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COMMISSION OF THE EUROPEAN COMMUNITIES

COM(76) 119 final.

Brussels, 31 March 1976.

PROPOSAL FOR A COUNCIL DIRECTIVE CONCERNING
MUTUAL ASSISTANCE BY THE COMPETENT AUTHORITIES OF
MEMBER STATES IN THE FIELD OF DIRECT TAXATION

(submitted to the Council by the Commission)

COM(75) 119 final.

EXPLANATORY MEMORANDUM

I. GENERAL CONSIDERATIONS

1. Tax evasion and tax avoidance reaching beyond the national borders of Member States represent a serious problem, not only nationally but also at Community level. For each Member State they lead to budgetary losses and to breaches in the principle of ~~fair~~ taxation, but in addition they are likely to distort capital movements and the conditions of competition.

2. Because of the increasing interpenetration of economies and the development of multinational companies, it is no longer possible effectively to combat international tax evasion and avoidance merely nationally or bilaterally ; the attack needs to be organised on as wide an international basis as possible and, in the first place, at the Community level.

3. For these reasons, on 10 February 1975 the Council adopted, on a proposal from the Commission, a Resolution on the measures to be taken by the Community in order to combat international tax evasion and avoidance. The present proposal for a directive contains a first series of measures intended to follow up the Resolution.

4. The attack on international tax evasion and avoidance requires above all permanent collaboration between the tax administrations of the various Member States, so that each of them may have access to all the facts and material of use in correctly determining the amount chargeable to tax. Such collaboration would, it is true, be all the more effective if all the States were able to employ the same far-reaching means of ascertaining those facts. But that would require an inevitably long-term effort to harmonise legislations. Any action which is to bring about quick results must therefore find its place within the limits imposed by the present differences in the structure of national laws. The present proposal accordingly provides that collaboration between administrations shall be carried out within the conditions and limits of each Member State's existing legislation.

5. The present proposal for a directive is restricted to the field of direct taxes, in which the Member States already have experience of co-operation under double taxation agreements. Similar action is needed for indirect taxes, especially value added tax. The Commission has begun the work needed for this and it intends to submit a proposal to the Council as soon as possible.

6. Most of the double taxation agreements which have been concluded between almost all Member States contain articles providing for bilateral co-operation. The present proposal will not make these provisions redundant. Where such an article goes further than the provisions of the proposal, it will continue to be applied. But these will be exceptional cases. In general, the proposed provisions strengthen and expand the exchange of information and the mutual assistance procedures in a Community setting and establish them in situations which are not even envisaged in the bilateral conventions.

7. Since tax evasion and avoidance are always assuming new forms, it is important that any action taken at the Community level shall be capable of adaptation to changes in circumstances and to the experience which the tax administrations will gain with increasing co-operation between Member States. This need to create permanent opportunities for adaptation and development finds expression in the proposal in two ways. In the first place, permanent collaboration between the Member States and the Commission is provided, not only to review the working of the co-operation procedures set up under the proposal but also to take advantage of the experience gained, with a view to improving the co-operation procedures and to formulating new measures if need arises. In the second place, the structure of the proposal for a directive is itself very elastic.

8. The provisions of the proposal fall, in fact, into two complementary categories. First there are the binding provisions, which oblige all the Member States to observe certain rules concerning the supply of information and the carrying out of enquiries in clearly defined circumstances.

Secondly, there are provisions of an optional nature, permitting an almost à la carte extension of certain co-operation measures. In considering if or to what extent it will make use of these opportunities for

going beyond the obligatory requirements, each Member State will have to consider whether the procedure in question is really useful in the circumstances of its own bilateral relationships and whether it can be adopted within the State's constitutional or legislative framework.

9. The amount of information exchanged under the provisions of this proposal is likely to be much greater than under previous arrangements. For this reason, it is very important to preserve the rights of taxpayers and to take the greatest precautions to ensure that information passed from one State to another is not divulged to unauthorised persons. The Commission's proposal lays down very strict rules to safeguard the confidential character of the information and to ensure that it can only be used for the purpose laid down.

10. It is not impossible that the introduction of measures for a wider exchange of information between the tax administrations will bring about an increase in the number of cases where there is double taxation, especially in the field of transfer pricing within groups of companies; information obtained in this way might lead a Member State to increase the taxable profits of an enterprise without the other Member State making a corresponding adjustment. In order to deal with this problem the Commission will, after the usual consultations, submit to the Council not later than July 1976 a proposal for a directive which it would like to see adopted at the same time as the present proposal.

