

# BANKING SECRECY, TAX INVESTIGATIONS AND THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

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In a world that seeks to promote free international trade in goods and services<sup>2</sup> on the one hand, and fight international terrorism on the other, the European Union (EU) is striving to establish the right balance between protecting fundamental principles such as professional secrecy in relation to banking while ensuring that such principles are not misused so as to obstruct the collection of fiscal revenues and the pursuit of organised crime. The first of these concerns can be dealt with under the first "pillar" of the EU, namely the internal market of the European Community (EC)<sup>3</sup>, while the second falls to be dealt with under the third pillar, co-operation in the fields of justice and home affairs.<sup>4</sup> Recent tragic terrorist attacks the other side of the Atlantic have highlighted this latter concern in the public eye. The purpose of this article is to take stock of the rules adopted at EC or EU level with the objective of achieving the right balance between protection of banking secrecy on the one hand, and the prevention of tax fraud and serious crime on the other.

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<sup>2</sup> The General Agreement on Trade in Services signed in 1994 at the outcome of the Uruguay Round provides for liberalisation of the provision of services, *inter alia*, through the presence of natural persons.

<sup>3</sup> See Title II of the Treaty on European Union (Treaty of Maastricht).

<sup>4</sup> See Title VI of the Treaty on European Union (Treaty of Maastricht).

## 1. Professional Secrecy in the Banking Sector

EC law does not regulate professional secrecy for bankers; that is a matter for national law. On the other hand, professional secrecy for banking supervisors does fall within the remit of EC law because it can affect the prudential supervision of credit institutions on a consolidated Community wide basis. It is for this reason that Article 12 of the First Banking Directive<sup>5</sup> imposed on Member States the obligation to ensure that all persons working for the competent (banking) authorities were bound by the obligation of "professional secrecy". This article was completely recast by the Second Banking Directive,<sup>6</sup> and then amended by the so-called "BCCI" Directive.<sup>7</sup>

Professional secrecy, in the context of Article 12, is the principle according to which confidential information obtained in the course of their duties by persons employed by the competent (banking) authorities, shall not be divulged to any person or authority whatsoever except in summary or collective form, such that individual institutions cannot be identified. This obligation binds not only persons in the employ of the competent (banking) authorities, but also persons who used to be in the employ of such authorities, as well as auditors or experts acting for, or who have acted on behalf of the competent (banking) authorities.

It is not difficult to see that, in the context of the internal market, exceptions have to be made to the principle of professional secrecy in order to allow the exchange of information between the competent authorities of the different Member States. If this were not possible, the competent authority of one Member State would not have access to essential information about the credit institution's activities in other Member States, and this could have serious consequences, as was demonstrated by the Ambrosiano scandal in the early 1980s. It is for this reason that, in its initial form, Article 12 of the First Banking Directive established the general principle of exchange of information between the competent authorities of the Member States provided such information remained protected by the obligation of professional secrecy, and provided that the information was used only for the purposes of dealing with applications for a licence to open a branch (including administrative and judicial appeals arising out of such applications) and monitoring the liquidity and solvency

<sup>5</sup> Directive 77/780/EEC, OJ L322, 17.12.77, p. 12.

<sup>6</sup> Directive 89/946/EEC on the coordination of law, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, and amending Directive 77/780/EEC, OJ L386, 30.12.89, p. 1.

<sup>7</sup> Directive 95/26/EC, amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, ... , with a view to reinforcing prudential supervision, OJ L168, 18.7.95, p. 7.

of such branches. With the establishment, by the Second Banking Directive, of the single licence and the principle of prudential control by the home country authorities (assisted, where necessary, by the host country authorities), Article 12 was amended so as to enlarge the purposes for which information communicated by the competent authorities of another Member State could be used. The amendments made by the Second Banking Directive also recognised that it was necessary to allow the communication of information by the competent (banking) authorities to other regulatory bodies provided the information remained protected by the obligation of professional secrecy and provided also that the information was used only for the purposes of pursuing the regulatory functions of these other bodies. After the shortcomings in the system exposed by the failure of BCCI, the BCCI Directive extended still further the category of regulatory bodies to which the competent authorities could communicate information, provided always that such information remained protected by the obligation of professional secrecy, and was used only for the purposes of the recipient bodies' regulatory functions. It should be noted that some of the new provisions introduced by the BCCI Directive are optional, in the sense that Member States may, if they wish, authorise the communication of confidential information to certain additional regulatory bodies.<sup>8</sup> Up until then, all the provisions of Article 12 were mandatory, in the sense that Member States were obliged to authorise the communication of confidential information to the prescribed bodies in the circumstances laid down by that article.

