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23 April 2002

## REPORT

on the change of legal basis of the proposal for a European Parliament and Council regulation amending Regulation 218/92/EEC on administrative co-operation in the field of indirect taxation (VAT)  
(C5-0103/2002 - 2000/0147(COD))

Committee on Economic and Monetary Affairs

Rapporteur: José Manuel García-Margallo y Marfil



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## PROCEDURAL PAGE

On 14 December 2000, Parliament delivered its favourable opinion at first reading on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) (A5-0362/2000).

By letter of 18 February 2002 the Council consulted Parliament on the change of legal basis of the proposal for Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) (2000/0147(COD)).

By letter of 21 March 2002, the chairwoman of the Committee on Economic and Monetary Affairs requested the opinion of the Committee on Legal Affairs and the Internal Market on the legal basis.

At the sitting of 8 April 2002 the President of Parliament announced that he had referred this consultation on the changement of the legal basis to the Committee on Economic and Monetary Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for their opinion.

The Committee on Economic and Monetary Affairs had appointed Mr José Manuel García-Margallo Y Marfil rapporteur at its meeting of 19 June 2000.

It considered the question of the change of legal basis and the draft report at its meetings of 19 March and 23 April 2002.

At the last meeting it adopted the motion for a resolution unanimously.

The following were present for the vote: Christa Randzio-Plath, chairman; José Manuel García-Margallo y Marfil, vice-chairman and rapporteur; Philippe A.R. Herzog, John Purvis, vice-chairmen; Generoso Andria, Lutz Goepel (for Astrid Lulling), Lisbeth Grönfeldt Bergman, Christopher Huhne, Othmar Karas, Giorgos Katiforis, Piia-Noora Kauppi, Christoph Werner Konrad, Wilfried Kuckelkorn (Robert Goebbels), Ioannis Marinou, David W. Martin, Hans-Peter Mayer, Miquel Mayol i Raynal, Mikko Pesälä (for Carles-Alfred Gasòliba i Böhm), Alexander Radwan, Bernhard Rapkay, Olle Schmidt, Bruno Trentin

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 23 April 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

## MOTION FOR A RESOLUTION

### **Resolution of the European Parliament on the change of legal basis of the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) (C5-0103/2002 - 2000/0147(COD))**

*The European Parliament,*

- having regard to the proposal from the Commission to the European Parliament and to the Council (COM(2000) 349 – C5-0298/2000 - 2000/0147 (COD))<sup>1</sup>,
  - having regard to the European Parliament's opinion at first reading<sup>2</sup>,
  - having been consulted by the Council on the change of legal basis (C5-0103/2002),
  - having regard to Rule 70 of its Rules of Procedure
  - having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the changement of the legal basis
  - having regard to the report of the Committee on Economic and Monetary Affairs (A5-0140/2002),
1. Confirms its opinion at first reading;
  2. Disputes the appropriateness of the new legal basis proposed by the Council,
  3. Insists that Article 95 of the EC Treaty is the appropriate legal basis;
  4. Calls on the Council therefore to forward its common position to Parliament;
  5. Instructs its President to forward this resolution to the Council and Commission.

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<sup>1</sup> OJ C 337, 28.11.2000, p. 63 (E).

<sup>2</sup> OJ C 232, 17.8.2001, pp 202-301.

## EXPLANATORY STATEMENT

### Reminder

In June 2000 Mr Garcia-Margallo Y Marfil was appointed rapporteur on the proposal for a Regulation amending Regulation (EEC) No 218/92. The reference was then COD 2000/0147 and the legal basis for the Directive was Article 95 of the EC Treaty, which provides for the co-decision procedure.

At that stage, Parliament gave a favourable opinion at first reading on the proposal on 14 December 2000 and suggested just one amendment. The Commission did not submit an amended proposal.

By letter of 18 February 2002 the Council of the European Union informed the President of the European Parliament that it had decided to change the legal basis for the proposal for a Directive to Articles 93 and 94 of the EC Treaty (which only provide for a single consultation of the European Parliament). At its meeting of 11 January 2001 the Committee of Permanent Representatives had asked for Parliament to be consulted on the change of legal basis. The letter of 17 January 2001 therefore asked Parliament to state its position, preferably within a short period of time (by 1 March) so that the Directive could enter into force in the Member States in 2002.