11. Although the provisions of the proposal do not regulate relations between Member States and third countries, it is obvious that mutual assistance, as a means of combatting international taxation abuses, should not be restricted to collaboration within the Community boundaries. The Commission is aware that it would be desirable to extend the scope of the co-operation procedures beyond these limits and it intends to submit to the Council, in due course, other proposals whose purpose will be to strengthen collaboration, especially with those third countries which are important in an industrial and financial sense.

COMMENTS ON CERTAIN ARTICLES

Article 1

11. The first paragraph of Article 1 lays down the principle that the competent authorities of the Member States shall exchange information which is relevant in determining the correct liability to taxes on income and on capital. The remaining paragraphs define certain essential concepts such as "taxes on income and on capital" and "competent authorities of the Member States".

12. The definition of taxes on income and on capital aims to make the scope of the directive as broad as possible. It does not matter for which authority these taxes are collected : it can equally well be the State itself, its political subdivisions, or its local authorities.

13. Equally the method of collection makes no difference : the tax can be levied by means of a direct assessment, by deduction at source or in the form of surcharges or "centimes additionnels".

Article 2

14. This Article deals with the exchange of information upon request.

The purpose of paragraph 1, second sentence, is to grant the competent authority of the requested State the option of refusing to comply with the request if that authority considers that the circumstances are as described in that sentence. Clearly this option in no way restricts the possibility of refusal under Article 8.

15. Paragraph 2 fulfils a dual role :

- on the one hand, it requires the competent authority of the requested State, when that authority does not have the information requested at its disposal, to undertake all necessary enquiries while observing the limits set out in Article 8 ;

- on the other hand, it provides the competent authorities of the Member States with a legal basis, if they need it, for extending the powers of enquiry they have for determining national tax liabilities so that they cover the requirements of another State.

Article 3

16. Whereas exchange on request must relate to an actual case, automatic exchange invariably covers certain categories of data, such as dividends, royalties, frontier workers' pay etc...., on which the competent authorities of the Member States concerned have reached prior agreement under the consultation procedure set out in Article 9.

Article 4

17. This Article deals with the transmission of information otherwise than on request or by prior agreement as provided for in Articles 2 and 3.

18. Paragraph 1 obliges the competent authorities to furnish information in the five sets of circumstances set out in sub-paragraphs a to e. The possibility of extending this obligation to other cases is provided for in paragraph 2. It is self-evident that, on any reasonable interpretation, the competent authorities are not required to transmit information which they consider holds little interest for the tax administration of the other Member State.

19. As regards sub-paragraphs a to e, the following observations should be made :

- sub-paragraph a : this provision covers in a general way every case where there has been an abnormal reduction in or exemption from tax, even where, in the absence of proof of deliberate intent by the taxpayer, there is no tax evasion in the strict sense of the term ;
- sub-paragraph b : the point to note is that it must be a case of the

same taxpayer in the different Member States : the case of a transfer of profits between associated companies is dealt with in sub-paragraph d.

An area in which sub-paragraph b could often apply is that of double taxation treaties. It should be emphasized that the operation of this provision is not confined to cases where the taxpayer attempts to gain improperly from the treaty : it is sufficient if the taxpayer obtain a tax advantage in one Member State which should entail a tax disadvantage in the other State.

- sub-paragraph c : the term "through one or more other countries" is intended to cover as widely as possible all the intermediaries who act in the transactions and are situated in another country, whether that country is a Member State or a third country.

It can thus apply to an independent individual or legal person or equally well to a permanent establishment of one of the persons liable to tax in a Member State. Similarly, it does not matter whether the intermediary is subject to tax in the other country.

20. The purpose of paragraph 3 is to ~~authorize~~ the competent authority in general terms to effect a spontaneous transmission of information, in cases other than those covered by paragraphs 1 and 2, whenever it acquires knowledge of facts which may be of interest to the tax administration of another Member State.

Article 6

21. This Article provides a legal basis enabling the competent authority of a Member State to authorise the presence on its territory of officials of another Member State. The text brings out the non-compulsory character of the provision : the competent authority of a Member State is consequently not obliged to comply with a request from the competent authority of another Member State.

Article 7

22. Paragraph 1 requires the competent authority to maintain secrecy concerning the information obtained from another Member State in like manner as for information obtained under its domestic law. Where there is a breach of secrecy, the penalties provided by the administrative and penal code of the State concerned may be applied.