In its present form, Article 12 contains eleven mandatory exceptions and five optional exceptions to the principle of non-communication of information covered by the obligation of professional secrecy.

- 1.1     Mandatory exceptions – Classes of person to whom Member States must allow the communication of confidential information by its competent authorities.
- (Ia)    Exchange of information between the competent authorities of the different Member States in accordance with the directives applicable to credit institutions ("Member State banking regulators");<sup>9</sup>
- (Ib)    Exchange of information within a Member State, where there are two or more competent authorities in the same Member State ("dual regulators");<sup>10</sup>

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<sup>8</sup>       Namely paragraphs (5A) and (5B), introduced by the BCCI Directive.

<sup>9</sup>       Article 12(2)

<sup>10</sup>      Article 12(5), first phrase.

- (Ic) Exchange of information between the competent authority in a Member State and:
- (i) the authorities in another Member State entrusted with the supervision of other financial organisations and insurance companies (“other financial institution regulators”);<sup>11</sup>
  - (ii) the authorities in another Member State responsible for the supervision of financial markets (“financial markets regulators”);<sup>12</sup>
  - (iii) bodies involved in another Member State in the liquidation and bankruptcy of credit institutions and in other similar procedures (“insolvency practitioners”);<sup>13</sup>
  - (iv) persons responsible in another Member State for carrying out statutory audits of the accounts of credit institutions and other financial institutions (“banking auditors”);<sup>14</sup>
- (Id) Disclosure to bodies which administer deposit guarantee schemes (“deposit guarantee regulators”);<sup>15</sup>
- (Ie) Disclosure to central banks and other bodies with a similar function in their capacity as monetary authorities (“monetary authorities”);<sup>16</sup>
- (If) Where appropriate, disclosure to other public authorities responsible for overseeing payment systems (“payment system regulators”);<sup>17</sup>
- (Ig) Communication of certain information to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of the Member States’ markets (“clearing

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<sup>11</sup> Article 12(5), first indent.

<sup>12</sup> Article 12(5), first indent.

<sup>13</sup> Article 12(5), second indent.

<sup>14</sup> Article 12(5), third indent.

<sup>15</sup> Article 12(5), *in fine*.

<sup>16</sup> Article 12(6), first indent (amended by BCCI Directive).

<sup>17</sup> Article 12(6), second indent (inserted by BCCI Directive).



houses”).<sup>18</sup>

1.2 Optional exceptions – Classes of persons to whom Member States may authorise the disclosure of confidential information.

(IIa) Exchange of information between the competent (banking) authorities of a Member State and a third country pursuant to a co-operation agreement (“third country banking regulators”);<sup>19</sup>

(IIb) Exchange of information between the competent authorities and the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of financial undertakings and other similar procedures (“regulators of the insolvency profession”);<sup>20</sup>

(IIc) Exchange of information between the competent authorities and the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other similar procedures (“regulators of the auditing profession”);<sup>21</sup>

(IIId) Exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law, including persons not employed in the public sector who, by reason of their special competence, are appointed for the purposes of carrying out such detection and investigation (“company law regulators”);<sup>22</sup>

(IIe) Disclosure of information to other departments of central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies and to inspectors acting on behalf of those departments (“other government departments”).<sup>23</sup>

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<sup>18</sup> Article 12(8), inserted by BCCI Directive.

<sup>19</sup> Article 12(3).

<sup>20</sup> Article 12(5A), first indent, (inserted by BCCI Directive).

<sup>21</sup> Article 12(5A), second indent (inserted by BCCI Directive).

<sup>22</sup> Article 12(5B) (inserted by BCCI Directive).

<sup>23</sup> Article 12(7).