### Parliament's position

Pursuant to Rule 63 of the Rules of Procedure, the Committee on Economic and Monetary Affairs asked for the opinion of the Committee on Legal Affairs and the Internal Market. In its conclusions, the Legal Affairs Committee points out that the proposed act does not contain measures harmonising tax provisions and that its content is to extend the system of information set up by Regulation 218/92 to services supplied electronically. Consequently at its meeting of 16 April the Committee decided unanimously that Article 95 of the EC Treaty is the appropriate legal basis.

At its meeting of 20 March the Committee on Economic and Monetary Affairs examined the matter and supported the recommendation of the rapporteur, that the appropriate legal base should indeed be Article 95 of the Treaty, as proposed by the Commission, as the objective and substance of the proposal undoubtedly concern administrative co-operation and not fiscal provisions. There is no indication that the changes made by the Council to the original Commission proposal justify a different legal basis. Consequently and in line with the view of the Committee on Legal Affairs and the Internal Market the change of legal basis should be rejected.

The Committee on Economic and Monetary Affairs therefore calls for Parliament to maintain its first-reading position and, considering that Article 95 of the EC Treaty constitutes the directive's legal basis, calls on the Council to forward its common position.

## OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

## AND THE INTERNAL MARKET

To the Committee on Economic and Monetary Affairs

Subject: Legal basis of the proposal for a Council Regulation amending Regulation (EEC) No 281/92 on administrative co-operation in the field of indirect taxation (VAT) and introducing additional measures regarding electronic commerce (C5-0103/2002-2000/0147(COD))

Dear Madam President,

By letter of 21 March 2002 you requested the Committee on Legal Affairs and the Internal Market, under Rule 63(2), to consider the issue of the appropriate legal basis for the above proposal. You did so because, while the Commission had based its proposal on Article 95 of the EC Treaty, in a letter of 18 February 2002 the Council took the view that Article 93 should be used as the legal basis.

The Committee on Legal Affairs and the Internal Market considered the above question at its meeting of 16 April.

### **1. Regulation 218/92**

As is evident from its title, the proposal seeks to amend Regulation 218/92<sup>1</sup>. That Regulation lays down procedural arrangements for mutual assistance between the authorities of Member States with respect to the exchange of value-added tax information on intra-Community transactions by electronic means, and any subsequent exchange of information between Member States' competent authorities.

These basis arrangements are fleshed out by provisions relating to storage and processing of information, requests for information, information of confidential nature, bilateral communication on matters of interest for two Member States. This directive therefore essentially contains procedural provisions.

### **2. The Commission proposal**

The proposal seeks to amend Regulation 218/92 in the light of the developments in trade, whereby services are supplied electronically.

On 12 February 2002, the Council gave its political agreement to the Commission proposal for a Directive, as amended in discussions with Member States, on the application of VAT to electronic services. Under the new rules, EU suppliers will no longer be obliged to levy VAT when providing these services outside the EU, thereby removing a significant competitive handicap.

Accordingly, the proposed Regulation amending Regulation 218/92 seeks to ensure that the information necessary for the special scheme for services supplied electronically<sup>2</sup> is transmitted

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<sup>1</sup> Council Regulation (EEC) no. 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT), OJ L 24, 1.2.1992, p. 1.

<sup>2</sup> Provided for in Article 26c of Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2001/4/EC (OJ L 22, 24.1.2001, p. 17).

to Member States.

As regards the scope of the Regulation, the proposed Regulation seeks to include services supplied electronically in accordance with the special scheme provided for by Article 26c of Directive 77/388/EEC.

The proposal is aimed at improving the functioning of the internal market by more effective administrative assistance.

### **3. Assessment**

The issue in this case is whether Articles 93 and 94 EC on the one hand or Article 95 EC on the other hand is the correct legal basis for the adoption of such a Regulation. These possibilities are alternative: there is no scope for a combination of the two, since the legislative procedures are incompatible.