23. Paragraph 2 specifies the persons and authorities to whom the information obtained may be divulged, as well as the purposes for which it may be used. The possible uses permitted by this provision are relatively circumscribed. Where, however, the competent authority of the Member State which supplies the information considers that its use must be more restricted, paragraph 3 makes it possible to enforce even stricter secrecy.

24. On the other hand, the possible uses permitted by paragraph 2 may be more restrictive than those allowed under the national legislation of the Member States concerned. In order to enable this particular drawback to be overcome, paragraph 4 provides a legal basis for a derogation from the provisions of paragraph 2.

Article 8

25. This Article refers to the limitations on exchange of information and on enquiries to obtain information.

26. Paragraph 1 states that the competent authority is not required to exceed the limits set by its legislation or administrative practice relating to the determination of national taxes. But within these limits, the competent authority must make use of all the powers at its disposal in order to be in a position to supply the information.

27. Paragraph 2 deals with certain information which affects the "ordre public".

28. Paragraph 3 allows information to be withheld where the State for which it is intended is not in a position to furnish similar information. The competent authority of this latter Member State cannot therefore require another Member State to provide informations in its possession if its own legislation or administrative practice does not permit a corresponding provision of information.

Article 9

29. In dealing with problems such as these covered by the preceding Articles, detailed rules of application and enforcement have to be left, in many cases, to bilateral agreement between the competent authorities of the Member States concerned. There is therefore a need for a simple and efficient procedure under which questions arising can be examined.

30. Furthermore, the Community character of the measure requires that, as far as possible, it shall be uniformly applied and interpreted throughout the Community.

31. This Article seeks to achieve these two objectives by providing two consultation procedures which operate, ^{respectively,} depending on the interests involved :

- on a bilateral basis, for bilateral matters ;
- on a Community basis, for matters that are not exclusively bilateral.

32. To ensure that this Community procedure can be applied equally and effectively, paragraph 3 requires the other Member States and the Commission to be notified "a posteriori" of bilateral measures in so far as they do not deal exclusively with individual cases. This notification will enable each of the other Member States and the Commission to judge whether it is expedient to request Community consultations for the purpose of having these measures extended to the Member States as a whole.

33. The consultation procedure of Article 9 is free of complications and is effective from the legal and administrative points of view, by virtue of the fact that it operates directly between the competent authorities and, where appropriate, the Commission, enabling them to take decisions on their own authority.

Article 10

34. This Article establishes permanent collaboration between the Member States and the Commission.

35. A prime purpose of this collaboration is to follow the progress of co-operation between the competent authorities so as to improve it and possibly enlarge its area of application.

36. A second function, to which explicit reference is made, concerns the problem of transfer pricing within groups. The Article provides for all the tax administrations to pool their experience in this field with a view to the possible formulation of Community measures.

PROPOSAL FOR A COUNCIL DIRECTIVE

concerning mutual assistance by the competent authorities
of Member States in the field of direct taxation

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

having regard to the provisions of the treaty establishing the
European Economic Community and particularly Article 100,

having regard to the proposal of the Commission,

having regard to the opinion of the Economic and Social Committee,

having regard to the opinion of the European Parliament,

whereas practices of tax evasion and tax avoidance reaching beyond
national borders of Member States lead to budget losses and violations of
the principle of fair taxation and are liable to bring about distortions of
capital movements and of conditions of competition ; whereas they therefore
affect the operation of the common market ;

whereas the Council for these reasons adopted on 10 February 1975 a
Resolution on the measures to be taken by the Community in order to combat
international tax evasion and avoidance ;

whereas the international nature of the problem means that national
measures, whose effect does not extend beyond State boundaries, are in-
sufficient and whereas collaboration between administrations, on the basis
of bilateral agreements, is also unable to counter new forms of tax evasion
and avoidance, which are more and more assuming a multinational character ;

whereas it is therefore desirable to strengthen collaboration between
tax administrations within the Community in accordance with these principles,
under observance of common rules ;

whereas the Member States ought to supply to each other, on request,
information concerning particular cases and whereas the requested State
ought to make the necessary enquiries to obtain this information ;

whereas the Member States ought to exchange, even without request, any information which appears useful for the correct determination of taxes on income or capital, in particular where there appears to be an artificial transfer or profits between undertakings in different Member States or where transactions are carried out between undertakings in two Member States through a third country in order to obtain tax advantages, or where tax has been or may be evaded or avoided for any reason whatever ;

whereas it is important that officials of the tax administration of one Member State shall be allowed to be present in the territory of another Member State if both the States concerned consider it desirable ;

