

**Opinion of the European Economic and Social Committee on the ‘Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures’**

COM(2009) 28 final — 2009/0007 (CNS)

and the

**‘Proposal for a Council Directive on administrative cooperation in the field of taxation’**

COM(2009) 29 final — 2009/0004 (CNS)

(2009/C 317/23)

Rapporteur: **Mr Sergio SANTILLÁN CABEZA**

On 13 February 2009, the Council decided to consult the European Economic and Social Committee, under Article 93 of the Treaty establishing the European Community, on the

*Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures*

COM(2009) 28 final — 2009/0007(CNS)

and the

*Proposal for a Council Directive on administrative cooperation in the field of taxation* COM(2009) 29 final – 2009/0004 (CNS).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 24 June 2009. The rapporteur was Mr Sergio Ernesto Santillán Cabeza.

At its 455th plenary session, held on 15 and 16 July 2009 (meeting of 16 July), the European Economic and Social Committee adopted the following opinion by 114 votes to three, with one abstention.

## **1. Conclusions and recommendations**

1.1 The EESC welcomes the proposals for directives on mutual assistance for the recovery of claims relating to taxes and administrative cooperation in the field of taxation, because they meet an urgent need. The 30-year old legislation that they will replace has proved inadequate in the light of current requirements. The fact that only 5 % of claims are currently recovered calls for an urgent response.

1.2 The Commission's proposals take account of studies, suggestions and recommendations that have been made by the EU, in the Member States and in international fora and institutions such as the G-20 and the OECD. The EESC too has, in a number of opinions, given its unreserved support to the proposals aimed at making arrangements for cooperation between States in the field of taxation more effective (point 4.8 of this opinion).

1.3 The need for reform is now growing, as companies are having to deal with the social and economic fallout of the economic meltdown caused by the speculative and fraudulent practices uncovered in late 2007. This fallout, which will place a considerable burden on taxpayers for years to come, has led to the urgent call for effective measures to be adopted against the fraudsters who operate from the safety of tax havens or who use legal loopholes to avoid paying tax.

1.4 Globalisation makes the need for States to cooperate in the field of taxation even more pressing. In the EU, the fundamental freedoms that underpin its workings cannot be used to cover up failure to comply with the public obligation to pay taxes.

1.5 As a consequence, the Commission has rightly decided to draw up a new regulation in this field instead of introducing partial reforms to current legislation.

1.6 The EESC endorses the core aim of the proposals, which is to establish a Community administrative culture and give administrations the appropriate tools provided by modern technology (such as electronically-processed forms) to make procedures simpler and swifter. The provisions on language arrangements, one of the main obstacles to cooperation in the field of taxation (point 5.1), are also worth highlighting.

1.7 The obligation to provide information and the limit set (point 5.2) are in line with the OECD's procedures and attempt, quite rightly in the EESC's view, to prevent the improper use of banking secrecy and other, seemingly legal, procedures to defraud the treasury.

1.8 The involvement of a requesting State's officials in investigations carried out in the requested State has precedents in current legislation in certain fields (point 5.3). On this and on other aspects, the proposals uphold national sovereignty (point 5.5).

1.9 The taxpayer's obligations to the treasury are upheld in the context of cooperation between States, because this entails the possibility of contesting the legality of investigations and the acts carried out by the authorities (point 5.4).

1.10 The EESC suggests that in future, the Commission consider unifying tax law (point 5.6).

## 2. Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (COM(2009) 28 final)

### 2.1 Grounds for the Commission proposal

2.1.1 The current legislation on mutual assistance <sup>(1)</sup> is slow, disparate and lacks coordination and transparency.

2.1.2 Tax authorities lack the power to recover taxes beyond their State borders because legislation in this field is national in nature: in order to recover taxes, the authorities must request the assistance of another Member State (or States), using procedures that have proven to be ineffective. This limitation on powers has created a problem that is worsening, due to the increased mobility of capital and persons. As a result, free movement, which is one of the European Union's key aims, has a detrimental effect in this area, as it benefits fraudsters. There is, therefore, a clear need for new measures.