### 1.3 Limitations on the type and use of confidential information disclosed

Information disclosed in categories (Ia) and (IIa) above, that is to say, information exchanged in accordance with the Directives applicable to credit institutions and information exchanged pursuant to agreements providing for the exchange of information with the competent authorities of third countries, may only be used by the recipient competent authorities in the course of their duties for certain purposes. Those purposes are prescribed by Article 12(4) as:

- to check that the conditions governing the taking-up of the business of credit institutions are met and to facilitate monitoring, on a non-consolidated or consolidated basis, of the conduct of such business, especially with regard to the monitoring of liquidity, solvency, large exposures, and administrative and accounting procedures and internal control mechanisms, or
- to impose sanctions, or
- in an administrative or court appeal against the decision of the competent authority, or
- in court proceedings initiated pursuant to special provisions provided for in the Directives adopted in the field of credit institutions.

The limitations for the other categories are:<sup>24</sup>

- In the case of information falling within categories (Ic) and (Id) (other financial institution regulators, financial markets regulators, insolvency practitioners, banking auditors, and company law regulators), the limitation is simply that the information must be "necessary" for the exercise by the recipient authority of its functions.
- In the case of information falling with categories (IIb) and (IIc) (regulators of the insolvency profession and regulators of the auditing profession), the information must be limited to that necessary for the purpose of performing the task of overseeing referred to.

<sup>24</sup> The relevant references to the paragraphs of Article 12 are the same as in the classification set out in sections 1.1 and 1.2 above.

- In the case of information falling within category (IId) (company law regulators), exchange of information should only be authorised where necessary for the strengthening of the stability and integrity of the financial system.
- In the case of information falling within category (Ie) or (If) (monetary authorities and payment system regulators), the limitation is that the information is “intended” for the performance of the recipient authority’s task. The recipient authority may, however, transmit the information to the competent (banking) authority to the extent necessary for the purposes set out in Article 12(4) described above.
- In the case of information falling with category (Ig) (clearing houses), the information must be necessary in order to ensure the proper functioning of the recipient body in relation to defaults or potential defaults by market participants.

In certain cases, where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities in the Member State which disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement. This is the case for information in categories (IIb) – regulators of the insolvency profession and (IIc) – regulators of the auditing profession and (IId) – company law regulators. The reason for this is clear. Since these three categories are only open to disclosure at the option of a Member State A, another Member State B who has not exercised the option may not want to find that information disclosed by it pursuant to the obligatory provisions of Article 12 is subsequently disclosed by Member State A to authorities to whom the information could not be disclosed under the law of Member State B. In addition, there is one mandatory exception, category, (Ib) – clearing houses, where information exchanged between the competent authorities of the Member States for the purposes of the directives applicable to credit institutions may not subsequently be disclosed to a clearing house without the express consent of the competent authorities which disclosed it.

The foregoing discussion enables one to see that Article 12 establishes a balance between protecting professional secrecy in relation to credit institutions while allowing communication of confidential information where this is justified by the public policy objectives of prudential supervision of financial institutions, supervision of the auditing and insolvency professions, regulation of companies, monetary policy, and regulation of deposit guarantee systems, payments systems and financial markets. Where confidential information can be communicated under one

of the public policy exceptions, it remains protected by professional secrecy in the hands of the recipient, and can only be used for certain purposes. In short, confidential information relating to credit institutions is "ring-fenced".

## **2. EC Law Relating to Mutual Assistance in the Tax Field**

The EU Council has adopted two measures dealing with mutual assistance among the competent (fiscal) authorities of the Member States. The first, Directive 77/799/EEC, establishes a harmonised framework for exchange of information between Member States in relation to direct taxation and value added tax (VAT). The second, Regulation (EEC) No 218/92, deals specifically with particular aspects arising out of the abolition of internal frontiers for VAT purposes within the EC.