whereas it ought to be ensured that information transmitted in the course of such collaboration is not disclosed to unauthorised persons, so that the basic rights and guarantees of citizens and undertakings are safeguarded ; whereas it is therefore necessary that the Member States receiving such information do not use it, without the authorization of the Member States which supply it, other than for the purposes of taxation or to facilitate a prosecution for failure to observe the taxation law of the receiving States ; whereas it is also necessary that the receiving States afford to the information the same degree of confidentiality which it had in the State which provided it, if that State so requires ;

whereas a Member State that is called upon to provide information ought to have the right to refuse to do so where its legal provisions or administrative practice do not give its tax administration authority to obtain or use such information for its own purposes, or where the provision of such information would be contrary to public policy, or where the State for which the information is intended would be unable, for legal or practical reasons, to effect a similar provision of information ;

whereas collaboration between the Member States and the Commission is necessary for the permanent study of co-operation procedures and the exchange of experience in the fields considered, and in particular in the field of the artificial transfer of profits within groups of undertakings, with the aim of improving those procedures and of preparing appropriate Community rules ;

HAS ADOPTED THE PRESENT DIRECTIVE :

in Germany : Einkommensteuer
Körperschaftsteuer
Vermögensteuer
Gewerbesteuer

in France : Impôt sur le revenu
Impôt sur les sociétés
Taxe professionnelle
Taxe foncière sur les propriétés bâties
Taxe foncière sur les propriétés non bâties

in Ireland : Income tax
Corporation profits tax
Capital gains tax
Wealth tax

in Italy : Imposta sul reddito delle persone fisiche
Imposta sul reddito delle persone giuridiche
Imposta locale sui redditi

in Luxembourg : Impôt sur le revenu des personnes physiques
Impôt sur le revenu des collectivités
Impôt commercial communal
Impôt sur la fortune

in the Netherlands : Inkomstenbelasting
Vennootschapsbelasting
Vermogensbelasting

in the United Kingdom : Income tax
Corporation tax
Capital gains tax
Petroleum revenue tax

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4. The provisions of paragraph 1 shall apply also to any identical or substantially similar taxes imposed subsequently, whether in addition to or in place of the taxes named in paragraph 3. The competent authorities of the Member States shall inform one another and the Commission whenever such a tax enters into force.

5. The expression "competent authority" means :

- in Belgium : De minister van financiën of een door deze aange-
wezen vertegenwoordiger
Le Ministre des finances ou un représentant autorisé
- in Denmark : Ministeren for skatter og afgifter eller befulmæg-
tigatede stedfortraeder
- in Germany : Der Bundesminister der Finanzen oder sein Beauftragter
- in France : Le ministre de l'économie et des finances ou un
représentant autorisé
- in Ireland : The Revenue Commissioners or their authorized
representative
- in Italy : Il Ministro per le finanze od un suo rappresentante
autorizzato
- in Luxembourg : Le ministre des finances ou un représentant autorisé
- in the Netherlands : De minister van financiën of een door deze aangewezen
vertegenwoordiger
- in the United Kingdom : The Commissioners of Inland Revenue or their authori-
zed representative

Article 2

Exchange on request

1. The competent authority of a Member State shall have power to request the competent authority of another Member State to furnish information falling within Article 1, paragraph 1, in a particular case. The competent authority of the requested State need not comply with the request, if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without risk of frustrating the purpose of the enquiry.

2. For the purpose of furnishing information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any necessary enquiries, so far as may be required to obtain the information.

Article 3

Automatic Exchange of Information

For particular categories of cases, determined under the consultation procedure laid down in Article 9, the competent authorities of the Member States shall furnish the information referred to in Article 1, paragraph 1, without previous request and in a regular manner.

Article 4

Spontaneous Exchange of Information

1. The competent authority of each Member State shall without previous request communicate the information within the scope of Article 1, paragraph 1, of which it has knowledge, to the competent authority of another Member State in the following circumstances :
 - a) the competent authority of a Member State has grounds for supposing that there may be a loss of tax in the other Member State ;

- b) a person liable to tax secures a reduction of or an exemption from tax in a Member State which would give rise to an increase in tax or to liability to tax for him in the other Member State ;
 - c) business dealings between a person liable to tax in a Member State and a person liable to tax in another Member State are conducted through one or more other countries in such a way that tax saving may result in one or the other Member State or in both ;
 - d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
 - e) information transmitted to a Member State by the competent authority of the other Member State has resulted in the provision of information which may be relevant in determining the liability to tax in that other Member State.
2. The competent authorities of the Member States shall have power to extend the exchange of information provided for in paragraph 1 to cases other than those specified therein under the consultation procedure set out in Article 9.
3. The competent authorities of the Member States shall have power to communicate to each other in any other case, without previous request, any information within the scope of Article 1, paragraph 1, of which they have knowledge.

