to operate when the definitive arrangements are in place.

4.4. Priority should be geven to minimizing the scope for fraud.

4.5. The proposal for transitional arrangements should therefore be closely linked with the proposal for administrative cooperation in the field of indirect taxation.

Done at Brussels, 19 September 1990.

The Chairman

of the Economic and Social Committee

Alberto MASPRONE

Opinion on the proposal for a Council Regulation (EEC) concerning administrative cooperation in the field of indirect taxation

(90/C 332/35)

On 17 July 1990 the Council decided to consult the Economic and Social Committee, under Article 100 A of the Treaty establishing the European Economic Community, on the abovementioned proposal.

The Committee instructed the Section for Economic, Financial and Monetary Question to prepare its work on the subject. When work was in progress, Mr Giacomelli was appointed Rapporteur-General.

At its 279th plenary session (meeting of 19 September 1990) the Economic and Social Committee adopted the following Opinion *nem. con.* with one abstention.

1. **Introduction**

The Committee (Section) approves the content of the present proposal which seeks, in line with the conclusions of the ECOFIN Council meeting held on 13 November 1989, to create a specific Community legal instrument for improving the effectiveness of administrative cooperation on indirect taxation (Value Added Tax (VAT) and excise duties). The Committee's (Section's) approval is nevertheless subject to the following provisos: (a) the formalities falling on firms must be reduced, (b) checks must be even-handed and not excessively meticulous and (c) the legal basis and form of the Commission proposal must be revised. The arguments for a directive rather than a regulation are set out further on.

2. **Introductory comments and explanations**

2.1. *The case for the Commission proposal*

2.1.1. The proposed amendment to the draft Council directive supplementing the common system of VAT and amending Directive 77/388/EEC provides for the establishment of a transitional VAT-based taxation scheme. The Commission argues that this and the present proposal are warranted by the creation of the internal market and the abolition, of fiscal frontiers. The present proposal can, moreover, be viewed as a corollary of the first one.

2.1.2. Both proposals seek to abolish checks on intra-Community cross-border traffic as of 1 January 1993. The first proposal, which will be dealt with separately, is principally designed to maintain, with some changes, VAT-based taxation in the country of destination, although it does confirm the medium-term aim of changing VAT in the country of origin. The second proposal concerns a Regulation (rather than a Directive) which would be directly applicable in every Member State; the explanatory memorandum and the draft Regulation proper indicate that the proposal springs from the need of strengthen existing provisions for administrative cooperation or mutual assistance in mat-

ters of indirect taxation, the main argument being the abolition of fiscal frontiers.

2.1.3. As there will no longer be any customs checks at intra-Community frontiers, national fiscal controls will be based first and foremost on the verification of traders' accounts for intra-Community transactions. It is vital that the current mutual assitance arrangements be backed up by 'a much more developed and comprehensive system of cooperation', as proposed in Council Directive 79/1070/EEC of 6 December 1979 (OJ No L 331/8). This is necessary as each Member State will be responsible for checking the accounts of its own taxable persons, in order not only to curtail the risk of evasion and irregularities, particularly under the transitional arrangements, but also to ensure that the tax is collected in the country of destination, i.e. where the goods are consumed. Appropriate arrangements were provided for in document COM(87) 323 of 5 August 1987 on the introduction of a VAT clearing mechanism for intra-Community sales (*cf.* Section 9.1). The idea of a clearing house has been dropped in the meantime, but the abolition of fiscal frontiers, to be accompanied by the abolition of the Single Administrative Document (SAD) accompanying goods principally for the purposes of fiscal control, nevertheless requires an improvement in administrative cooperation, which has hitherto been confined to mutual assistance in the event of evasion or suspected evasion.

