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Draft protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS No. 127)

Request for an opinion
Committee of Ministers

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Letter from the Secretary to the Committee of Ministers to the Secretary General of the Parliamentary Assembly of 15 December 2009

Please find enclosed documents CM(2009)165[1] and CM(2009)185 final[2]. The Deputies agreed to transmit these to the Parliamentary Assembly at their 1073rd meeting (9 and 14 December 2009) on the understanding that the draft is still under consideration and could be changed by the Committee of Ministers. They invite the Assembly to give its opinion on the draft Protocol during the forthcoming part-session in January 2010.

[Signed]

Mireille Paulus, Secretary to the Committee of Ministers

1. Draft protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS No. 127).
2. Council of Europe ad hoc Committee for the Revision of the Convention on Mutual Assistance in Tax Matters (CAHTAX): Cover note to the draft protocol amending the convention and appended opinion of the Council of Europe Legal Advice Department concerning Article VIII.

Appendix 1 – Document CM(2009)185 final of the Committee of Ministers of 14 December 2009

Council of Europe ad hoc Committee for the Revision of the Convention on Mutual Assistance in Tax Matters (CAHTAX) – Draft Protocol amending the Convention on Mutual Assistance in Tax Matters (CETS No. 127)

Cover note

At the meeting in Paris on 22-23 October 2009, and through subsequent written procedure, the CB/CAHTAX finalised their work on the draft protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS 127), as contained in CM(2009)165. A number of key issues were resolved, including the following:

– the Convention should be aligned to the internationally agreed standard on transparency and exchange of information as articulated in Article 26 of the OECD Model Tax Convention and in the 2002 Tax Information Exchange Agreements (TIEAs) Model;

– the Convention should be open for signature by countries which are not members of the Council of Europe (CoE) or the OECD;

– the relationship between Convention 127 and EU legislation (see also last paragraph on page 3).

Some issues were not agreed by consensus, namely:

– the date of effect of the amended Convention. As no specific provision regarding the date of effect of the Convention is contained in the original Convention No. 127, it applies as soon as it enters into force in respect of the ratifying State. The amended Convention distinguishes between administrative assistance where an effect for tax periods preceding the entry info force can be agreed upon between two parties (article 28 para. 6) and criminal fiscal issues where the provisions apply only after the entry into force of the amended Convention in respect of the ratifying State (article 28 para. 7). No agreement was found on the possibility of applying this provision to previous taxable periods. The great majority of delegates supported a compromise to add a reservation enabling States to accept the effect of article 28 para. 7 with regard to tax periods three years before its entry into force. It was adopted by written procedure and appears in article VIII of the draft protocol (CM(2009)165) despite the fact that opposition to any form of retroactivity in criminal matters was continuously expressed by some of the states represented, including through written procedure;

– another question remains open and is clearly recognised as unresolved by the CB/CAHTAX, i.e. the question concerning the reference to data protection laws in the text of the Convention. Subsequent to the Paris meeting, consultations continued and the Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) prepared an opinion in that respect. On 20 November, a meeting took place between the T-PD Bureau, the OECD Secretariat and the CoE Secretariat. Following this meeting, a compromise provision was drafted, which according to the T-PD Bureau satisfies the requirements of Convention 108 and its Protocol. The text below has been forwarded to CB/CAHTAX delegates for acceptance by 15 December. This compromise text was noted by the Committee of Ministers at its 1073rd meeting (9 December 2009) with a view to its transmission to the Parliamentary Assembly.

“Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party, **and in accordance with the safeguards required to ensure the necessary level of protection of personal data under the domestic law of the supplying Party**.”

The Parliamentary Assembly is invited to give its opinion on the draft protocol as contained in CM(2009)165, taking into account the new provision on data protection and alternative proposals submitted on the issue of retroactivity. The Committee of Ministers urges the Parliamentary Assembly to give a careful consideration to the legal issues at stake in the draft Protocol and of major importance for the respect of Council of Europe values by transmitting the issue to its Committee on Legal Affairs and Human Rights in addition to the Committee on Economic Affairs and Development already seized.

* * *

It is brought to the Assembly's attention that a number of Council of Europe member states are of the opinion that:

the explanatory report, referring to article 28 paragraphs 6 and 7, should be completed in order to reflect the opinion expressed by the legal adviser of the Council of Europe and better explain the application of those provisions. Other legal opinions on this issue may later be transmitted to the Parliamentary Assembly.

* * *

It is brought to the Assembly's attention that four Council of Europe member states are of the opinion that:

a) **the provision on retroactivity** contained in Article VIII, paragraph 2 of the draft amending Protocol should be deleted and the following additional provision on reservations should be added to Article 30, paragraph 1 of the Convention:

> *"f. not to apply paragraph 7 of Article 28.";*

b) on **automatic exchange of information**, Article VIII, paragraph 2 of the draft amending Protocol should add another sub-paragraph to Article 30, paragraph 1 of the Convention providing as follows:

> *"g. not to provide automatic exchange of information."*

* * *

The so-called "**disconnection clause**" contained in Article VII of the draft amending Protocol should be replaced in order to comply with the recommendation of the Ministers' Deputies of 10 December 2008 (CM/Del/Dec(2008)1044/10.6c), based on an opinion of the Committee of Legal Advisers on Public International Law (CAHDI) (CM(2008)164), in order to ensure compatibility between the application of EU legislation and the international obligations of EU member states towards other States Parties to the Convention, in conformity with the most recent Council of Europe treaty practice.