2.1.3 This is plainly demonstrated by the fact that in 2007, the Member States received 11 794 requests for assistance from other Member States to recover tax claims. The amounts actually collected, however, account for only 5 % of the total.

2.1.4 VAT fraud is particularly significant, and has two undesired effects: it distorts competition in the internal market and reduces Member States' and the Community's revenues <sup>(2)</sup>.

### 2.2 Proposed measures for the recovery of tax claims

2.2.1 Extending the scope of mutual assistance. Unlike Directive 2008/55/EC, which contains a short list of claims likely to be recovered, the current proposal covers 'all taxes and duties levied

by or on behalf of Member States' territorial or administrative subdivisions, including the local authorities', as well as compulsory social security contributions, 'refunds, interventions and other measures' relating to the EAGF <sup>(3)</sup> and the EAFRD <sup>(4)</sup>, as well as 'levies and other duties provided for under the common organisation of the market for the sugar sector;' (Articles 1 and 2).

2.2.2 Better exchange of information. In addition to the spontaneous exchange of information (Article 5), the proposal adds the highly significant option of officials from one Member State being able to participate actively in enquiries carried out by another Member State (Article 6).

2.2.3 Simplification of the procedure for the notification of documents (Articles 7 and 8).

2.2.4 More effective recovery and precautionary measures (Chapter IV). These provisions, which form a key part of the proposal, address the following aspects:

- The conditions governing a request for recovery in the requesting Member State (Articles 9 to 12).
- Consideration of the claim: 'For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it were a claim of the requested Member State, unless this Directive provides otherwise.' (Art. 12(1)) <sup>(5)</sup>. The requested Member State shall recover the claim in its own currency.
- Other aspects relating to recovering a claim: information to the requesting State, the transfer of any amounts recovered, interest charged and payment by instalment (Article 12(2) to 12(5)).
- Precautionary measures ensuring claims recovery (Articles 15 and 16).
- Limits to the requested authority's obligations (Article 17).
- Limitation on claims (Article 18).
- Procedural costs (Article 19).

2.2.5 Uniformity and simplification of the general rules governing requests in relation to forms, means of communication, use of languages, etc. (Articles 20 to 23).

<sup>(1)</sup> Directive 76/308/EEC of 15 May 1976, subsequently codified by Council Directive 2008/55/EC of 26 May 2008.

<sup>(2)</sup> COM(2009) 28 final: 'The effect of Directive 2000/65/EC, which abolished the possibility of requesting designated VAT representatives, and the expansion of VAT fraud - especially the so-called carousel fraud - has led to a situation where 57,50 % of all recovery requests relate to VAT claims (situation in 2007)'. See too the Commission Communication on 'A coordinated strategy to improve the fight against VAT fraud in the European Union', COM(2008) 807 final.

<sup>(3)</sup> European Agricultural Guarantee Fund

<sup>(4)</sup> European Agricultural Fund for Rural Development.

<sup>(5)</sup> Directive 2008/55/EC currently in force contains a similar provision (Art. 6(2)). According to this provision, the claim **does not belong** to the requested Member State but **can be considered as such**, in other words, it is treated in the same way in which the requested State treats its own claims.

### 3. Proposal for a Council Directive on administrative cooperation in the field of taxation (COM(2009) 29 final)

#### 3.1 Grounds for the Commission proposal

3.1.1 The High-level working group on fraud <sup>(6)</sup>, the Commission <sup>(7)</sup> and the Member States have all noted that the legislation on mutual assistance by the competent authorities in the field of direct taxation and the taxation of insurance premiums taxes is inadequate <sup>(8)</sup>. According to the Commission, the serious shortcomings of Directive 77/799 have created increasing difficulty in assessing taxes correctly, affect the functioning of taxation systems and entail double taxation, which itself incites to tax fraud and tax evasion, while the powers of controls remain at national level <sup>(9)</sup>.