2.1.4. Finally, the Commission refers of the conclusions of the ECOFIN Council of 13 November 1989: the Council ruled out the idea of country-of-origin based taxation in the near future, due to major disagreements between Member States inter alia on (a) the principles and procedures for concomitant alignment of VAT rates and (b) compensation arrangements between debtor and creditor States. The Council did, however, accept the need for checks to ensure effective protection against the risk of evasion. These arrangements would essentially be based on (a) national monitoring of business returns, (b) regular information exchange and (c) the communication of documentation established by the administration. The Council felt that administrative cooperation 'must not give rise to any obstacle on grounds of national legislation and will supplement existing mutual assistance procedures'.

2.1.5. The Commission views the present proposal as a major component of the three-tier measures: (i) transitional VAT scheme, (II) administrative cooperation, (iii) statistics, designed to eliminate controls at intra-Community frontiers in the Internal Market as of 1 January 1993. The legislation must effectively combat evasion and also help build up trust between the administrations responsible for applying the new arrangements. At her press conference on 8 May 1990, Commissioner Scrivener pointed out that such trust was necessary both for the transitional and the final VAT scheme; the final scheme should in theory replace the transitional one from 1 January 1997, following an overall examination of the matter by the Council to determine, on the Commission's proposal, arrangements for final standardization of the common VAT system (*cf.* COM(90) 182 final—SYN 274 of 19 June 1990, point 3).

2.2. *Current situation*

2.2.1. The proposal covers administrative cooperation on indirect taxation. It should be noted that Community legislation does not yet provide for mutual assistance in the administration of excise duties as it does in the case of VAT. In accordance with Articles 1 and 2, the Regulation therefore had to make express reference to these excise duties. In the event, the indirect taxes concerned are listed in Article 5, title II: value-added tax; excise duty on manufactured tobacco products; excise duty on alcoholic beverages and alcohol contained in other products; excise duty on mineral oils. Consequently titles I, III *et seq.* implicitly apply also to administrative cooperation and to exchange of information on such duties.

2.2.2. For administrative cooperation on VAT, the Commission decided to invoke the legislative framework provided by Council Directive 79/1070/EEC (*cf.* 2.1.3 above) concerning mutual assistance by the competent authorities of the Member States in the field of indirect taxation.

2.2.3. The Commission also cited two other references: (i) Regulation (EEC) No 1468/81 on mutual assistance in customs and agricultural matters, as amended by Regulation (EEC) No 945/87, and (ii) the 1967 Naples Convention which provides for mutual assistance between customs administrations, but is not a Community instrument.

2.2.4. If, as the Commission states, current Community legislation on mutual assistance provides a sound basis for administrative cooperation on VAT, it would appear that these measures have not been widely deployed, as Member States have decided that their own national checking procedures, using import and export documents, are adequate for effective control.

2.2.5. Information received from the relevant authorities, does indeed indicate that these instruments, namely Council Directive 79/1070/EEC—have only

been used haphazardly, in cases of evasion or suspected evasion, and within the limits set down in Article 7(2) (provisions relating to secrecy) and 8 (limits to exchange of information) of Council Directive 77/799/EEC on assistance in matters of direct taxation, extended to VAT by Directive 79/1070/EEC.

2.2.6. Administrative cooperation is due to become standard practice once fiscal frontiers have been removed; it will be part of a system of checking procedures based on Member States' own 'a posteriori' checks of tax declarations. Current arrangements are based on 'a priori' checks of transactions by the customs. The Commission holds the view that it can fulfil the mandate assigned by the Council by proposing a new legal instrument to improve administrative cooperation between Member States on indirect taxation.

2.3. *The arrangements to apply from 1 January 1993*

2.3.1. Checks will be carried out under national tax arrangements and will be based on *a posteriori* verification of tax declarations.

2.3.2. Periodical VAT declarations show:

— total VAT payments and deductions,

— the volume of intra-Community sales and purchases.

This is sufficient to process VAT.

2.3.3. Checks are carried out on firms' accounts (on the spot and on the basis of documentation) thus allowing:

— checks on firms stocks,

— checks on exemption conditions in connection with the shipment of foods to another Member State,

— order forms,

— invoices,

— certificates,

— transport documents.

