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2017/0272 (NLE)

Proposal for a

## **COUNCIL DECISION**

**on the conclusion, on behalf of the European Union, of the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of Value Added Tax**

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

Council Regulation (EU) No. 904/2010<sup>1</sup> and Council Directive 2010/24/EU<sup>2</sup> provide for the legal framework for Member States to cooperate in order to prevent and fight against fraud, and recover claims in the field of VAT.

However, experience in the Member States has shown that fraudsters often exploit weaknesses in the control of transactions involving companies located in third countries.

Therefore, cooperation with third countries is essential to fight VAT fraud. In particular, Norway is a Member of the European Economic Area with a VAT system similar to that applied in the EU, which enjoys a good tradition of cooperation in the field of VAT with the EU Member States.

In 2009, Norway played a key role when informing Member States about VAT missing traders' fraud in the field of carbon credits. Between 2009 and 2012, the Norwegian tax authorities communicated to Member State authorities information on fraudulent transactions for a total amount of EUR 2.703 million. Norwegian officials also participated in multilateral controls with some Member States in the energy sector and were invited as observers in the VAT observatory (Eurofisc Working Field 4<sup>3</sup>). Norway also informed several Member States about the transactions of missing traders that exploited the Norwegian Alternative Payment Platforms.

This evidences the advantages for Member States to cooperate with Norway. However, with the current legal framework, administrative cooperation with Norway is occasional and only possible on the basis of bilateral agreements between Norway and individual Member States, the Nordic convention or rare invitations to Norway to participate in the VAT observatory meetings as an observer.

The bilateral Agreement between the EU and Norway will provide for a solid legal framework for a sound cooperation between Norway and all the Member States. This cooperation will follow the same structure of the cooperation currently in force between EU Member States and will benefit from the same instruments such as electronic platforms and e-forms.

#### **• Consistency with existing policy provisions in the policy area**

In the VAT Action plan COM (2016) 148 final of 7 April 2016, the Commission announced that better cooperation with non-EU countries in VAT should make it possible to extend the EU system of administrative cooperation to non-EU countries, particularly to ensure effective taxation of e-commerce.

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<sup>1</sup> Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT (OJ L 268, 12.10.2010, p. 1)

<sup>2</sup> Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84, 31.3.2010, p. 1)

<sup>3</sup> Eurofisc is a network for the multilateral and swift exchange of targeted information between EU Member States. It is split in subject areas which are called working fields. It is regulated in Chapter X of Council Regulation (EU) No 904/2010

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

The present proposal to the Council is submitted pursuant to Article 113 of the Treaty on the functioning of the European Union (TFEU), in conjunction with Article 218(6)(b) and (8) second subparagraph.

Article 3(2) TFEU provides that, in addition to the areas of exclusive Union competence listed in Article 3(1) TFEU, the Union shall "also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".

Under the Court of Justice "AETR" or "ERTA" case, an agreement falls within the EU's exclusive competence when either the subject matter of the agreement falls within the scope of internal common rules, or within an area already largely covered by such rules, or rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures.

The subject matter of the envisaged agreement, i.e. administrative cooperation, combating fraud and recovery of claims in the field of VAT, falls within the scope of internal common rules, in particular of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT and Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. Therefore, the Union has exclusive competence to conclude an agreement with Norway on administrative cooperation, combating fraud and recovery of claims in the field of VAT.

Thus, by its Decision of 9 December 2014, Article 1, the Council authorised the Commission to open negotiations with Norway on behalf of the Union.

The content of the Agreement reflects the negotiating directives of the Council set out in the addendum to the Council Decision of 9 December 2014 authorising the Commission to open negotiations on behalf of the Union for an Agreement between the European Union and Norway on administrative cooperation, combating fraud and recovery of claims in the field of VAT.

The cooperation instruments included in the Agreement are the same as those under the EU framework, with the exception of access to databases. The latter has been excluded from the text of the Agreement because it was considered as not proportional to the objectives. In fact, the VAT Information Exchange System (VIES)<sup>4</sup> allows Member States to access information regarding intra-EU transactions, which are not relevant in the context of cooperation with Norway.

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<sup>4</sup> The VIES is the VAT Information Exchange System. The information available through the VIES and the use of the system are regulated in Chapter V of Council Regulation (EU) No 904/2010.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

#### **• Stakeholder consultations**

The Agreement covers administrative cooperation in the field of VAT between the tax administrations of the EU Member States and Norway. The text was negotiated with the Norwegian authorities along the period 2015 and 2016.

During the whole process, the Council Working Party on Tax Questions (CWPT) was informed of the state of the negotiations and consulted on the results thereof.