3.1.2 Consequently, it is proposed to adopt an innovative approach that goes beyond simply making changes to the current directive. The new scheme, therefore, represents a new and integrated legal framework that covers all the fundamental aspects of administrative cooperation in the field of taxation, markedly boosting the authorities' powers to combat fraud and tax evasion.

3.1.3 Since the aim is to establish effective mechanisms for cooperation between the Community authorities and the Member States and between the Member States themselves, a key objective of the two proposals is to set common rules, whilst fully respecting national sovereignty in the field of taxation.

#### 3.2 Proposed measures to improve administrative cooperation between Member States

3.2.1 Extending the scope of legislation along the lines of the preceding proposal (on the recovery of claims).

3.2.2 Exchange of information. Three proposals for exchanging information are put forward:

- A prior request by the requesting authority (Articles 5 to 7). The request for information might entail carrying out 'any administrative enquiries' necessary to obtain the information.
- Automatic exchange of information (Article 8). This means the systematic communication of predefined information from one Member State to another, without prior request, at

pre-established regular intervals or as and when that information becomes available (Article 3(4)). Nevertheless, it is the comitology procedure, set out in Article 24 that will, within two years, determine the specific features of this information exchange.

- Spontaneous exchange, where the competent authorities of a Member State deem this appropriate.

#### 3.2.3 Other forms of cooperation:

- The presence of officials from the requesting authorities in the offices of the administrative authorities and their participation in the administrative enquiries of the requested authority (Article 10).
- Simultaneous controls of one or more persons in different States (Article 11).
- Rules governing the administrative notification decided on in another Member State (Article 12).

#### 3.2.4 General aspects of administrative cooperation.

- Feedback (Article 13). The emphasis is on the speed of response, amongst other things.
- Sharing of best practices and experience (Article 14).
- Different aspects of cooperation. The requesting or requested authorities may disclose the information and documentation they obtain to other authorities and use these for purposes other than those originally stated (Article 15). Other aspects covered are: the conditions governing Member States' obligations (Article 16); The limits on the obligation to cooperate (Article 17); Application of the principle of 'most favoured nation' (Article 18); Standard forms and computerised formats (Article 19) and use of the common communication network (CCN network) (Article 20).

### 4. General comments

4.1 The EESC fully shares the Commission's assertion that 'The Member States' need for mutual assistance in the field of taxation and especially for direct taxation is growing rapidly in a globalised era. There is a tremendous development of the mobility of taxpayers, of the number of cross border transactions and of the internationalisation of financial instruments, which makes it more and more difficult for Member States to assess taxes due properly, while they stick to national sovereignty as regards the level of taxes' <sup>(10)</sup>.

<sup>(6)</sup> Report published in May 2000 (Council Document 8668/00 entitled 'Fight against tax fraud').

<sup>(7)</sup> See the Communications from 2004 (COM (2004)611 final) and 2006 (COM(2006)254 final).

<sup>(8)</sup> Council Directive 77/799/EEC, of 19 December 1977.

<sup>(9)</sup> COM(2009)29 final, p.2.

<sup>(10)</sup> Explanatory memorandum, COM(2009) 29 final.

4.2 The two proposals are based on the observation that the legislation produced more than thirty years ago (at a time when the EU had nine Member States) is today inadequate, due to the changes that have taken place in the internal market since then: in the second half of the 1970s, free movement had not yet been achieved and integration was minimal.

4.3 For years now, concern has been expressed at the high levels of fraud and tax evasion in the EU. In 2004, the Commission addressed this issue, as the result of scandals relating to the dubious practices employed by some companies <sup>(11)</sup> and put forward a range of measures to 'improve transparency of tax systems' and proposed developing 'concrete proposals targeted at cases of tax fraud and avoidance involving complex and opaque structures'. Referring to specific cases <sup>(12)</sup>, the Commission pointed out that these scandals 'caused uncertainty in capital markets, damaging the overall economy'.