2.3.4. Improved cooperation between administrations will allow:

— mutual assistance in cases of evasion or suspected evasion,

— 'on request' cooperation in respect of routine checks,

— spontaneous assistance and communication of information.

2.3.5. Provision has been made, *inter alia*, for administrations to make reciprocal checks by means of random sampling, on whether a declared export is matched by an equivalent import and vice versa. Any information requested in this way must be communicated to the applicant Member State within 3 months.

2.3.6. The reduction in paperwork (such as abolition of the transit advice note, soon to be followed by abolition of the SAD) will thus be reflected in firms' statistics. Proposals in this sphere, such as the amended proposal for a Council Regulation (EEC) on the statistics relating to the trading of goods between Member States (COM(90) 177 final—SYN 181 of 27 June 1990), mean that the SAD (with up to 55 entries) will be replaced by a form comprising only 10 statistical entries for the largest firms (under 20 % of Community firms). Other firms, however, will only have to supply two additional figures in their periodical VAT declarations, i.e. their total Community imports and total Community exports.

2.3.7. In the absence of any indication to the contrary, the impression prevails that the proposed instrument will apply to both the transitional and final schemes, irrespective of the decisions taken by the Council on VAT or excise duties.

2.3.8. Notwithstanding recent Commission proposals on excise duties (heavely criticized by the Committee in its Opinions on these proposals: CES 1328/89, CES 63/90, CES 135/90 and CES 275/90 of 5 July 1990), the proposed arrangements seem even less concrete than those on VAT; in any case, the tax will continue to be charged in the country of destination, i.e. where the goods are consumed. The operation of integrated monitoring systems for goods attracting axcise duty and being transported under exemption arrangements still has to be defined in detail. The Commission merely notes that the cooperation arrangements here will have to be similar to those for VAT.

2.4. *Administrative cooperation*

There will be two distinct but related types of cooperation under the new legal instrument.

2.4.1. Existing mutual assistance procedures for dealing with cases of evasion or serious irregularity (still to be defined) will be continued. These procedures will operate largely on a bilateral basis, but will need to be incorporated into a Community framework and codified in a Community instrument (regulation).

2.4.2. Furthermore, a new type of administrative cooperation is to be introduced in order to achieve the principal goal of the present proposal: to exchange

information for the purposes of checking intra-Community transactions subject to VAT and excise duties, after fiscal checks at intra-Community frontiers have been abolished.

2.4.3. Provision has been made for three categories of assistance:

2.4.3.1. assistance on request, where the initiative lies with the applicant authority;

2.4.3.2. automatic assistance, where both applicant and requested authorities agree in advance to exchange information;

2.4.3.3. spontaneous assistance, where one authority deems it necessary to take the initiative without being requested to do so.

Assistance on request is and will probably remain the most frequently used category.

3. General comments: remarks on the content and form of the proposal

3.1. If the system is to operate flexibly and without excessive evasion, closer cooperation between national indirect tax authorities will be vital once fiscal controls and formalities have been abolished in the run-up to the Internal Market; this will undoubtedly hold true for both transitional (as proposed by the Commission) and definitive arrangements (to be adopted by the Council after examination of the Commission's *ad hoc* suggestions, for implementation by 1 January 1997).

3.2. The current legal basis for the proposal is Article 100A of the Treaty; this is dubious insofar as it is intended to disregard Article 100A (2) wich states that 'paragraph 1 shall not apply to fiscal provisions'. It seems that the Commission intends to circumvent the unanimity rule by implicitly giving a restrictive interpretation of the derogation contained in paragraph 2 and deciding that paragraph 1 will apply irrespective of paragraph 2; the Commission view is that since the proposed measures to step up administrative cooperation on indirect taxation are purely executive they only require a qualified majority. This is by no means certain; fiscal provisions cover the tax, its introduction, assessment basis, rate, establishment and collection; close scrutiny of the Commission proposal reveals that it deals specifically with the establishment of the taxes, in that Article 1 introduces cooperation between administrations and with the Commission in order to ensure (a) compliance with legislation on indirect taxation and (b) correct establishment of the taxes.

