Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004

COUNCIL REGULATION (EU) No 389/2012

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Regulation (EC) No 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties[(3)] provides for a common system whereby, in order to ensure the correct application of legislation on excise duties and to combat the evasion of excise duties and the ensuing distortions in the internal market, Member States assist each other and cooperate with the Commission. A number of changes need to be made to that Regulation in view of experience gathered and in view of recent developments. Given the number of changes thus necessary, the Regulation should be replaced for reasons of clarity.

(2) The completion of the internal market continues to require a system of administrative cooperation in the field of excise duties encompassing all aspects of legislation concerning the application of excise duties to the goods referred to in Article 1 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty[(4)].

(3) In the interests of effectiveness and speed and on grounds of cost, it is essential that the role of electronic means in the exchange of information be enhanced. In view of the repetitive nature of certain requests and the linguistic diversity within the Union, it is important to ensure that standard formats be more widely used in the exchange of information, so that information requests can be more rapidly processed. These requirements can best be met through the more systematic use of the computerised system established under Decision No 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of

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excisable products[(5)]. That system now offers broader possibilities than at the time Regulation (EC) No 2073/2004 entered into force, and it will continue to be developed. Member States should thus be required to make use of it whenever possible.

(4) Exchange of information in excise matters is necessary to a very wide extent in order to establish a true picture of the excise affairs of certain persons but, at the same time, Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the excise affairs of a given person or ascertainable group or category of persons.

(5) For the purposes of a proper coordination of information flows, it is necessary to maintain the provisions of Regulation (EC) No 2073/2004 as regards a single point of contact in each Member State. Since more direct contacts between the authorities and officials of the Member States might be necessary for reasons of efficiency, the provisions on delegation and the designation of competent officials should also be maintained.

(6) In order for the necessary information to be available in a timely manner, the provisions of Regulation (EC) No 2073/2004 requiring the requested authority to act as quickly as possible and at the latest within a given time limit should be maintained. However, the time limit for the provision of information already available to the requested Member State should be shorter than the standard time limit.

(7) For the effective monitoring of excise procedures in cross-border movement, it is necessary to continue to provide for the possibility of simultaneous controls by Member States and for the presence of officials of one Member State in the territory of another Member State, within the framework of administrative cooperation.

(8) Difficulties linked to the notification of administrative decisions and measures across borders should continue to be addressed by maintaining the provisions of Regulation (EC) No 2073/2004 in the matter.

(9) In order to fight fraud effectively, the provisions on the exchange of information without prior request should be maintained. To facilitate such exchange, the categories of information to be exchanged on a mandatory basis should be specified.

(10) Member States should continue to be able to exchange, on an optional basis, information necessary for the correct application of the legislation on excise duties, where that information falls outside the categories of information to be automatically exchanged.

(11) Feedback is an appropriate means to ensure continual improvement of the quality of the information exchanged. A framework for the provision of feedback should therefore be put in place.

(12) The electronic storage by Member States of certain specified data regarding the authorisation of economic operators and tax warehouses is indispensable for the proper functioning of the excise duties system and the fight against fraud. It allows for rapid exchange of those data between Member States and automated access to information. This can be achieved by making use of the information already contained in the national computerised systems for excise, through the development of risk analysis

which enhances the information held nationally on excise economic operators and their movements of excise goods within the Union, and through the inclusion of a range of information regarding taxable persons and their transactions. Since the procedures for establishing or recovering excise duties, and the periods of limitation and other time limits, differ in the various Member States, it is necessary, in order to ensure effective mutual assistance for the application of the legislation on excise duties in cross-border situations, to provide for a minimum period during which each Member State should store that information.

(13) In order for the information stored in the electronic databases to be reliable, provision should be made for them to be updated regularly.

(14) Economic operators should be able to speedily operate the verifications necessary for movements of excise goods. They should be provided with the possibility to have the validity of excise numbers confirmed electronically through a central register operated by the Commission and fed by the information contained in national databases.

(15) National rules on banking secrecy could hamper the efficiency of the mechanisms provided for in this Regulation. Member States should therefore not be entitled to refuse the provision of information solely on the basis of such rules.

(16) This Regulation should not affect other measures adopted at the level of the Union, which contribute to combating excise irregularities and fraud, but should rather complement them.

