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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Directive 77/799/EEC concerning mutual assistance by the competent
authorities of the Member States in the field of direct and indirect taxation**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

The Directive on Mutual Assistance dates from 1977. It sets out the rules under which the Competent Authorities of Member States provide mutual assistance and exchange of information in order that they may apply their tax laws effectively.

Such an instrument was needed because there was an ever-increasing risk that practices of tax evasion and tax avoidance across national frontiers would lead to budget losses and also to violations of the principle of fair taxation. In turn, these would give rise to distortions in capital movements and in conditions of competition with adverse effects on the operation of the common market (now the internal market).

Although, in most instances, Member States have negotiated bilateral treaties with other member States, these were not regarded as adequate to counter new forms of tax evasion and avoidance that tended to take on a multinational character. Accordingly, there was a need to strengthen the collaboration between tax administrations of Member States in accordance with a system of common principles and rules.

The Directive makes provision for three types of information exchange – information on request, automatic exchange and spontaneous exchange. It also contains safeguards relating to secrecy so that any information exchanged is handled with proper respect and consideration for the rights of taxpayers. In addition, there are limits to the exchange of information in order to ensure that there is reciprocity in the types of information that can be exchanged. It is not possible for a Member State to seek information from another Member State if the state making the request would be precluded by its own laws, or administrative practices, from obtaining similar information.

The Directive also allows collaboration between Member States and the Commission for the purposes of permanent study of the way in which co-operation procedures work in practice so that the Commission can decide whether it is necessary to propose appropriate community rules in order to bring about necessary improvements.

When it was first adopted, it applied only to direct taxes. Over time, that changed and first, Value Added tax and later, Excise Duties were brought within its scope. More recently, the Commission has presented a proposal [COM (2001) 294 final] to have an entirely separate instrument for Value Added Tax and another proposal will be made for a new instrument to deal exclusively with Excise Duties. The Directive has been in place for a quarter of a century and was designed for conditions that were markedly different than those that exist today. Thus, this is an opportune moment to review the original Directive in order to modernise it and while recognising that there are significant differences between the different types of tax, to bring its provisions into closer alignment with the arrangements for administrative co-operation and mutual assistance in relation to indirect taxes.

2. THE AD-HOC WORKING PARTY ON TAX FRAUD

In September 1999, the Committee of Permanent Representatives (COREPER) set up a working party consisting of high level tax officials responsible for tax control, designated by the member States and a representative of the Commission. It was chaired by the Member State holding the Presidency of the Council and was required, by 30 May 2000, to present a report to the COREPER with a view to submission to the ECOFIN Council. The AD-hoc Working Party's terms of reference included the following matters:

- to assess the situation concerning tax fraud at that time;
- to study possible weaknesses in existing Community rules and control systems;
- to study the efficiency of existing administrative co-operation arrangements for dealing with tax evasion and fraud in the areas of both indirect and direct taxation; and
- to examine the possibility of improved administrative co-operation in these areas, making suggestions for any new arrangements or measures that it considered appropriate. It was to take account of all work done and being done in similar bodies.

The working party presented its report on time. (Council Document 8668/00 FISC 67 CRIMORG 83) It contained many recommendations. Some of these related to matters involving the existing rules for administrative co-operation and mutual assistance, where Member States already have the power to introduce changes of an organisational nature, without the need for any additional legislation.

However, the report also called for changes to both national and community legislation. It pointed out that the existing Directive needed to be improved in order to eliminate certain weaknesses that the report's authors had identified.

After the ECOFIN Council had taken due note of the report's contents, the Commission undertook to consider the ways in which the Ad hoc Working Party's recommendations could be taken forward, in so far as they concerned direct taxation. Accordingly, the Commission initiated discussions within the framework of a Commission-chaired working group comprising experts from Member States. Deliberations were conducted in this forum, on the occasion of three separate meetings, in order to search for a consensus view.

3. OUTLINE OF THE PROPOSED CHANGES TO THE EXISTING ARTICLES AND THE NEW PROVISIONS BASED ON THE SPANISH PROPOSALS

1. *Article 1.* This article sets out the changes being proposed in relation to the existing articles of the main Directive.
2. The first change that is proposed relates to article 2 of the Directive dealing with exchange of information on request. Article 2.2 recognises that the competent authority of one Member State will often need to carry out enquiries in order to obtain the information needed to respond to a request from the competent authority of another Member State.