### **4. OTHER ELEMENTS**

#### **Detailed explanation of specific provisions of the proposal**

##### **Title I – General Provisions**

The objective is to establish the framework for administrative cooperation for the fight against VAT fraud and assistance for recovery of VAT claims (Articles 1).

The definitions (Article 3) are in line with the relevant EU legislation. Therefore, the Agreement encompasses the definition of "requesting authority" for administrative cooperation and combating fraud under Title II (in line with the definition of Council Regulation EU No. 904/2010) while "applicant authority" will apply to the assistance for recovery under Title III (in line with the definition of Council Directive 2010/24/EU). The same definitions are also reflected in the e-forms currently used by the Member States under the EU framework for administrative assistance. Therefore, using the same definitions will allow to use the same e-forms for cooperation with Norway without substantial amendments in their layout.

Also the organisation (Article 4) repeats the structure set up by Council Regulation EU No. 904/2010 and Council Directive 2010/24/EU. On this point, it can be noted that this Agreement does not provide for the possibility to designate "liaison offices" responsible for specific types of taxes, as foreseen under Article 4(3) of Directive 2010/24/EU, since this Agreement only applies to VAT.

The Parties shall ensure that the communication systems necessary for the exchange of information are operational. Therefore a service level agreement should be concluded (Article 5) in order to set the technical quality and quantity for the functioning of the communication and information exchange system. The service level agreement will not refer to the VIES, which is not included in the Agreement amongst the cooperation instruments with Norway.

The Parties must ensure confidentiality and protection of personal data as laid down in the relevant EU legislation (Directive 95/46/EC). Article 6 foresees the conditions for: the disclosure of data only to national authorities concerned with the application of the VAT legislation and for the use of those data; the use for other purposes only if allowed by the law of the states and after authorisation of the state providing the information; the use of the data exchanged; the transmission of the information to a third state and to a third country; the transmission of the information received from a third country.

##### **Title II – Administrative cooperation and combating fraud**

Title II provides for the same cooperation instruments (exchange of information and administrative enquiries, spontaneous exchange of information, feedback, automatic exchange of information, administrative notification, presence in administrative offices

and participation in administrative enquiries, simultaneous controls and Eurofisc) as laid down in Council Regulation (EU) No. 904/2010 with the exception of the access to databases through the VIES system. Also the time limits to provide for the information are the same as in the European legal framework.

As regards exchange of information on request, Article 7 paragraph 4 refers to the cases where the supply is taxable in the State of the requesting authority but the taxable person is established in the State of the requested authority. In those cases, the only way the requesting authority has to assess VAT is to ask for assistance to the requested authority. Therefore, the article foresees a minimal set of data that the requested authority must send to the requesting authority. The categories covered by this provision and listed in Annex 1 to the Agreement are imports of negligible value, services connected with immovable property, telecommunication services, radio and television broadcasting services and electronically supplied services.

As regards the automatic exchange of information (Article 11), the Parties in the Joint Committee (Article 41) will establish the categories of information to be exchanged.

The participation of Norway in Eurofisc (Article 15) will not allow the Eurofisc liaison officials designated by the competent authority of a state the access to the databases of the other state. Furthermore, the Eurofisc Liaison Official of Norway shall not have the role of chair or coordinator in the working fields nor have any right of vote.

Under Article 17, a tax administration can refuse to carry out administrative enquiries when the request involves a disproportionate administrative burden for the requested authority and when the requesting authority has not exhausted the domestic sources of information. Furthermore, bank secrecy shall not be used as a ground for refusing administrative assistance.

The Joint Committee will adopt the forms for the exchange of information. The e-forms currently used by the Member States under Council Regulation (EU) No.904/2010 and Council Directive 2010/24/EU may be also used for the purposes of this Agreement, subject to some minor linguistic amendment. In fact, the current version of the e-forms only refers to "Member States" and "intra-Community" transactions.

### **Title III - Recovery**

Title III provides for instruments for recovery assistance similar to those under Directive 2010/24/EU: exchange of information (including presence in administrative offices and participation in administrative enquiries in the requested state), assistance for the notification of documents, and recovery and precautionary measures.

The conditions and modalities governing these types of recovery assistance are also in line with the conditions and modalities set by Directive 2010/24/EU.

The scope of this Agreement is however limited to VAT claims and to administrative penalties, fines, fees and surcharges, interest and costs relating to such claims (in accordance with Article 2(1)(b) of the Agreement). Contrary to Directive 2010/24/EU, its scope does not cover other taxes and duties. Such limitation of the scope is in line with the negotiating mandate given by the Council.