(17) For reasons of clarity, it is useful to confirm in this Regulation that where information or documents are obtained with the authorisation or on the request of a judicial authority, the communication of the information or documents to the competent authority of another Member State is subject to authorisation by the judicial authority if such authorisation is required under the law of the communicating Member State.

(18) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(6)] governs the processing of personal data carried out by Member States within the framework of this Regulation. 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[(7)] governs the processing of personal data carried out by the Commission pursuant to this Regulation.

(19) The exchange of information with third countries has proven beneficial for the correct application of legislation on excise duties and should therefore be maintained. Directive 95/46/EC sets out specific conditions for the communication of information to third countries, with which Member States must comply.

(20) For the purposes of the effective application of this Regulation, it might be necessary to limit the scope of certain rights and obligations laid down by Directive 95/46/EC, specifically the rights defined in Article 10, Article 11(1) and Articles 12 and 21 thereof, in order to safeguard important economic and financial interests of the Member States, bearing in mind the potential loss of revenue for Member States and

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the crucial importance of information covered by this Regulation for the effectiveness of the fight against fraud. Given the need to preserve evidence in cases of suspected fiscal irregularities or fraud, and to prevent interference with the correct assessment of compliance with legislation on excise duties, it might be necessary to restrict the obligations of the data controller and the rights of the data subject relating to the provision of information, access to data and publicising of processing operations, in the course of the exchange of personal data under this Regulation. Member States should be obliged to apply such limitations, to the extent they are necessary and proportionate.

(21) In order to ensure uniform conditions for the implementation of certain Articles of this Regulation, and to describe the main categories of data that can be exchanged by Member States under this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[(8)].

(22) The examination procedure should be used for the adoption of those implementing acts given that those acts are measures of general scope within the meaning of Article 2(2)(a) of Regulation (EU) No 182/2011.

(23) It is necessary to monitor and evaluate the functioning of this Regulation. Provision should thus be made for the collection of statistics and other information by Member States and for the preparation of regular reports by the Commission.

(24) Since the objective of this Regulation, namely the simplification and the strengthening of administrative cooperation between Member States, which requires a harmonised approach, cannot be sufficiently achieved by the Member States alone, and can, by reason of the uniformity and effectiveness required, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective.

(25) This Regulation respects the fundamental rights and observes the principles which are recognised by the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data (Article 8). In view of the limits set by the present Regulation, the processing of such data carried out within the framework of this Regulation does not go beyond what is necessary and proportionate for the purposes of protecting the legitimate fiscal interests of the Member States.

(26) Regulation (EC) No 2073/2004 should be repealed.

(27) The European Data Protection Supervisor was consulted and adopted an opinion[(9)],

HAS ADOPTED THIS REGULATION:

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CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1 This Regulation lays down the conditions under which the competent authorities in the Member States for the application of the legislation on excise duties are to cooperate with each other, and with the Commission, in order to ensure compliance with that legislation. To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange, by electronic means or otherwise, information that is necessary to ensure the correct application of legislation on excise duties.

2 This Regulation shall not affect the application in the Member States of the rules on mutual assistance in criminal matters.

3 It shall not affect the fulfilment of any wider obligation in relation to mutual assistance ensuing from other legal instruments, including bilateral or multilateral agreements.

Article 2

Definitions

For the purposes of this Regulation:

(1) ‘competent authority’ means the authority designated in accordance with Article 3(1);

(2) ‘requesting authority’ means the central excise liaison office or any liaison department or competent official of a Member State who makes a request for assistance on behalf of the competent authority;

(3) ‘requested authority’ means the central excise liaison office or any liaison department or competent official of a Member State who receives a request for assistance on behalf of the competent authority;

(4) ‘excise office’ means any office at which formalities laid down by excise rules may be completed;

(5) ‘event driven automatic exchange’ means the systematic communication, without prior request, of information with a predefined structure concerning an event of interest as and when that information becomes available, other than the exchange of information provided for in Article 21 of Directive 2008/118/EC;

(6) ‘regular automatic exchange’ means the systematic communication, without prior request, of information with a predefined structure at pre-established regular intervals;

(7) ‘spontaneous exchange’ means the communication of information without prior request to another Member State, not covered by points (5) or (6) or by Article 21 of Directive 2008/118/EC;

(8) ‘computerised system’ means the computerised system for the movement and surveillance of excise goods established by Decision No 1152/2003/EC of the