3. A number of Member States have procedures in their domestic law that require them to notify a taxpayer that a request for assistance has been received from the competent authority of another Member State. The Ad Hoc Group identified this as a weakness in existing procedure because it often limited the benefit derived by the requesting State from any information subsequently obtained as well as slowing down the information gathering process. Delay of that kind can undermine the investigation process and only serves the interests of the tax evader.
4. There is no such similar requirement in the case where those Member States make enquiries on their own behalf. The result of these different procedures is that it takes considerably longer to obtain information on behalf of another Member State than it does to obtain information for a domestic enquiry. Such delay is inimical both to the interest of the Member State that is trying to enforce its tax laws and also to the overall interests of the European Union because the smooth working of the internal market is also affected.
5. The proposal is that the Directive be amended so that any request for information is treated as made under the domestic laws and practices of the State in which the authority collecting the information is situated. The text of the suggested amendment is identical to that contained in the proposal relating to VAT in article 5(3).¹
6. Another area of weakness that the *Ad Hoc* Group identified in the existing Directive can be found in existing article 7.1. Currently, it is only possible to disclose information where the competent authority of the Member State that supplied it makes no objection. The Ad Hoc Group pointed out that the existing text gave rise to ambiguity. Some Member States took the view that it was necessary to obtain the explicit approval of the supplying competent authority before using the information in judicial proceedings. Other Member States held the contrary view that tacit approval could be assumed if no objection had been raised. The purpose of the text is to eliminate any possible delay, by rendering it unnecessary to suspend court action pending clarification, in those Member states that consider explicit approval is necessary. The position would be free from any doubt right from the outset.
7. The existing text of article 8.1 was seen in some quarters as being open to more than one interpretation. The Commission would like to use this opportunity to revise the text to remove any such ambiguity. During the discussions in the experts' working group, Member States agreed with the Commission's interpretation that the current wording did not allow a Member State to refuse to obtain and exchange information on the grounds that the information in question was not required for its domestic tax purposes. It only applied to types of information that the Member State could not collect or use even for its own purposes. The redrafting of the paragraph is intended to ensure that this is no longer a matter for interpretation but is now stated in explicit terms.
8. The terms of the existing text of paragraph 8.3 were also the subject of possible ambiguity concerning the identification of the "State concerned." Did this refer to the State from whom information had been requested or was it referring to the State that had requested information? In the Commission's view, it can only be a reference to the State that has requested information. Member States agreed that this was the

¹ COM (2001) 294 final

correct interpretation and the amendment is designed to remove any possible ambiguity.

9. The proposed new Directive also introduces new material reflecting suggestions made during the course of the meetings held in the experts' working group. They are designed to align the provisions relating to direct taxation more closely with those that are being adopted in relation to indirect taxation.
10. The proposed new article 8a sets out the procedure to be followed where it is necessary to notify a taxpayer of instruments or decisions emanating from the administrative authorities of the Member State where the tax liability arises.
11. The requirement for such notification does not exist in every Member State. However, it would be highly beneficial for those Member States where notification is required if the procedures could be carried out on their behalf by the competent authority of another Member State. Where the latter State does not require such procedures, in relation to the enforcement or recovery of tax debts under its domestic laws, it is likely that its tax officials will not be aware of their importance for the requesting State. The proposed amendment of the Directive will emphasise the importance of such procedures and facilitate any later action under the Directive relating to Mutual Assistance on Recovery of claims.
12. The proposed new article 8b deals with simultaneous controls of the affairs of a single taxpayer operating in two or more Member States. Simultaneous controls are regarded as one of the most efficient ways in which competent authorities can exchange information. The *Ad Hoc* Group had urged that consideration be given to tackling abuses involving under-invoicing and over-invoicing, where transactions took place between related entities in cross-border situations (transfer-pricing), by stepping up information exchange. It suggested that synchronised inspections would be one way of developing increased co-operation between tax administrations. The amendment to the Directive would make it possible to have these types of controls but only where the competent authorities agreed that they wanted to take part.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Economic and Social Committee³,

Whereas:

- (1) Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation⁴ established the ground rules for administrative co-operation and the exchange of information between Member States in order to detect and prevent tax evasion and tax fraud. It is essential to improve, expand and modernise those rules.
- (2) When a Member State conducts enquiries in order to obtain the information necessary to respond to a request for information, that State should be regarded as acting on its own account; in that way, there will only be one set of rules applying to the information-gathering process, irrespective of the location of the taxpayer concerned, and the investigation will not be undermined by delays.
- (3) It is inappropriate, if the fight against tax fraud is to be effective, that a Member State which has received information from another Member State should have to request permission to use the information in judicial or other proceedings.
- (4) It should be made clear that a Member State is not under any obligation to carry out enquiries in order to obtain the information necessary to respond to a request for assistance where either its legislative or administrative practices do not permit its competent authority to conduct enquiries or to collect such information.
- (5) It should be possible for the competent authority of a Member State to refuse information or assistance when the requesting Member State is not in a position to supply the same type of information, whether for reasons of fact or of law.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 336, 27.12.1977, p. 15.

- (6) In view of the legal requirement in certain Member States that a taxpayer be notified of decisions and instruments concerning his tax liability and of the ensuing difficulties for the tax authorities in cases where the taxpayer has relocated to another Member State, it is desirable that, in such circumstances, those authorities should be able to call upon the assistance of the competent authorities of the Member State to which the taxpayer has moved.
- (7) Since businesses are often organised in such a way that affiliated and related entities are established in several Member States and enter into business transactions with one another, it is often necessary to verify that arm's-length prices have been applied and to determine whether a potential loss of tax could arise in one or more Member States. It should therefore be made possible for simultaneous controls to be applied to such businesses by two or more Member States with a view to exchanging information so that the tax liability of each related entity can be correctly assessed.
- (8) Directive 77/799/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/799/EEC is amended as follows:

- (1) In Article 2(2), the following subparagraph is added:

“In order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.”
- (2) In the second indent of the second subparagraph of Article 7(1), the second part of the sentence is replaced by the following:

“such information may, however, be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection at the time when it first supplies the information.”
- (3) Article 8 is amended as follows:
 - (a) Paragraph 1 is replaced by the following:

“This Directive does not impose any obligation upon a Member State from which information is requested to carry out inquiries or to communicate information, if it would be contrary to its legislative or administrative practices for the competent authority of that State to conduct such inquiries or to collect the information sought.”