4.4 Five years on, the events detailed in the 2004 Communication appear insignificant in comparison with those that have erupted recently and the damage done to the economy now is also considerably greater.

4.5 This issue is today of global importance due to the economic and financial disaster caused by fraudulent practices, which started to emerge in late 2007. One of the G-20's tasks is to propose the drafting of international rules to make commercial transactions transparent and trustworthy, thereby combating fraud and tax evasion <sup>(13)</sup>.

4.6 The scandals caused in some EU countries in relation to tax-evasion mechanisms provided by tax havens (such as the fraud committed in Liechtenstein at the expense of the German Treasury), have been widely condemned by the public, which is calling for more effective measures to combat tax evasion and financial crime.

4.7 The exchange of information and greater ease of access to data to combat tax fraud are another of the OECD's goals <sup>(14)</sup>.

<sup>(11)</sup> Commission Communication on Preventing and Combating Corporate and Financial Malpractice (COM(2004) 611 final).

<sup>(12)</sup> Such as Parmalat and Enron, whose shareholders lost USD 67 billion.

<sup>(13)</sup> G-20 Washington Declaration (15 November 2008): 'Tax authorities, drawing upon the work of relevant bodies such as the Organization for Economic Cooperation and Development (OECD), should continue efforts to promote tax information exchange. Lack of transparency and a failure to exchange tax information should be vigorously addressed.'

<sup>(14)</sup> Global Forum on Taxation, also involving non-OECD countries. See 'Tax co-operation: towards a level playing field – 2008 Assessment by the Global Forum on Taxation'. OECD, August 2008.

4.8 Over the years, the EESC has strongly supported measures to improve cooperation and has called for better control instruments and mechanisms <sup>(15)</sup>.

4.9 In line with all of this earlier work, the EESC welcomes the two proposals for directives, because they represent a real step forwards for European integration. Compliance with tax obligations is a cornerstone of a functioning welfare state.

## 5. Specific comments

### 5.1 *Creating a Community administrative culture*

5.1.1 In the EESC's view, the most noteworthy aspect of the two proposals – particularly in the proposal for administrative cooperation – is the desire to establish a Community administrative culture, a crucial aspect of the fight against fraud, as stated in the 2006 Communication <sup>(16)</sup>.

5.1.2 This decision, which reflects the experiences of tax administrations over a period of time, also applies to different aspects such as: the obligation to designate a single tax liaison office in each Member State, and also the option to designate specific liaison services, which will stay in touch with one another; the possibility of appointing competent officials to play a direct role in activities; setting deadlines (which do not currently exist) for the transmission of information; the obligation to provide 'feedback', etc.

<sup>(15)</sup> See the EESC opinion on the Commission Communication concerning the need to develop a coordinated strategy to improve the fight against fiscal fraud, OJ C 161, 13.7.2007, p. 8. This opinion contains an exhaustive list of Community legislation. See also the opinions on the following proposals:

- Proposal for a Regulation (EC) of the Council, of 7 October 2003, on administrative cooperation in the field of value added tax and the 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation', OJ C 80, 3.4.2002, p. 76.
- The proposal for a European Parliament and Council regulation on administrative cooperation in the field of excise duties and the Proposal for a European Parliament and Council Directive amending Council Directive 77/799/EEC, concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, and Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products., OJ C 112, 30.4.2004, p. 64.
- Proposal for a Decision of the European Parliament and of the Council establishing a Community programme to improve the operation of taxation systems in the internal market (Fiscalis 2013) OJ C 93, 27.4.2007, p. 1.

<sup>(16)</sup> Adopts a suggestion from the Council's ad hoc Group on fiscal fraud See COM(2006) 254, point 3.1)..



5.1.3 The EESC welcomes the proposal to use standardised forms and computerised formats, which will greatly facilitate procedures.