This is the wording recommended by the Ministers' Deputies:

> *"Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties."*

Following the recommendation, this wording has been used in most recent conventions developed by the Council of Europe, such as the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) or the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

* * *

It is finally brought to the Assembly's attention that the issue of European Union competence in the areas covered by the draft protocol, as well as the issue of compatibility with European Union legislation, are still under examination by the European Union.

Appendix to document CM(2009)185 final

DIRECTORATE OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW LEGAL ADVICE DEPARTMENT AND TREATY OFFICE

MEMORANDUM

To: Mireille Paulus, Secretary to the Committee of Ministers

Date: 11 December 2009

Subject Article VIII of the Draft Protocol amending the Convention on Mutual Assistance in Tax Matters

Following the 1073rd meeting of the Ministers' Deputies, you will find below the opinion of the Legal Adviser on paragraphs 6 and 7 of Article 28 (Article VIII) of the Draft Protocol amending the Convention on Mutual Assistance in Tax Matters (ETS No. 127).

1. Paragraphs 6 and 7 of Article 28 (Article VIII) of the Draft Protocol amending the Convention specify the dates on which the provisions of the Convention, as amended by the Protocol, come into effect.

2. Paragraph 6 states a general principle of non-retroactivity and provides that, exceptionally, the provisions of the amended Convention will be applicable to periods prior to entry into force, subject to the conclusion of a specific agreement to this end between the States Parties. It effectively provides in very clear terms that:

> *"The provisions of this Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party, or where there is no taxable period, for administrative assistance related to charges to tax arising on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party. Any two or more Parties may mutually agree that the Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to earlier taxable periods or charges to tax.".*

3. Paragraph 7 provides, in respect of criminal tax issues, that:

> *"Notwithstanding paragraph 6, for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the provisions of this Convention, as amended by the 2010 Protocol, shall have effect from the date of entry into force in respect of a Party.".*

4. This provision also states a principle of non-retroactivity, since it is provided therein that the provisions of the amended Convention will take effect "from the date of entry into force". In her letter to the Chairman of the Committee of Ministers dated 5 December 2009, however, the Chair of CB/CAHTAX noted that the effect of this provision would be that the amended Convention will be applicable to taxable periods prior to the date of entry into force (document DD (2009) 623, p.3). A literal reading in good faith of paragraph 7 does not enable the Legal Adviser to reach the same conclusion. It is therefore essential, for obvious reasons of clarity and legal certainty, that this question be resolved through clarification of the exact scope of paragraph 7 in the text of the draft itself or, at least, in the explanatory report.

Manuel Lezertua, Director

Appendix 2 – Draft protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS No. 127)

Preamble

The member states of the Council of Europe and the member countries of the Organization for Economic Co-operation and Development (OECD), signatories of this Protocol,

Considering that the Convention on Mutual Administrative Assistance in Tax Matters, done at Strasbourg on 25 January 1988 (hereinafter "the Convention"), was concluded before agreement was reached on the internationally agreed standard to exchange information in tax matters;

Considering that a new cooperative environment has emerged since the Convention was concluded;

Considering that it is desirable that a multilateral instrument is made available to allow the widest number of states to obtain the benefit of the new co-operative environment and at the same time to implement the highest international standards of co-operation in the tax field;

Have agreed as follows:

Article I

1. The seventh recital of the Preamble to the Convention shall be deleted and replaced by the following:

> *"Convinced therefore that states should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data;"*

2. The following shall be added after the seventh recital of the Preamble to the Convention:

> *"Considering that a new co-operative environment has emerged and that it is desirable that a multilateral instrument is made available to allow the widest number of states to obtain the benefits of the new co-operative environment and at the same time implement the highest international standards of co-operation in the tax field;"*

Article II

Article 4 of the Convention shall be deleted and replaced by the following:

> *"Article 4 - General provision*
>
> *1. The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention.*
>
> *2. Deleted.*
>
> *3. Any Party may, by a declaration addressed to one of the Depositaries, indicate that, according to its internal legislation, its authorities may inform its resident or national before transmitting information concerning him, in conformity with Articles 5 and 7."*

Article III

1. The term "and" in paragraph 1.b of Article 18 of the Convention shall be replaced by the term ", or".

2. The reference to "Article 19" in paragraph 1.f of Article 18 of the Convention shall be replaced by a reference to "Article 21.2.g".

Article IV

Article 19 of the Convention shall be deleted.

Article V

Article 21 of the Convention shall be deleted and replaced by the following:

> *"Article 21 - Protection of persons and limits to the obligation to provide assistance*

1. Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested state.