3.3. Moreover, it is reasonable to ask why no reference has been made to Article 99 of the Treaty since, within the framework of wider improved administrative cooperation which implies the correct assessment of indirect taxes, the proposed new provisions broach the issue of aligment of legislation on turnover taxes, excise duties and other indirect taxes, insofar as such aligment is necessary to secure the establishment and operation of the Internal Market within the deadline set in Article 8A (which is not disputed here). In any case, point 5 of the explanatory memorandum does not provide convincing arguments for using Article 100A as the legal basis. If the Commission has opted for a regulation instead of a directive it should be aware that regulations can also be adopted under Article 99. In any case and in the absence of more convincing arguments to the contrary, Article 99 appears to provide the most appropriate bedrock for the proposal.

3.3.1. It is extremely significant to point out here that in reply to a question raised by the *ad hoc* group on the abolition of fiscal frontiers, the EC Council's legal service issued an Opinion on 16 July last stating categorically that 'Article 99 of the EC Treaty is the proper legal basis for application of the Commission proposal.' The Opinion contained highly pertinent arguments which in some respects overlapped with those put forward by the Committee (Section).

3.4 It is equally debatable whether a regulation is the best and most appropriate instrument for this case. Assistance between fiscal administrations in applying tax legislation to individuals or taxable persons (Article 7(2) and Article 9 of teh proposal) and in assessing the correct tax in most Member States requires statutory legislation rather than executive action. In other words, whether or not procedures such as this Commission proposal are enacted will depend on (a) national parliaments and (b) Member States' unanimity.

A regulation would be directly applicable to the individual, and would give no role to the Member State; the proposal in question provides for contact between taxable persons via their respective Member States, with no Community involvement; so there is no need for a Regulation, nor would one be warranted. Point 16 of the explanatory memorandum is not a strong enough argument for a Regulation on its own.

The most appropriate legal instrument is therefore a Directive based on Treaty Article 99, both in terms of interpretation of the Treaty [(fiscal provisions as set out in Article 100A (2)] and in terms of the proposal's content.

Moreover, close examination of Article 19 of the proposal (consultation and coordination procedures) reveals optional arrangements, vague measures, undetermined procedures all of which leave a considerable amount of latitude more appropriate to a Directive but incompatible with a Regulation which is interpreted literally and is directly applicable. This is yet another argument for a Directive, together with the fact that the instrument which the present proposal is designed to replace (Article 22 of the proposal repeals this text) is also a Directive.

4. Specific comments

4.1. *Second recital*

— The second recital is based on false premises i.e. it refers to 'fiscal harmonization measures taken for completion of the Internal Market'; in the current situation this is controversial at the very least; a Regulation adopted by the Council under these conditions would subsequently expose it to restrictions to which it had implicitly subscribed and which would prejudge a final decision which was its prerogative. This recital should therefore be amended to read as follows: 'whereas in order to give full effect to the abolition of frontier controls while avoiding fiscal revenue losses for Member States, the measures taken for the transitional period in the interests of completing the Internal Market require the establishment... etc.'

4.2. *Third recital*

— The third recital quite rightly refers to provisions whose objective is, by setting up a cooperation system, to abolish frontier controls in line with Article 8A of the Treaty. This is in fact the aim of the present proposal which, contrary to the second recital, cannot invoke fiscal alignment measures which have not yet been taken; notwithstanding the third recital, the proposal effectively provides for an alignement of fiscal measures under the terms of Article 100A (2); as indirect taxation is involved, the legal basis of Article 99 then comes into play.