5.1.4 Also worth highlighting is the simplification of the language arrangements – a major obstacle to cooperation and a factor making procedures more expensive – and the use of the new technologies in this field, as forms can be translated automatically.

## 5.2 Limits on administrative cooperation, banking secrecy, the involvement of intermediaries and share ownership

5.2.1 There are limits to the administrative cooperation set out in the proposal. The requested Member State should provide the requested information provided that this does not 'impose a disproportionate administrative burden' and that the requesting State 'has exhausted the usual sources of information which it could have used'. The requested State may, however, refuse to provide information on certain grounds: a) if conducting enquiries or copying the requested information breaches its own legislation; b) if, for legal reasons, the requesting State is unable to provide information similar to the information it is requesting; c) where this might lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy <sup>(17)</sup>. The EESC considers these limits to be adequate.

5.2.2 The requested Member State may not, however, refuse 'solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person' <sup>(18)</sup>. Given the high frequency of tax fraud, the EESC welcomes this clarification, without which the stated aims of both proposals to ensure compliance with tax obligations could come to nothing <sup>(19)</sup>.

5.2.3 It should be noted that the obligations to provide information and the limits on these obligations are covered in similar terms in the OECD's Model Convention <sup>(20)</sup>.

## 5.3 The presence of officials from another Member State

5.3.1 The proposal for a directive on administrative cooperation and the proposal for a directive on assistance for the recovery of claims both provide for the possibility that officials from the requesting Member State be present during the administrative enquiries carried out in the requested State. The EESC considers this form of cooperation to be adequate, as it is subject to two important conditions: an agreement must be in place between the

requesting and requested authorities and the officials must act 'in accordance with the laws, regulations or administrative provisions of the requested Member State' <sup>(21)</sup>.

5.3.2 The presence of officials from another Member State is already provided for in the fields of excise duties <sup>(22)</sup> and VAT <sup>(23)</sup> although in the case under consideration, the powers involved are greater, because officials may exercise powers of inspection.

## 5.4 Legality of the instrument for enforcing a tax claim

5.4.1 One issue of particular interest is the legality of the investigation procedures that the tax authorities are entitled to carry out. The EESC considers that this issue is satisfactorily addressed in the proposal for a directive on assistance for the recovery of claims. First of all, it should be borne in mind that the schemes provided for, not only in the two proposals for directives under consideration in this opinion but also those applying to VAT and excise duties, only establish procedures for cooperation between States, which retain full sovereignty for determining the legality of the investigation procedures that they carry out on their territory.

5.4.2 As a general principle, officials must act in accordance with the law <sup>(24)</sup> and administrative measures are presumed to be valid and are consequently binding, with the exception of the right of the party concerned to contest them in a court of law. With regard to disputes concerning the recovery of claims, it is the Member State seeking to recover the claim (in other words, the requesting State) that is competent to determine the validity of the claim, the initial instrument permitting enforcement, the uniform instrument permitting enforcement and the validity of the notifications sent by that State <sup>(25)</sup>.

5.4.3 In the event of a dispute, however, it falls to the corresponding bodies in the requested State to determine whether the enforcement measures taken or the notifications sent by that State are legal <sup>(26)</sup>. In both cases, the guarantee that can be requested from the taxpayer is assured because, except where the law provides for the possibility referred to in the following point, the enforcement procedure is suspended in the part of the claim affected by the dispute. The obligation for States to provide information on contested claims is set out, although the parties concerned could, of course, also provide this information.

<sup>(17)</sup> COM(2009) 29 final, Art. 16.

<sup>(18)</sup> COM(2009) 29 final, Art. 17(2).

<sup>(19)</sup> Switzerland is estimated to account for about a third of the world's USD 11 000 bn in clandestine personal wealth. 'Swiss banks ban top executive travel. Concern that employees will be detained'. Financial Times 27-03-09.

<sup>(20)</sup> Model Convention with respect to taxes on income and capital, Articles 26 and 16; OECD, 17 July 2008.