### **2.1 Directive 77/799/EEC**

Council Directive 77/799/EEC on mutual assistance by the competent authorities of the Member States in the field of direct taxation and VAT provides for the exchange of information between the competent (fiscal) authorities of the Member States where such information may enable them to effect a correct assessment of taxes on income and on capital and also on VAT. The Directive provides for three modes of exchange of information, "exchange on request", "spontaneous exchange of information" and "automatic exchange of information". Where the competent (fiscal) authority of one Member State requests its counterpart in another Member State to provide information, the authority receiving the request need not comply if it appears that the authority making the request has not exhausted its own usual information, which it could have used, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought-after result.<sup>25</sup> However, in those cases where the requested authority is not entitled to refuse to comply, it must arrange for the conduct of any inquiries necessary to obtain the information.<sup>26</sup>

Even in the absence of a prior request, the competent (fiscal) authority of a Member State is obliged to provide information spontaneously to the competent authority of another Member State in the following circumstances:<sup>27</sup>

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<sup>25</sup> Directive 77/799/EEC, Article 2(1).

<sup>26</sup> Article 2(2).

<sup>27</sup> Article 4(1).

- (a) the competent (fiscal) authority of Member State A has grounds for supposing that there may be a loss of tax in Member State B;
- (b) a person liable to tax obtains a reduction in or an exemption from tax in Member State A which would give rise to an increase in tax or liability to tax in Member State B;
- (c) business dealings between a person liable to tax in Member State A and person liable to tax in Member State B are conducted through one or more countries in such a way that a saving in tax may result in one Member State A or Member State B;
- (d) the competent (fiscal) authority of Member State A has grounds for supposing that a savings in tax may result from artificial transfers of profits within groups of enterprises;
- (e) information forwarded to Member State A by the competent (fiscal) authority of Member State B enables information to be obtained which may be relevant in assessing liability to tax in the latter Member State B.

The above category of cases subject to spontaneous exchange of information can be extended through consultation among the Member States.<sup>28</sup> Such consultations can also be used to determine categories of information to be exchanged on a regular basis without prior request (so called “automatic” exchange of information).<sup>29</sup>

There are three important exceptions to the principle of exchange of information between the competent (fiscal) authorities of the Member States.<sup>30</sup> First, no Member State can be required to carry out inquiries or supply information if it would be prevented by its own laws or administrative practices from carrying out such inquiries or collecting or using the information for its own purposes. This could be called the exception of legal or administrative impossibility. Second, under a public policy exception, the provision of information may be refused where it would lead to disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy. Third, by virtue of a reciprocity principle the competent (fiscal) authority of a Member State may refuse to provide information where the state concerned, i.e. the requesting state, is unable, for practical or legal reasons, to provide similar

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<sup>28</sup> Article 4(2).

<sup>29</sup> Article 3.

<sup>30</sup> Article 8.

information. (The first and second of these exceptions also apply in relation to the provision of information to the arbitral body, the "advisory commission", set up by Article 9 of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.)<sup>31</sup>

All information exchanged pursuant to the procedures established by the Directive are "ring-fenced" by secrecy provisions.<sup>32</sup> All information received from the competent authority of another Member State must be kept secret in the same manner as information obtained under domestic legislation. Such information *cannot* in any circumstances be used *other than* for taxation purposes or in connection with judicial or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing of a tax assessment. Moreover, the information can only be made available to persons directly involved in the assessment of tax or the judicial or administrative proceedings. If the Member State supplying the information raises no objection, however, information may be disclosed during public hearings or in judgments.<sup>33</sup>

If a Member State applies stricter limits on secrecy than those set out above, it may refuse to provide information to a requesting Member State unless that state undertakes to respect such narrower limits.<sup>34</sup> Conversely, if the legislation of the requested Member State allows information to be used for wider purposes than as set out above, that state may authorise the requesting state to use the information to be used for such wider purposes, provided that the conditions laid down by the requested Member State's legislation are respected in the requesting Member State.<sup>35</sup>

## 2.2 Regulation (EEC) No 218/92

Administrative cooperation in the field of VAT is organised by Council Regulation (EEC) No 218/92.<sup>36</sup> This Regulation was designed as a supplement to Directive 77/799/EEC in order to deal with the controls necessitated by the abolition of fiscal

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<sup>31</sup> OJ L225, 20.8.90, p.10.

<sup>32</sup> Directive 77/799/EEC, Article 7.

<sup>33</sup> Article 7(1).

<sup>34</sup> Article 7(2).

<sup>35</sup> Article 7(3).

