

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 113 and 115 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee⁽²⁾,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) The Member States' need for mutual assistance in the field of 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 difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion, while the powers of controls remain at national level. It thus jeopardises the functioning of the internal market.
- (2) Therefore, a single Member State cannot manage its internal taxation system, especially as regards direct taxation, without receiving information from other Member States. In order to overcome the negative effects of this phenomenon, it is indispensable to develop new administrative cooperation between the Member States' tax administrations. There is a need for instruments likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States.
- (3) Therefore, a completely new approach should be taken by creating a new text to give Member States the power to efficiently cooperate at international level to overcome the negative effects of an ever-increasing globalisation on the internal market.
- (4) In such a context, the existing Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums⁽³⁾ no longer provides for appropriate measures. Its deep weaknesses have been looked into by the Ad hoc Council

Working Party on Tax Fraud in its report of 22 May 2000 and more recently by the Commission Communication on Preventing and Combating Corporate and Financial Malpractice of 27 September 2004 and the Commission Communication concerning the need to develop a coordinated strategy to improve the fight against fiscal fraud of 31 May 2006.

- (5) Directive 77/799/EEC, even with its later amendments, was designed in a different context to current internal market requirements and is no longer able to meet the new requirements of administrative cooperation.
- (6) Due to the number and the importance of adaptations to be made to Directive 77/799/EEC, a mere amendment thereof would not be sufficient to fulfil the objectives described above. Directive 77/799/EEC should therefore be repealed and replaced by a new legal instrument. That instrument should apply to direct taxes and indirect taxes that are not yet covered by other Union legislation. To this end, this new Directive is considered to be the proper instrument in terms of effective administrative cooperation.
- (7) This Directive builds on the achievements of Directive 77/799/EEC but provides for clearer and more precise rules governing administrative cooperation between Member States where necessary, in order to establish, especially as regards the exchange of information, a wider scope of administrative cooperation between Member States. Clearer rules should also make it possible in particular to cover all legal and natural persons in the Union, taking into account the ever-increasing range of legal arrangements, including not only traditional arrangements such as trusts, foundations and investment funds, but any new instrument which may be set up by taxpayers in the Member States.
- (8) There should be more direct contact between Member States' local or national offices in charge of administrative cooperation, with communication between central liaison offices being the rule. The lack of direct contacts leads to inefficiency, under-use of the arrangements for administrative cooperation and delays in communication. Provision should therefore be made to bring about more direct contacts between services with a view to making cooperation more efficient and faster. The assignment of competences to the liaison departments should be deferred to the national provisions of each Member State.
- (9) Member States should exchange information concerning particular cases where requested by another Member State and should make the necessary enquiries to obtain such information. The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While Article 20 of this Directive contains procedural requirements, those provisions need to be interpreted liberally in order not to frustrate the effective exchange of information.
- (10) It is recognised that the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross-border situations and of fighting fraud. To that end, a step-by-step

approach should therefore be followed starting with the automatic exchange of available information on five categories and reviewing the relevant provisions after a report by the Commission.

- (11) The spontaneous exchange of information between Member States should also be strengthened and encouraged.
- (12) Time limits for the provision of information under this Directive should be laid down in order to ensure that the information exchange is timely and thus effective.
- (13) It is important that officials of the tax administration of one Member State are allowed to be present in the territory of another Member State.
- (14) Since the tax situation of one or more persons liable to tax established in several Member States is often of common or complementary interest, it should be made possible for simultaneous controls to be carried out on such persons by two or more Member States, by mutual agreement and on a voluntary basis.
- (15) 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, including cases where the taxpayer has relocated to another Member State, it is desirable that, in such circumstances, the tax authorities should be able to call upon the cooperation of the competent authorities of the Member State to which the taxpayer has relocated.
- (16) Feedback on information sent will encourage administrative cooperation between Member States.
- (17) Collaboration between the Member States and the Commission is necessary for the permanent study of cooperation procedures and the sharing of experience and best practices in the fields considered.
- (18) It is important for the efficiency of administrative cooperation that information and documents obtained under this Directive could, subject to the restrictions laid down in this Directive, be used by the Member State that received them also for other purposes. It is also important that Member States could transmit that information to a third country, under certain conditions.
- (19) The situations in which a requested Member State may refuse to provide information should be clearly defined and limited, taking into account certain private interests which should be protected as well as the public interest.
- (20) However, a Member State should not refuse to transmit information because it has no domestic interest or because the information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person.
- (21) This Directive contains minimum rules and should therefore not affect Member States' right to enter into wider cooperation with other Member States under their national legislation or in the framework of bilateral or multilateral agreements concluded with other Member States.

- (22) It should also be made clear that where a Member State provides a wider cooperation to a third country than is provided for under this Directive, it should not refuse to provide such wider cooperation to other Member States wishing to enter into such mutual wider cooperation.
- (23) The exchange of information should be made through standardised forms, formats and channels of communication.
- (24) An evaluation of the effectiveness of administrative cooperation should be made, especially on the basis of statistics.
- (25) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽⁴⁾.
- (26) In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (27) All exchange of information referred to in this Directive is subject to the provisions implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽⁵⁾ and to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁽⁶⁾. However, it is appropriate to consider limitations of certain rights and obligations laid down by Directive 95/46/EC in order to safeguard the interests referred to in Article 13(1)(e) of that Directive. Such limitations are necessary and proportionate in view of the potential loss of revenue for Member States and the crucial importance of information covered by this Directive for the effectiveness of the fight against fraud.
- (28) This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union.
- (29) Since the objective of this Directive, namely the efficient administrative cooperation between Member States to overcome the negative effects of the increasing globalisation on the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity and effectiveness required, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

- (1) Opinion of 10 February 2010 (not yet published in the Official Journal).
- (2) Opinion of 16 July 2009 (not yet published in the Official Journal).
- (3) OJ L 336, 27.12.1977, p. 15.
- (4) OJ L 184, 17.7.1999, p. 23.
- (5) OJ L 281, 23.11.1995, p. 31.
- (6) OJ L 8, 12.1.2001, p. 1.