4.3. *Eleventh (penultimate) recital*

— The second last recital lists instances where a Member State is entitled to refuse to undertake research or supply information; these same cases, however, are not listed in Article 18 and paragraph 1 of this Article cites only one example, namely the likelihood of prejudicing public policy! Consequently this oversight should be remedied by completing the list in Article 18 (1).

4.4. *Article 1*

As has already been pointed out in the general comments, the proposal in question effectively entails the harmonization of fiscal provisions insofar as it seeks, through cooperation between the administrative authorities responsible in the Member States for the application of the indirect tax legislation, to ensure compliance with such legislation as well as a correct assessment of the taxes in question. Article 1 thus inexplicitly brings into play EEC Treaty Article 99 which is concerned with the harmonization of legislation on indirect taxation.

4.5. *Article 3*

Article 3 provides for the logical and necessary cooperation beetween the competent authorities of the Member States. Except in special cases, such cooperation will be mainly bilateral in kind. The Commission is also involved, insofar as Community legislation is or will be affected and steps have to be taken to ensure compliance with Community provisions on indirect taxation.

The second paragraph of Article 3 states at the end that the competent authorities shall communicate 'any specific or general information to the Commission when this may be of interest at Community level'. It would be helpful here if the Commission would make clear exactly what type of information it has in mind. Vague wording is out of place in proposals as far-reaching as this.

4.6. *Article 5*

Article 5, which deals with administrative assistance, is concerned with requests made by the applicant authority to the requested authority to divulge all information necessary to ensure compliance with the legislation on indirect taxation. The Article then lists the taxes and duties falling within the scope of the proposal: VAT plus excise duties on manufactured tobacco products, alcoholic beverages and mineral oils. Would it not have been better to have defined the scope of the proposal in Article 1 rather than in Article 5 so that the reader would have got his bearings right from the start?

Article 5 would also be more complete if it were to incorporate the second sentence of Article 2(1) of Directive 77/799/EEC on mutual assistance in the field of direct taxation (now equally applicable, via Directive 79/1070/EEC, to mutual assistance in the field of indirect taxation) which states that the requested authority need not comply with the request if it appears that the applicant authority 'has not exhausted its own usual sources of information which it could have utilized, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result'.

Assistance on request will no doubt be the most frequently used type of cooperation during the transitional period.

4.7. *Article 7*

Article 7 deals with cases of coordinated tax examinations where two or more authorities have a common or related intererst, each in its own territory, in examining the indirect tax affairs of a person or persons with a view to exchanging the information which they so obtain. It is questionable whether such a provision can be effective if, as the first paragraph states, 'each authority involved shall decide whether or not it wishes to participate in a particular coordinated tax examination'. The provision should at least set out the criteria which can justify a party wishing to opt out of a coordinated tax examination.

4.8. *Article 11*

This Article is concerned with the information referred to in Article 3 being exchanged automatically, regularly and without prior request 'for categories of cases which shall be determined by the competent authorities under the procedures laid down in Article 19'.

It is not easy to express a view on the exact scope of Article 11 since it is an outline provision and certain parts still remain to be clarified under the procedures laid down.

4.9. *Article 13(1)(b)*

This provision is initially confusing. It would therefore help to word it more clearly so that the uninitiated can understand it better.

4.10. *Article 13(2)*

Like a number of other provisions, this paragraph suffers from the uncertainty surrounding Article 19.

4.11. *Article 13(3)*

Are the 'other Member States' who are to receive the information referred to in paragraphs 1 and 2 the Member States actually affected or concerned by such information? If this is the case, then it should be spelt out in paragraph 3.

4.12. *Article 15*

Comment is inappropriate here as the first part of Article 15(1) depends on arrangements still to be agreed under the procedures laid down in Article 19. Article 15(2) should also make provision for refusals to supply information, with an obligation on the requested authority to state its reasons (e.g. when the request from an applicant authority is accompanied by an application from a court authority). Refusal to supply information is moreover provided for in Directive 77/799/EEC on mutual assistance in the field of direct taxation (which through Directive 79/1070/EEC likewise regulates mutual assistance in the field of indirect taxation).