<sup>36</sup> OJ L24, 1.2.92, p.1.

controls at internal frontiers introduced by Directive 91/680/EEC,<sup>37</sup> amending the Sixth VAT Directive (77/388/EEC). The Regulation does not therefore limit the scope of Directive 77/799/EEC in any way.<sup>38</sup> The scope of the information covered by the Regulation relates, in particular, to “intra Community transactions”. By virtue of Article 7 of the Regulation, a Member State is obliged to provide information requested by another Member State provided that:

- the number and nature of the requests within a specific period do not impose a disproportionate administrative burden on the requested authority. (A similar provision does not exist in Directive 77/799/EEC);
- the applicant authority exhausts the usual sources of information which it can use in the circumstances to obtain the information requested, without running the risk of jeopardising the achievement of the desired end. (A similar provision is to be found in Article 2(1) of Directive 77/799/EEC);
- the applicant authority requests assistance only if it would be able to provide similar assistance to the applicant authority of another Member State. (This is not quite the same as the provision in Article 8(3) of Directive 77/799/EEC);

It should be noted that there is no exception similar to that in Article 8(2) of Directive 77/799/EEC, presumably on the basis that the information exchanged for the purposes envisaged by the Regulation is not likely to involve commercial, industrial or professional secrets, commercial processes or information the disclosure of which would be contrary to public policy.

If the applicant authority is unable to comply with the three conditions laid down by Article 7, and the requested authority considers that it is not obliged to provide the information, the respective authorities should seek to reach agreement, failing which they may request that the matter be examined by the Member States and the Commission pursuant to the provisions of Article 11 on the evaluation and operation of the arrangements for administrative cooperation.<sup>39</sup>

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<sup>37</sup> OJ L376, 31.12.91, p.1.

<sup>38</sup> Regulation (EEC) No 218/92, Article 7(3).

<sup>39</sup> See Article 7(2).

Where information is exchanged pursuant to the Regulation, the authority requesting the information may ask the requested authority not to notify the person concerned that information is being exchanged if so to do would prejudice the investigation of tax evasion in another Member State.<sup>40</sup>

Information exchanged pursuant to Regulation (EEC) No 218/92 is confidential. It is therefore protected by the obligation of professional secrecy under the law of Member State of the receiving authority, and also under the corresponding provisions applicable to Community authorities, notably Article 287 EC (formerly Article 214).<sup>41</sup> There are the only two purposes for which the information may be used without the consent of the requested authority.<sup>42</sup> First, such information may be made available to persons directly concerned with the assessment, control or collection of VAT, or to persons employed by the Community institutions whose duties require that they have access to it. Second, such information may, in addition, be used in connection with judicial or administrative proceedings that may involve sanctions for infringement of the law relating to VAT. It follows that if the requesting authority considers that information received from the requested authority is likely to be useful to the competent authority of a third Member State, it may transmit such information to the latter only with the prior agreement of the requested authority.<sup>43</sup>

### 3. Criminal Law

In its original form, Article 12(1) of the First Banking Directive provided that confidential information received by persons employed by a competent authority in the course of duties could not be divulged to any person or authority except by virtue of provisions laid down by law. Paragraph (3) of that Article, in its original form, went on to say that "without prejudice to cases covered by criminal law", a competent authority receiving information covered by the obligation of professional secrecy should use it only for the purposes of banking supervision, or in cases when decisions of the authority were subject to administrative or judicial appeal. The approach of Article 12, in its amended form, is to state an outright prohibition, in paragraph (1), against the disclosure of information covered by the obligation of professional secrecy, and then to enact various exceptions in the following

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<sup>40</sup> Article 8.

<sup>41</sup> Article 9(1).

<sup>42</sup> Article 9(2).

<sup>43</sup> Article 9(3).



paragraphs. The outright prohibition is stated, however, to be “without prejudice to cases covered by criminal law.” It is therefore clear that banking secrecy does not prevent the disclosure of information covered by the obligation of professional secrecy where such disclosure is required by a disposition of the criminal law of a Member State. A good example of this is to be found in the Money-Laundering Directive.<sup>44</sup> Article 9 of this Directive lifts the obligation of professional secrecy in the cases laid down by that Directive for the communication of suspicions that someone is involved in money-laundering.

