EC/Liechtenstein agreement: cooperation to combat fraud and other illegal activity to the detriment of their financial interests

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PURPOSE: to propose an amended version of the proposal to conclude the Cooperation Agreement between the EU and its Member States, of the one part, and Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests and to ensure exchange of information on tax matters.

PROPOSED ACT: Council Decision.

BACKGROUND: on 10 December 2008, the Commission adopted a proposal for a Council Decision on the signing, on behalf of the European Community, of the Cooperation Agreement between the European Community and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests as well as a proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Cooperation Agreement between the European Community and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests (see previous initial legislative document – COM(2008)0839).

Following the conclusions adopted by the ECOFIN Council on 10 February 2009, Liechtenstein is expected to encompass in the agreement with the EU at least a similar scope of obligations as it had agreed with third Countries. The Council also mandated the Commission to negotiate changes to ensure effective administrative assistance and access to information with regard to all forms of investments, in particular foundations and trusts.

Liechtenstein, followed by other countries, issued an official statement, by which it recognises the standard for cooperation under the OECD Article 26 of the Model Convention on income and capital (2005). Following the conclusions of the G20 of 2 April 2009, the inclusion of the standards of the OECD model is a logical step. The Council conclusions therefore need to be interpreted in this light. Such a standard should not be restricted to cases of tax fraud and tax evasion but should cover all exchanges of information, including for tax cooperation purposes.

In 2009, the Agreement negotiated with Lichtenstein covered several issues:

- the global coverage of the Agreement needs to be extended to include **tax cooperation** in accordance with the Article 26 OECD standard;
- the general scope should be extended to reflect properly OECD standards, specifying that **assistance on request** through exchange of information shall include information that is foreseeably relevant to the determination, assessment, enforcement and collection of taxes, the recovery and enforcement of tax claims or the investigation or prosecution of tax matters;
- tax evasion including the **omission of submitting a legally required tax return** should be covered and a clarification of what is meant by tax fraud and tax evasion is needed, in particular, to determine the scope for assistance concerning investigations;
- the drafting of the revised agreement should also better reflect the exact wording of the OECD Article 26 standard with regard to the **limits to exchange of information**;

- in order to guarantee full application of the standard of Article 26 of the OECD model, it is necessary to **define the powers which the administration of a requested partner has at its disposal**. The parties must in particular ensure that their administrative authorities have the powers to obtain and provide information held by banks, companies, partnerships, trusts and foundations, in particular regarding ownership and beneficiaries in order to supply this information upon request;
- the Agreement should be revised to give an additional role to the Joint Committee with regard to monitoring and evaluation;
- **the form and content of requests for assistance should be specified** to integrate a description of the content of the request for assistance that mirrors provisions recently agreed by Liechtenstein with third countries;
- the Agreement should allow for its **quick implementation** and provide for a differentiated regime with provisional application of certain Union competences, namely as regards traditional own resources and certain aspects of information exchange provisions.

In the context of these negotiations, Liechtenstein raised the main following issues:

- the context of the Agreement is for Liechtenstein characterised by its membership of the EEA and therefore by its participation in the Internal Market freedoms and its signed association agreements on the Schengen and the Dublin Acquis;
- equal treatment and non-discrimination are fundamental principles and, as such, should be applied by all Member States in their relations with Liechtenstein. It is also an objective for Liechtenstein to obtain equal treatment and non-discrimination with respect to both the other European third countries and the tax information exchange obligations under the Agreement;
- Liechtenstein preserves the possibility of concluding complementary bilateral tax cooperation agreements with individual Member States within their sphere of competence. Such agreements have already been concluded with some Member States.

The amended proposal takes into account these recent developments. It also takes into account the new provisions of the Treaty on the Functioning of the EU (TFEU), in particular with regard to the legal bases.

This Agreement should serve as a **model for negotiating Anti-fraud agreements with other third Countries**.

