.4.1 The current text of Article 8(1) has created ambiguity linked to the ability of a Member State to refuse to supply the information requested when its national tax laws do not provide for this.

2.4.2 The amendment specifically makes it clear that a Member State can only refuse to supply the information requested when its national legislation or administrative procedures do not permit the investigations necessary to obtain that information.

2.4.3 There is no doubt that the proposal improves on the existing text, probably to the greatest extent realistically attainable. It is nonetheless apparent that the existing differences between investigative procedures, which are a direct reflection of the approximate nature of harmonisation between national tax laws, are an obstacle to an efficient system of information exchange. This makes it difficult to conduct effective checks on suspect transactions and therefore impedes the functioning of the internal market.

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2 Article 5(3), COM(2001) 294 final, Section 5, paragraph 3

2.4.4 Similar observations apply to the proposed amendment to Article 8(3), aimed at clearing up ambiguities concerning the application of the principle of reciprocity of exchange of information.

2.4.5 The Commission proposal makes it clear that the competent authority of a Member State may refuse to supply information when the requesting authority is not able to supply similar information.

2.4.6 Whilst it appreciates the effort made to eliminate differences in interpretation, the Committee points out that recourse to the principle of reciprocity protects the individual Member State but is prejudicial to the full implementation of the internal market.

2.5 The Commission proposes to insert two new articles after Article 8: 8a and 8b. These bring the rules on direct taxation into line with those on indirect taxation.

2.5.1 Article 8a(1) states that, at the request of an authority in a Member State, the competent authority in another Member State should notify the taxpayer, in accordance with the rules and procedures in force at the time, of any instrument or decision adopted by the authority of the requesting Member State. Article 8a(2) lists the main points that should appear on the notification, while Article 8a(3) lays down the requirement to inform the requesting Member State promptly of what action has been taken in response to its request.

2.5.2 The new article takes note of the various practices and procedures that apply in national tax legislation and emphasises the requirement to follow those procedures when dealing with requests from other Member States. In particular, the duty to inform, which does not exist in some Member States, is a fundamental part of the procedures in others. The procedure would certainly be much simpler if it were managed directly by the requesting Member State. However, as things stand, this is unrealistic and risky: unrealistic because it would imply in-depth knowledge on the part of every national competent authority of the procedures, including that of notification, connected with the legislation of every other Member State; risky, because a notification that was incomplete and legally void according to national tax legislation would have a prejudicial effect on the length of investigations.

2.5.3 The Commission's proposal is nonetheless appreciated because, in concrete terms, it emphasises the importance of such procedures and obliges the requested authority to inform the requesting authority immediately of notifications it has sent, in order to facilitate any subsequent action.

2.5.4 Article 8b provides for the possibility for two or more Member States to carry out simultaneous controls on a single taxpayer where these would appear to be more effective than controls conducted by one Member State alone. The competent authority of a Member State is to identify the taxable persons whom it intends to propose for simultaneous control and notify the

respective authorities in other Member States of the reasons for such controls and of the period of time in which they should be conducted. The requested authority shall confirm its agreement or its refusal to its counterpart authority. If approval is granted, each authority must then appoint a representative with responsibility for the control operation.

2.5.5 The new text recognises the importance of simultaneous controls, which are, in fact, considered to be one of the most effective methods, if not the most effective method of control. Indeed, it stands to reason that crosschecking data collected during the same period by competent authorities in the Member States in which the taxpayers under investigation operate increases the likelihood of discovering tax evasion or fraud. It is no coincidence that there are widespread calls for an increased use of simultaneous controls, above all to detect fraudulent use of transfer pricing for intra-Community transactions between entities operating in several Member States.

2.5.6 The insertion of Article 8b is therefore to be welcomed. However, it should be noted that the ability to refuse to act on a request for simultaneous controls, even if there is a reason for doing so, could limit the scope of such controls and with it the cooperation between Member States' administrations.

3. **Conclusion**

3.1 The EESC accepts the need to put in place an effective system of information exchange between Member States in order to combat tax evasion and fraud.

3.2 It takes note that the expansion of the internal market, both in geographical and economic terms, along with the increase in the number of taxpayers operating in more than one Member State, makes closer cooperation among national administrations essential.

3.3 While recognising the peculiarities specific to each sector, the EESC emphasises that improved and more systematic coordination between control systems for direct and indirect taxes and excise duties is an indispensable part of an effective system of control and of mutual assistance by Member States' competent authorities.

3.4 The EESC reaffirms[3] that the differences that exist between the administrative procedures of the Member States are prejudicial to the effectiveness of controls, increase the length of time required to carry them out, and represent a significant obstacle to the working of the single market.

3.5 Once again, the defence of national interests is limiting the benefits that could be derived from a more efficient internal market and, in this instance, from detecting and combating tax

3 EESC opinion on the Proposal for a Regulation of the Council amending Directive 77/388/EEC on the common system of Value Added Tax (the Value Added Tax Committee), OJ C 19 of 21.1.98, p. 56.

evasion and fraud. As the EESC has already pointed out[4], administrative cooperation and the prevention of fraud must go hand in hand with modernisation and simplification of tax regimes. This is all the more true in an enlarged Union in which harmonisation becomes more important.

3.6 It would be helpful to complement supranational legal instruments, such as the European company, with suitable tax instruments and associated control and information-exchange procedures. In other words, it would be possible to envisage the phasing-in of a European control and exchange system that is not tied to current national procedures.

3.7 The EESC takes the opportunity to denounce once again the limits imposed by the principle of unanimity, which currently applies to all decisions on Community tax legislation, and reaffirms the need to replace this with qualified majority voting.

3.8 It is odd that people often talk in general terms about the constitutional principles of fair taxation when referring to the potential distortions of the European internal market, and then go on in practice to accept differences and privileges born of national legislation and procedures.

3.9 Taking into account existing national procedures and the political desire not to overturn these, the EESC accepts the proposed amendments as a move towards convergence and as a further, albeit inadequate, step towards modernising cooperation between Member States. Furthermore, the EESC calls on the competent authorities of Member States to respond promptly to requests for cooperation from other administrations, without discriminating against such requests in favour of investigations of a purely national nature. To this effect, control and information-exchange technology must obviously be able to keep up with the most sophisticated forms of fraud and evasion, which use the most modern technology available.

Brussels, 30 October 2003.

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Roger Briesch	**Patrick Venturini**

4 EESC Opinion on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No. 218/92 on administrative cooperation in the field of indirect taxation (VAT), and the Proposal for a Council Directive amending Directive No. 77/388/EEC as regards the Value Added Tax arrangements applicable to certain services supplied by electronic means, OJ C 116 of 20.4.2001, p. 59.