Article 5

Avoidance of Delay

The competent authority of the State which, by virtue of the preceding paragraphs, is called upon to furnish information shall do so with the least possible delay. If it encounters obstacles or if it refuses to furnish the information, it shall forthwith so inform the competent authority of the State concerned, indicating the nature of the obstacles or the reasons for the refusal.

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Article 6

Collaboration by officials of the State concerned

For the application of the preceding provisions, the competent authority of the informing Member State and the competent authority of the Member State for which the information is intended shall have power to agree, under the consultation procedure laid down in Article 9, to authorise the presence in the first Member State of officials of the taxation administration of the other Member State. The method of application of this provision shall also be determined under the abovementioned procedure.

Article 7

Secrecy

1. All information which is furnished by virtue of the foregoing provisions shall be kept secret in the State concerned in like manner as information received under its domestic legislation.
2. Notwithstanding the provisions of paragraph 1, in the State concerned the information :
 - may only be made available to such persons as are directly involved in the assessment of tax or in the administrative control of assessment to tax ;
 - may, apart from this, only be made known to persons who are directly involved in a judicial procedure for reviewing the tax assessment or in a prosecution in connection with the tax assessment ; and
 - shall in no circumstances be used for purposes other than taxation.
3. The provisions of paragraph 2 shall not oblige a Member State whose legislation lays down for domestic purposes narrower limits than those contained in the provisions of that paragraph to provide information if the State concerned does not undertake to respect those narrower limits.
4. Notwithstanding the provisions of paragraph 2, the competent authority of the informing State shall have power to permit information to be used for other purposes in the State concerned, if under the legislation of the informing State the information could, in similar circumstances, be used in the informing State for similar purposes.

5. Where a competent authority considers that information which it has received from the competent authority of another Member State is likely to be useful to the competent authority of a third Member State, it may, with the agreement of the competent authority which supplied the information, transmit it to that other competent authority.

Article 8

Limits to Exchange of Information

1. The provisions of this directive shall impose no obligation to provide information which the informing State would be prevented by its legal provisions or administrative practice from obtaining or using for its own tax purposes.
2. The provision of information may be refused where it would be contrary to public policy ("ordre public").
3. The competent authority of a Member State may refuse to provide information where the State concerned would be unable, for legal or practical reasons, to effect a similar provision of information.

Article 9

Consultations

1. Consultations on the application of the provisions of this directive shall be held, in a committee should the need arise, between :
 - the competent authorities of the two Member States, at the request of either, in respect of bilateral questions ;
 - the competent authorities of all the Member States and the Commission, at the request of one of the authorities or of the Commission, in so far as the matters concerned are not solely of bilateral interest.

In particular, consultations shall be held in the cases referred to in Article 3, in Article 4, paragraph 2 and in Article 6.

2. The competent authorities of the Member States shall have power to communicate directly with each other in the application of paragraph 1. The competent authorities of the Member States may by mutual agreement permit authorities designated by them to communicate directly with each other in specified cases or in specified groups of cases.
3. Where the competent authorities make arrangements on bilateral matters, other than the settlement of individual cases, which form the subject matter of this directive, they shall as soon as possible so inform the Commission. The Commission shall notify the competent authorities of the other Member States.

Article 10

Pooling of Experience

The Member States shall together with the Commission keep the collaboration prescribed by the provisions of this directive under constant review and shall pool their experience, especially in the field of transfer pricing within groups of companies with a view to securing improvements in collaboration and, where appropriate, formulating further measures in the specified fields.

Article 11

Effect upon wider obligations to provide assistance

The foregoing provisions shall be without prejudice to any wider obligations to exchange information assumed under any other international arrangement having force of law.

Article 12

Final Provisions

1. The Member States shall bring into force the necessary legislative and administrative provisions in order to comply with the provisions of the present directive not later than the first day of January of the second year following the year of its adoption, and shall immediately communicate them to the Commission.

2. The Member States shall ensure that the texts of any further main provisions of national law that they adopt in the field covered by the present directive are communicated to the Commission.

Article 13

The present directive is addressed to the Member States.

Done at, the

In the name of the Council

The President