Nevertheless, in view of facilitating recovery assistance for other taxes and reducing the administrative burden, Article 40(4) provides that the electronic communication network and the standard forms adopted for the implementation of this Agreement (corresponding to the standard forms currently used for recovery assistance between the EU Member States) may also be used for recovery assistance regarding other claims, if such recovery

assistance is possible under another bilateral or multilateral legally binding instruments on administrative cooperation between the states. This possibility – no obligation – to use the communication network and the standard forms for other taxes may be useful in practice, as the non-payment of taxes is usually not limited to VAT debts. Therefore, the Agreement allows to use one request form for recovery assistance relating to VAT claims (on the basis of this Agreement) and relating to other taxes (on the basis of other agreements). It will be for each Member State, in consultation with Norway, to decide if and how they want to make use of the faculty offered by Article 40(4).

Article 23 of this Agreement covers exchange of information without prior request. On the basis of this provision, a states may inform the state of establishment or residence of a pending refund of "taxes or duties" to a person established or resident in another state. This provision is similar to Article 6 of Directive 2010/24/EU, which relates to exchange of information without prior request about upcoming refunds of "taxes or duties, other than VAT".

The uniform instruments (uniform notification form and uniform instrument permitting enforcement in the requested State) introduced by Directive 2010/24/EU (Articles 8 and 12) have been introduced in this Agreement (Articles 25 and 29). These standard forms, already in use between all EU Member States, will also be applied for notification and recovery purposes in the relations with Norway. The automatic translation of these forms will be extended to the Norwegian language.

In order to allow for a quick and smooth implementation of the recovery assistance with Norway, Article 40(5) of the Agreement provides that, as long and in so far as no detailed rules are adopted by the Joint Committee for the implementation of Title III, the competent authorities shall make use of the rules, including the standard forms already adopted for the implementation of Council Directive 2010/24/EU.

#### **Title IV – Implementation and Application**

Article 41 sets up a joint Committee composed of representatives of the Parties. The Joint Committee shall ensure the proper functioning and implementation of the Agreement. It shall operate by unanimity and adopt its rules of procedure.

For the purpose of this Agreement Norway will use the e-forms and the CCN/CSI<sup>5</sup> network that are Union Components of the European Information System referred to in point A of the Annex of the Regulation (EU) No 1286/2013 (Fiscalis 2020)<sup>6</sup>. Depending on the technical solution adopted to connect Norway to the CCN/CSI network the Joint Committee will decide the financial contribution that Norway shall pay to the General Budget of the European Union.

The Commission will represent the European Union in the Joint Committee and Member States may participate. However, the adoption of decisions by the Joint Committee requires the prior adoption of the European Union position in accordance with the rules set forth in Article 113 TFEU (by unanimity). The Commission will subsequently follow and defend such decisions in the Joint Committee.

#### **Title V - Final Provisions**

<sup>5</sup>

The Common Communication Network and Common System Interface (CCN/CSI)

<sup>6</sup>

Regulation (EU) No 1286/2013 of the European Parliament and of the Council of 11 December 2013 establishing an action programme to improve the operation of taxation systems in the European Union for the period 2014-2020 (Fiscalis 2020) and repealing Decision No 1482/2007/EC (OJ L 347, 20.12.2013, p. 25)

This Agreement will be part of the EU acquis and will prevail over other bilateral or multilateral legally binding instruments on administrative cooperation in the same field. This means that the provisions of this Agreement will apply in cases of incompatibilities.

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## COUNCIL DECISION

**on the conclusion, on behalf of the European Union, of the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of Value Added Tax**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 in conjunction with Article 218(6)(b) and the second paragraph of Article 218 (8) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament<sup>7</sup>,

Whereas:

- (1) In accordance with Decision XXX/XXX/EC, the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of Value Added Tax was signed on XX/XX/XXXX.
- (2) The text of the Agreement, which is the result of the negotiations, duly reflects the negotiating directives issued by the Council.
- (3) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>8</sup>.
- (4) The Agreement should be approved on behalf of the Union,

HAS ADOPTED THIS DECISION:

### *Article 1*

The Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of Value Added Tax is hereby approved on behalf of the Union.

The text of the Agreement is attached to this Decision.

### *Article 2*

The President of the Council shall, on behalf of the Union, give the notification provided for in Article 44(2) of the Agreement.

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<sup>7</sup> OJ C, , p..

<sup>8</sup> 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 (OJ L 8, 12.1.2001, p.1).



*Article 3*

The Commission, assisted by representatives of the Member States, shall represent the Union in the Joint Committee set up under Article 41 of the Agreement.

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

Done at Brussels,

*For the Council  
The President*