Article 3(3) of Regulation (EEC) No 218/92 on cooperation in VAT matters states categorically that the Regulation shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. Directive 77/799/EEC, on the other hand, has no provision dealing expressly with criminal matters, but Article 11 says that the Directive’s provisions shall not impede the fulfilment of any wider obligations to exchange information which may flow from other legal acts.

Thus it can be seen that the banking and fiscal legislation discussed above does not prevent the competent authority of a Member State from disclosing confidential information to the police authorities of the same Member State where this is provided for by a disposition of national law aimed at the prevention or prosecution of crime. The legislation does not, however, authorise the disclosure of information to the police authorities of another Member State. For this, a bilateral or multilateral agreement relating to criminal matters is required. Acting pursuant to Article 34 of the Treaty on European Union, some important initiatives have been taken which have yet to be ratified before entry into force.

On 29 May 2000 the EU Member States signed a Convention on Mutual Assistance in Criminal Matters (“2000 Mutual Assistance Convention”), which will enter into force in the first eight existing Member States to ratify it, 90 days after the notification of the eighth ratification to the Secretary-General of the EU Council.<sup>45</sup>

Article 3(1) of the Convention provides that “Mutual assistance shall be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in

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<sup>44</sup> Directive 91/308/EEC, OJ L166, 28.6.91, p.77. For proposed amendment, see Council’s Common Position No 52/2001, OJ C36, 2001, p.36.

<sup>45</sup> See Article 27(3) of the 2000 Mutual Assistance Convention, the text of which is published in OJ C197, 12.7.2000. The Convention is also open to accession by any state that becomes a member of the European Union, and it also has effects in Iceland and Norway by virtue of these countries association with the Schengen *acquis* – see Articles 28 and 29.

criminal matters.” Paragraph (2) extends the obligation of mutual assistance to proceedings relating to offences or infringements by legal persons. Article 4(1) provides that, where mutual assistance is afforded, i.e. where Article 3 applies, “the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State.” Paragraph (3) of Article 4 provides that “if the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State shall promptly inform the authorities of the requesting Member State and indicate the conditions under which it might be able to execute the request. The authorities of the requesting and the requested Member State may subsequently agree on further action to be taken concerning the request, where necessary by making the action subject to the fulfilment of those conditions.” Thus it can be seen that Article 4 of the Convention offers plenty of scope for a Member State to refuse to provide information on the grounds that it is protected by professional secrecy within the meaning of Article 12 of the First Banking Directive, or that there exists a practice of the fiscal authorities which prevents communication of such information.

It is obviously with this in mind that the EU Council has proposed a protocol to the 2000 Mutual Assistance Convention which would deal explicitly with the question of professional secrecy relating to banking and the obstacles arising out of the established practices of national tax administrations. The text of the protocol was signed by the Member States on 16 October 2001<sup>46</sup> and is open to accession by any state which becomes a member of the European Union and which accedes to the 2000 Mutual Assistance Convention. The protocol will enter into force in the first eight existing Member States to ratify it, 90 days after the notification of the eighth ratification to the Secretary-General of the EU Council. However, if the 2000 Mutual Assistance Convention has not entered into force on that date, the protocol will enter into force on the date on which that Convention enters into force.<sup>47</sup>

When the necessary conditions are satisfied, as explained below, the protocol provides for the exchange of information relating to bank accounts and transactions on such accounts, and for these purposes lifts the obligation of professional secrecy. By virtue of Article 1 of the protocol, a Member State is obliged to respond to the request of another Member State for details of bank accounts held by a person subject to criminal investigation. The request may ask whether the person holds or

<sup>46</sup> OJ C326, 21.11.2001.