4.13. *Article 16*

This important Article is difficult to interpret. It is therefore regrettable that its provisions likewise depend on procedures which still remain to be determined under the provisions laid down in Article 19, which are moreover insufficiently explicit.

4.14. *Article 17*

The opening lines of Article 17(1) expressly state that any information communicated shall be of a confidential nature and shall be covered by the obligation of professional secrecy. This would seem to be redundant since access to such information is to be confined exclusively to civil servants who are bound to secrecy by their terms of employment. The wording of the equivalent provision [Article 7(1) of the directive on mutual assistance in the field of direct taxation, likewise applicable to indirect taxation through directive 79/1070/EEC)] is clearer and more concise and so should be incorporated lock, stock and barrel in Article 17(1) of the present proposal.

4.15. *Article 18*

It has already been pointed out in paragraph 4.3 above that Article 18(1) is incomplete insofar as it cites only one of the reasons given in the eleventh (penultimate) recital of the proposal entitling Member States to refuse to carry out enquiries or to provide information. Apart from the case where the provision of information would be contrary to public policy, the recital also states that a Member State has the right of refusal where its laws prevent its indirect tax administration from undertaking such enquiries or from collecting or using such information for its own purposes (the 'own account' use of information originating rather in Article 5(2).

Article 18(1) should therefore be completed accordingly.

4.16. *Article 19*

Given the uncertainties which pervade this outline provision concerning as yet unspecified consultation and coordination procedures, not to mention other reasons given under the general comments, it is virtually inconceivable that a Regulation should be proposed as the legal instrument for administrative cooperation in the field of indirect taxation when a Directive—which would also repeal and replace an existing Directive on the same subject—would be more appropriate. Provisions such as those in Article 19 are more appropriate for a Directive than a Regulation which must

be based on criteria of clarity, precision and literal interpretation. This is all the more so since taxation is concerned.

It would also undoubtedly have been simpler to invoke Article 9 of the Directive on mutual assistance in the field of direct taxation (likewise valid for indirect taxation), incorporating it, mutatis mutandis, into the present proposal and leaving Member States and their competent authorities as much freedom as possible to work out the actual details of cooperation, subject to observance of the principles of subsidiarity and national fiscal sovereignty.

4.17. *General comment*

In the light of the above comments, the word 'Regulation' should be replaced by 'Directive' in the various clauses of the new proposal.

4.18. *Final comment*

The Committee would stress that, in order to ensure the successful abolition of tax frontiers on 1 January 1983, there must be neither discussion nor deferred decision in the Council on the package of three measures relating respectively to the transitional VAT arrangements [COM(90) 182 final], administrative cooperation in the field of indirect taxation [COM(90) 183 final] and statistics relating to the trading of goods between Member States [COM(90) 177 final]. The three proposals are closely interlinked and the relevant discussions and decisions should occur simultaneously.

5. **Conclusion**

Assuming that Directive 79/1070/EEC of 6 December 1979, even if duly amended, will be unable to cope with the situation prevailing after 1 January 1993 (when there will be a system of *ex post facto* tax controls, following the abolition of checks on intra-Community crossborder traffic), it is necessary and indeed essential to step up mutual assistance and administrative cooperation in the field of indirect taxation. Subject to the above comments, the Committee (Section) therefore endorses the Commission's proposals on the assumption that definitive solutions will eventually be found in the fields of taxation, administrative cooperation and intra-Community trade statistics, thus ensuring that tax revenue is justly and equitably equitably allocated to the entitled parties, i.e. the Member State where the goods in question are finally consumed, without a complex, expensive compensatory mechanism on which the Committee expressed such strong reservations in its Opinion (ESC 742/88) of 7 July 1988 on document [COM(87] 323 (*cf.* paragraph 2.1.3 above).

Done at Brussels, 19 September 1990.

The Chairman

of the Economic and Social Committee

Alberto MASPRONE