CONTENT : the principal modifications to the Commission proposal are as follows:

Title of the Agreement and objective: the title and Article 1 of the Agreement are amended to reflect the extension of the objective of the Agreement (covering also assistance through exchange of information that is foreseeably relevant for the determination, assessment, enforcement and collection of taxes).

Objective: the objective of the Agreement is extended and now also covers assistance through exchange of information that is foreseeably relevant for the determination, assessment, enforcement and collection of taxes.

General Scope: this Article is amended to reflect the extension of the scope of the Agreement. Additional clauses are to take into account the Council conclusions of 10 February 2009 and the Liechtenstein commitment of 12 March 2009 to adopt the OECD standard of exchange of information in tax matters (Article 26 of the OECD Model Convention on Income and Capital). A new definition of direct taxes has been drafted in line with the definition of the OECD Model Agreement for exchange of information on tax matters. There is a new definition of “person” proposed by the Swedish Presidency in the compromise for the draft directive on administrative cooperation in the field of taxation. The Agreement is also brought into line with Article 2 of the OECD Model Agreement for exchange of information on tax matters as well as with obligations agreed by Liechtenstein with the United States of America.

Minor cases: this article has been amended so as to abandon the threshold with regard to the exchange of information concerning tax matters.

Relationships with other Agreements: this article is amended in order to make it clear that the Agreement has to be interpreted as providing minimum rules and that bilateral agreements (but also arrangements) may go beyond this minimum in so far as they entail more extensive cooperation in the field of administrative assistance.

Extent of Administrative Assistance: this clause mentions explicitly the administrative cooperation through the exchange of information in the field of the taxes covered by the Agreement.

Statute of limitations: it is stipulated that the expiration of a statute of limitations for taxes of the requested Party shall not preclude this Party from obtaining and providing the requested information.

Powers: this Article is revised in order to reach a similar scope of obligations as Liechtenstein agreed with the United States of America.

Limits to exchange of information: this Article is amended so as to fully take into account the OECD Article 26 Standard (paragraph 2). It is also amended to specify that a request for information shall not be refused on the ground that the tax liability giving rise to the request is contested by the taxpayer, in line with the obligations agreed by Liechtenstein with the USA.

Costs and obligation to exhaust the usual sources of information: the first paragraph has been replaced by a new provision on costs, which is in line with the 2002 OECD Model Agreement for exchange of information on tax matters.

Request for information: the new wording of this Article is in line with the obligations agreed by Liechtenstein with the USA which are inspired by the 2002 OECD Model Agreement for exchange of information on tax matters.

Presence of authorised staff of the authority of the requesting Party with regard to tax cooperation: new provisions concerning tax cooperation are inserted following the extension of the scope of the Agreement This is in line with the 2002 OECD Model Agreement for exchange of information on tax matters and is inspired by the obligations agreed by Liechtenstein with the USA.

Form and content of the request for assistance in tax matters: in line with the Council conclusions of February 2009, this Article is revised in order to reach a similar scope of obligations as Liechtenstein agreed with the USA. The Article should be interpreted in the light of the joint declaration regarding this provision, in particular where the identity of the accountholder is unknown.

Request for banking and financial information: this has been redrafted in order to better reflect the OECD standard.

Entry into force: taking into account the precedent with the Swiss Confederation, a provision is inserted so as to make some specific provisions of the Agreement (Title I and Title II in so far as they regard income covered by the taxation on savings and information exchange and mutual assistance on fraud and any other illegal activity in the area of traditional own resources and Community funds) applicable from the moment the Agreement has been signed by the Parties and Liechtenstein has notified its instrument of ratification.

Temporal application: this Article is amended to specify temporal application rules with regard to assistance through exchange of information for the determination, assessment, enforcement and collection of direct and indirect taxes. The new provision aims at a temporal application regime which is compatible

with the need of a predictable legal framework for existing client relationships. If the Agreement were to be signed before the end of 2009, the first tax year concerned would be 2010 and the first exchange of information based on this specific tax year would be made in 2011.