<sup>(21)</sup> COM(2009) 28 final, Art. 6(2) and COM(2009) 29 final, Art. 10(2).

<sup>(22)</sup> Council Regulation (EC) No. 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties, Art. 11.

<sup>(23)</sup> Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value-added tax and repealing Regulation (EEC) No 218/92, Art. 11.

<sup>(24)</sup> According to the European Code of Good Administrative Behaviour, 'The official shall [...] take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.' (Article 4).

<sup>(25)</sup> COM(2009) 28 final, Art. 13(4).

<sup>(26)</sup> COM(2009) 28 final, art. 13(2).

5.4.4 In the case of claims contested in the courts, precautionary measures could be adopted, provided that the legislation of the requested State permits this. Furthermore, if allowed under the legislation of the requesting Member State, that State may ask the requested authority to recover a contested claim in the courts on the basis of a reasoned request <sup>(27)</sup>.

5.4.5 Where criminal law is concerned, it should be noted that this falls within the exclusive remit of the Member States <sup>(28)</sup>.

#### 5.5 *The sovereignty of Member States*

5.5.1 The EESC wishes to emphasise that the proposals fully respect the sovereignty of the Member States which ultimately, under the directives in question, implement their own legislation through their own institutions in the relevant fields. This is illustrated, amongst other things, by the cases referred to in points 5.3 and 5.4 of this opinion.

5.5.2 This also concerns the disclosure of information and documents received under the directive, which states that:

- It may be disclosed by the requesting or requested authority to other authorities within the same Member State, in so far as this is allowed under the legislation of that Member State. The information may be used for other purposes than those relating to taxation.
- The competent authority of a Member State may transmit that information to the competent authority of a third Member State, 'provided this transmission is in accordance with the rules and procedures laid down in this Directive'.
- Further, any documents and information obtained by the requesting authority may be invoked/used as evidence on the same basis as similar information obtained within its own territory <sup>(29)</sup>.

Brussels, 16 July 2009.

*The President  
of the European Economic and Social Committee  
Mario SEPI*

5.5.3 Unlike the provisions of the OECD's Agreement on Exchange of Information on Tax Matters <sup>(30)</sup> authorisation from the requested State is not required.

#### 5.6 *The need to unify legislation*

5.6.1 The two directives contain regulations with identical or similar content. One example is the proposal on the notification of documents <sup>(31)</sup> and other examples could be given. As stated above, the presence of officials from other Member States is addressed in two directives and two regulations, which also differ on the range of powers for investigators.

5.6.2 The EESC considers that in future, a better legislative technique would be to strive to unify tax laws as far as possible.

#### 5.7 *Implementation of the new scheme*

5.7.1 Implementing the complex new scheme now being proposed will require considerable effort by the Community and national institutions. Firstly, due to the deadlines: the time limit for transposing the two directives (which cover different areas of the legal system) is 31 December 2009, which would appear to be quite ambitious. The Committee on Administrative Cooperation for Taxation will have to work extremely hard to draw up the rules on the automatic exchange of information within two years.

5.7.2 Secondly, adapting the administrative machinery to the new requirements will mean ensuring the tax authorities have the necessary material and human resources. Particular attention is drawn to the need to provide training for officials, which will in many cases require additional budgetary allocations.

5.7.3 In any event, the EESC wishes to emphasise that the proposals' aims for the fight against fraud and tax evasion will only produce tangible results if there is a determined political will to provide the appropriate resources.

<sup>(27)</sup> If the court finds in favour of the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the Member State of the requested authority COM(2009) 28 final, Art. 13(4), final paragraph.

<sup>(28)</sup> '... shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.', Treaty on European Union, Art. 33.

<sup>(29)</sup> COM(2009) 29 final, Art. 15(1), 15(2) and 15(3).

<sup>(30)</sup> The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party. (Art. 8).

<sup>(31)</sup> COM(2009) 28 final, Articles. 7 and 8; COM(2009) 29 final, Art. 12.