- (b) Paragraph 3 is replaced by the following:

“The competent authority of a Member State may decline transmission of information when the Member State requesting it is unable, for reasons of fact or law, to provide the same type of information.”

- (4) The following Articles 8a and 8b are inserted:

*“Article 8a
Notification*

1. At the request of the competent authority of a Member State, the competent authority of another Member State shall, in accordance with the rules governing the notification of similar instruments in the Member State in which it is established, notify the addressee of all instruments and decisions which emanate from the administrative authorities of the Member State in which the requesting authority is established and concern the application in that territory of legislation on direct taxes.
2. Requests for notification shall indicate the subject of the instrument or decision to be notified and shall specify the name and address of the addressee, together with any other information which may facilitate identification of the addressee.
3. The requested authority shall inform the requesting authority immediately of its response to the request for notification and shall notify it, in particular, of the date of transmission of the decision or instrument to the addressee.

*Article 8b
Simultaneous controls*

1. Where the tax situation of one or more taxable persons is of common or complementary interest to two or more Member States, those States shall conduct simultaneous controls, with a view to exchanging the information thus obtained.

Such simultaneous controls shall be conducted whenever they would appear to be more effective than controls conducted by one Member State alone.

2. The competent authority in each Member State shall identify independently the taxable persons whom it intends to propose for simultaneous control. It shall notify the respective competent authorities in the other Member States concerned of the cases which, in its view, should be subject to simultaneous control. It shall give reasons for its choice, as far as possible, by providing the information which led to its decision. It shall specify the period of time during which such controls should be conducted.
3. The competent authority of each Member State concerned shall decide whether it wishes to take part in the simultaneous control. On receipt of a proposal for a simultaneous control, the competent authority shall confirm its agreement or its refusal to its counterpart authority.
4. The competent authorities of the Member States concerned shall appoint a representative with responsibility for supervising and co-ordinating the control operation.”

Article 2

Member States shall adopt and publish, by [...] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President
[...]

For the Council
The President
[...]

ANNEX

ASSESSMENT IMPACT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

Title of proposal: Council Directive to amend Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation

Document reference number : [...]

The proposal

Practices of tax evasion and tax avoidance, extending across the frontiers of Member States, lead to budget losses and violate the principle of fair taxation. In turn, these result in distortions of capital movements and conditions of competition and adversely affect the workings of the single market. Thus, there is a strong community interest in Member States being able to enforce their tax laws effectively. The cross-border nature of these offensive practices means that national measures on their own are not sufficient. Hence, provision is needed for Member States to be able to co-operate and to provide mutual assistance.

The scope of the proposal is to modify several existing provisions of the Directive in order to make the language clearer and to shorten some of the procedures that need to be followed when assistance is requested. There are also some new elements. One of these concerns notification, in one Member State, of instruments or decisions originating in another Member State where a taxpayer has moved to the second state. Another makes provision for Member States to conduct simultaneous controls of a business that operates in a number of different countries. The Directive applies to direct taxation only because a separate instrument has been adopted for VAT and there is to be another for excise duties. It is important to keep these aligned even though direct taxes are exclusively the competence of the Member States.

The impact on business

Who will be affected by the proposal?

The proposal is designed to improve the provisions of an existing Directive under which the competent authorities of Member States' tax authorities co-operate to help counteract tax evasion and tax avoidance. The need to modernise the Directive was highlighted in the report⁵ delivered in May 2000 by the Council's *Ad hoc* Group on Tax Fraud. The only bodies that will be affected by it are the direct tax administrations of Member States.

What will business have to do to comply with the proposal?

Businesses will not be affected by the proposal because it does not place any new burdens on them. Hence, they will not need to do anything in order to comply with the proposal.

⁵ Council Document 8668/00 FISC 67 CRIMORG 83

What economic effects is the proposal likely to have?

The objective is to secure better compliance with tax obligations and to help secure fair taxation, which will help remove distortions in the operation of the internal market. There should not be any direct impact on levels of employment, creation of new businesses or on the competitiveness of businesses in general.

Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

Consequently, there is nothing in the proposal to take account of the specific positions of small or medium- sized firms.

Consultation

List the organisations which have been consulted about the proposal and outline their main views.

There has not been any consultation with organisations other than the national tax administrations of Member States. The content of the proposal was discussed within the framework of a Commission-chaired working group comprising experts from Member States. Deliberations were conducted in this forum, on the occasion of three separate meetings, in order to search for a consensus view. The proposal reflects the matters in respect of which agreement was reached.