<sup>47</sup> Article 13(3). The Convention also has effects in Iceland and Norway by virtue of these countries' association with the Schengen *acquis* – see Articles 15 and 16.

controls one or more accounts, of whatever nature, in a credit institution located in the requested state, and if the reply is affirmative, the request may ask for details of such accounts. If time permits, the request may extend to accounts over which the person subject to criminal proceedings holds a power of attorney. In order to protect credit institutions from having to research matters outside their knowledge, Article 1(2) provides that the credit institution keeping the account is only obliged to respond to the request to the extent that the information is in its possession. The scope of the obligation to comply with the request is limited to:

- offences punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting state and at least two years in the requested state; or
- offences referred to in Article 2 of the 1995 Convention on the Establishment of a European Police Office (Europol Convention),<sup>48</sup> or in the Annex to that Convention, as amended;<sup>49</sup> or
- to the extent not covered by the Europol Convention, offences referred to in the 1995 Convention on the Protection of the European Communities' Financial Interests,<sup>50</sup> the 1996 Protocol thereto,<sup>51</sup> or the Second Protocol thereto.<sup>52</sup>

Article 2 of the protocol enables a contracting state to request another contracting state to provide particulars of specified bank accounts and of banking operations which have been carried during a specified period through one or more accounts specified in the request, including particulars of any sending or recipient account. Article 3 enables a contracting state to request another contracting state to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results to the

<sup>48</sup> OJ C316, 27.11.95, p. 1. The crimes mentioned in Article 2 are basically terrorism, unlawful drug trafficking and other serious forms of international crime, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor vehicle crime, and illegal money-laundering activities in connection with the foregoing, and related criminal offences.

<sup>49</sup> Amendment published in OJ C358, 13.2000, p.1.

<sup>50</sup> OJ C316, 27.11.95, p. 48. The acts in question are various types of fraud affecting Community revenue and expenditure.

<sup>51</sup> OJ C313, 23.10.96, p.1.

<sup>52</sup> OJ C221, 19.7.97, p.11.

requesting state.

In all these cases, the requested state is obliged not to disclose to the bank customer concerned, or to other third parties, the fact that an investigation is taking place or that information has been transmitted to another state.<sup>53</sup> Moreover, the requested state has an obligation of "officiousness" in the sense that if, in the course of carrying out a request, it considers that it may be appropriate to undertake investigations not initially foreseen, or which could not be specified when the request was made, it must inform the requesting authority accordingly.<sup>54</sup>

As already indicated above, the requested state may not invoke banking secrecy as a reason for refusing to comply with a request.<sup>55</sup> Equally it may not object on the grounds that the request concerns an offence that the requested state considers to be a fiscal offence or on the grounds that the state does not impose the same kind of tax or duty, or that its laws do not contain a tax, duty, customs or exchange regulation of the same kind as the law of the requesting state. Subject to certain permitted reservations, a contracting state may not refuse to provide information on the grounds that the offence is a political offence, although this is unlikely to arise in the fiscal context.<sup>56</sup> It is pertinent to note, however, that the reservations permitted in respect of political offences are the only reservations that contracting states may make to the protocol.<sup>57</sup>

#### 4. Conclusion

In the history of the internal market there has been a growing recognition of the principle of the professional secrecy of information acquired by banking supervisors and tax controllers. At the same time, the principle of exchange of information between the authorities of the Member States has been recognised to the extent necessary for the functioning of the internal market, such information being "ring-fenced" by obligations of professional secrecy and restrictions on the purposes for which it could be used. These rules have had to be refined in order to deal with the progressive development of the internal market. Thus the shortcomings in the system evidenced by the BCCI failure have been dealt with by extending the

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<sup>53</sup> Article 4.

<sup>54</sup> Article 5.

<sup>55</sup> Article 7.

<sup>56</sup> See Article 9 of the protocol for further details.

<sup>57</sup> Article 11.

obligations of information exchange to authorities and bodies other than just banking supervisors. In the fiscal area, the abolition of internal frontiers required an improvement of the scope for exchange of information in the VAT area. However, despite all this, the system of protection of confidential information has rightly remained pretty water-tight. This can be a cause for concern once it transpires that information available in the banking and fiscal field may be useful to the police authorities in tracking down or preventing serious crime. The EU faces a difficult challenge in meeting the public policy objective of preventing and prosecuting serious crime, while not destroying public confidence in the protection of confidential information held by public authorities. The 2000 Mutual Assistance Convention, as amended by the protocol thereto, is an important step in this direction, the effectiveness of which will only become apparent after the Convention and protocol have entered into force. Members of the public will duly take note that in pursuing the public policy objective of preventing and prosecuting serious crime, the more serious tax offences have been rolled-up into this category.