2. Except in the case of Article 14, the provisions of this Convention shall not be construed so as to impose on the requested state the obligation:

(a) to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant state;

(b) to carry out measures which would be contrary to public policy (ordre public);

(c) to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant state or its administrative practice;

(d) to supply information which would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information, the disclosure of which would be contrary to public policy (ordre public);

(e) to provide administrative assistance if and insofar as it considers the taxation in the applicant state to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention which the requested state has concluded with the applicant state;

(f) to provide administrative assistance for the purpose of administering or enforcing a provision of the tax law of the applicant state, or any requirement connected therewith, which discriminates against a national of the requested state as compared with a national of the applicant state in the same circumstances;

(g) to provide administrative assistance if the applicant state has not pursued all reasonable measures available under its laws or administrative practice, except where recourse to such measures would give rise to disproportionate difficulty;

(h) to provide assistance in recovery in those cases where the administrative burden for that state is clearly disproportionate to the benefit to be derived by the applicant state.

3. If information is requested by the applicant state in accordance with this Convention, the requested state shall use its information gathering measures to obtain the requested information, even though the requested state may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations contained in this Convention, but in no case shall such limitations, including in particular those of paragraphs 1 and 2, be construed to permit a requested state to decline to supply information solely because it has no domestic interest in such information.

4. In no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested state to decline to supply information solely because the 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."

Article VI

Paragraphs 1 and 2 of Article 22 shall be deleted and replaced with the following:

"1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic laws of that Party and in accordance with the applicable international instruments and standards for the protection of privacy and flows of personal data.

2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

Article VII

Paragraph 2 of Article 27 of the Convention shall be deleted and replaced by the following:

> *"2. Notwithstanding paragraph 1, those Parties which are member states of the European Union can apply, in their mutual relations, the possibilities of assistance provided for by the Convention in so far as they allow a wider co-operation than the possibilities offered by the applicable Community or European Union."*

Article VIII

1. The following paragraphs shall be added at the end of Article 28 of the Convention:

> *"4. Any member state of the Council of Europe or any member country of OECD which becomes a Party to the Convention after the entry into force of the Protocol amending this Convention, adopted on XXth of the XXX (the '2010 Protocol') shall be a Party to the Convention as amended by that Protocol, unless they express a different intention in a written communication to one of the Depositaries.*
>
> *5. After the entry into force of the 2010 Protocol, any state which is not a member of the Council of Europe or of the OECD may request to be invited to sign and ratify this Convention as amended by the 2010 Protocol. Any request to this effect shall be addressed to one of the Depositaries, who shall transmit it to the Parties. The Depositary shall also inform the Committee of Ministers of the Council of Europe and the OECD Council. The decision to invite states which so request to become Party to this Convention shall be taken by consensus by the Parties to the Convention through the co-ordinating body. In respect of any state ratifying the Convention as amended by the 2010 Protocol in accordance with this paragraph, this Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of ratification with one of the Depositaries.*
>
> *6. The provisions of this Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party, or where there is no taxable period, for administrative assistance related to charges to tax arising on or after 1 January of the year following the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party. Any two or more Parties may mutually agree that the Convention, as amended by the 2010 Protocol, shall have effect for administrative assistance related to earlier taxable periods or charges to tax.*
>
> *7. Notwithstanding paragraph 6, for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the provisions of this Convention, as amended by the 2010 Protocol, shall have effect from the date of entry into force in respect of a Party."*

2. The following subparagraph shall be added after subparagraph e. of paragraph 1 of Article 30 of the Convention:

> *"f. to apply paragraph 7 of Article 28 exclusively for administrative assistance related to taxable periods beginning on or after 1 January of the third year preceding the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party, or where there is no taxable period, for administrative assistance related to charges to tax arising on or after 1 January of the third year preceding the one in which the Convention, as amended by the 2010 Protocol, entered into force in respect of a Party."*

3. The words "and any Party to this Convention" shall be added after the words "member countries of the OECD" in paragraph 1 of Article 32 of the Convention.

Article IX

1. This Protocol shall be open for signature by the Signatories to the Convention. It is subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously or simultaneously ratified, accepted or approved the Convention. Instruments of ratification, acceptance or approval shall be deposited with one of the Depositaries.

2. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of paragraph 1.

3. In respect of any Party to the Convention which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article X

1. The Depositary with whom an act, notification or communication has been accomplished, shall notify the member states of the Council of Europe, the member countries of OECD and any Party to the Convention as amended by this Protocol of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Protocol in accordance with the provisions of Article IX;

d. any other act, notification or communication relating to this Protocol.

2. The Depositary receiving a communication or making a notification in pursuance of the provisions of paragraph 1 shall inform the other Depositary thereof.

3. The Depositaries shall transmit to the member states of the Council of Europe and the member countries of the OECD a certified copy of this Protocol.

4. When this Protocol enters into force in accordance with Article IX, one of the Depositaries shall establish the text of the Convention as amended by this Protocol and shall send a certified copy to all the Parties to the Convention as amended by this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed the Protocol.

DONE at _____, the xx of_____2010, in English and French, both texts being equally authentic, in two copies one of which shall be deposited in the archives of the Council of Europe and the other in the archives of the OECD.