Under Articles 93 and 94 EC, the Council acts by unanimity, after consulting the European Parliament and the Economic and Social Committee, whereas under Article 95 EC, the Council and the European Parliament adopt the measure under the co-decision procedure.

The proposed act does not contain any fiscal provisions since it does not deal with matters relating to the determination of who is taxable, the setting of taxation rates, or any other issues relating to taxation proper. The proposal simply covers mutual assistance and procedural matters, and therefore seeks to approximate legislative provisions which are necessary for the establishment of the objectives set out in Article 14 EC - the establishment of internal market.

Article 95 EC is the only legal basis capable of covering all aspects of the proposal. Accordingly, it is necessary to examine whether the use of Article 95 EC is precluded by the second paragraph of that provision, which excludes "fiscal provisions" from co-decision. This exception should be interpreted narrowly, inasmuch as this expression includes rules on taxable persons, taxable events, tax basis, tax rates and exemptions only. Article 93 EC is therefore the sole adequate legal basis for harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation.

In contrast, Regulation 218/92 created a system for the exchange of information on intra-Community transactions between the competent authorities of the Member States. It concerns measures of cooperation whose aim is to facilitate the elimination of fiscal controls at internal frontiers, in accordance with the objective of completion of the internal market.

Such measures do not affect the tax sovereignty of the Member States, as they do not modify applicable tax rules on who pays tax and on how much, nor do they affect the amount of the tax debt. The proposed Regulation on mutual assistance in tax matters does not fall within the exclusion of fiscal provisions, since it does not interfere with the structure of the tax. Instead, it seeks only to create a system of administrative cooperation necessary to ensure that the absence of frontier controls does not prevent the effective enforcement of tax rules.

Pursuant to this strict interpretation of Article 95(2) EC, the Fiscalis programme<sup>1</sup> is based on Article 95 EC. Similarly, Council Regulation 2726/90 on Community transit<sup>2</sup> is based on Article 95 EC.

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<sup>1</sup> Decision 888/98/EC of the European Parliament and of the Council of 30 March 1998 establishing a programme of Community action to ameliorate the indirect taxation systems of the internal market (Fiscalis programme), OJ 1998 L 126/1. Decision as last amended by Decision 2000/565 of 7 September 2000, OJ L 236 of 20.9.2000, p. 35.

<sup>2</sup> Council Regulation (EEC) no 2726/90 of 17 September 1990 on Community transit, OJ L 262, 26.9.1990, p. 1



In a similar issue - although not identical - concerning mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agriculture Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value-added tax and certain excise duties<sup>1</sup>, the Committee on Legal Affairs and Internal Market was consulted on legal basis. The latter committee decided unanimously on 6 March 2001 that the appropriate legal basis of this proposal was Article 95 EC.

#### **4. Conclusion**

The aim of the proposed Regulation is the completion of the internal market. It does not contain measures harmonising tax provisions. Its content is to extend the system of exchange of information set up by Regulation 218/92 to services supplied electronically. Article 95 EC is the appropriate legal basis for the adoption of such legislative act.

At its meeting of 16 April the Committee on Legal Affairs and the Internal Market thus decided, unanimously<sup>2, 3</sup> that Article 95 of the EC Treaty is the appropriate legal basis.

Yours sincerely,

(s) Giuseppe Gargani

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<sup>1</sup> Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties, OJ L 175, 28.6.2001, p. 17.

<sup>2</sup> The following were present for the vote: Giuseppe Gargani, chairman, Willi Rothley, Ioannis Koukiadis, Bill Miller (vice-chairmen), Brian Crowley, rapporteur; Paolo Bartolozzi, Maria Berger, Ward Beysen, Philip Charles Bradbourn, Véronique De Keyser (for Carlos Candal pursuant to Rule 153(2)), Bert Doorn, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Heidi Anneli Hautala, Othmar Karas, Kurt Lechner, Klaus-Heiner Lehne, Toine Manders, Arlene McCarthy, Manuel Medina Ortega, Ana Palacio Vallelersundi, Marianne L.P. Thyssen, Rijk van Dam, Hannes Swoboda (for François Zimeray pursuant to Rule 153(2)), Rainer Wieland, Joachim Wuermeling, Matti Wuori and Stefano Zappalà.