



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

amending Directive 77/388/CEE concerning the common system of value added tax, as regards conferment of implementing powers and the procedure for adopting derogations

(presented by the Commission)

EXPLANATORY MEMORANDUM

INTRODUCTION

The Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC) requires Member States to apply a common system of value added tax.

The Directive establishes a general framework but contains no machinery providing for the introduction of implementing rules.

However, while the Directive does not contain a procedure for laying down common implementing measures it does make specific provision for the adoption of measures derogating from the common system of VAT.

Under Articles 27 and 30 of the Sixth Directive the Council can authorise a Member State to introduce special measures to derogate from its provisions in order to simplify the procedure for charging VAT, to prevent certain types of tax evasion or avoidance, or as part of an agreement with a non-member country or an international organisation

The purpose of this proposal is to modernise the Article 27/30 procedure and specifically to make it more transparent, and also to provide for the adoption of implementing rules at Community level.

THE ARTICLE 27/30 PROCEDURE FOR THE ADOPTION OF DEROGATIONS

In its communication of 7 June 2000 to the Council and the European Parliament on a strategy to improve the operation of the VAT system within the context of the internal market, the Commission undertook to rationalise the large number of derogations currently in force under Article 27. It intends to get started on this process, in collaboration with the Member States, in the next few months.

At the same time, however, it would like to review and modernise the Article 27/30 procedure to bring it into line with Treaty principles.

The current Article 27/30 procedure

The existing Articles 27 and 30 provide for Council decisions in two circumstances.

Article 27(1) states: *“The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.”*

The first paragraph of Article 30 contains a similar provision: *“The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to conclude with a non-member country or an international organisation an agreement which may contain derogations from this Directive.”*

These clauses provide for the Council to adopt a formal decision acting on a proposal from the Commission but the procedure is simpler than that prescribed in Article 93 of the Treaty, since the scope of these decisions is so narrow that it was not thought necessary to seek the opinions of Parliament or the Economic and Social Committee.

Article 27(4) and the second paragraph of Article 30 contain a further clause, however: *“The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.”*

In other words, the Council decision is tacitly adopted once two months have elapsed.

This entails the Council adopting a decision that has never formally been laid before it, since prior to that stage the procedure has consisted of a Member State presenting a request to the Commission and the Commission notifying the other Member States. Thus the tacit approval procedure does not require the Commission to formally present a proposal and the Council incurs responsibility for a decision without any procedural involvement.

This also raises the issue of transparency for traders since if the Council tacitly adopts a decision taxable persons will have to comply with national measures taken pursuant to that decision without being aware either of the exact scope of the authorisation granted or of the Council's grounds for it.

It has therefore been the Commission's longstanding practice to ensure that the two month deadline set in Articles 27 and 30 does not elapse without some initiative on its part, and within that period it will either present a proposal for a decision or ask that the matter be raised before the Council.

The proposed amendments

Eliminating tacit approvals

In the interests of all concerned - the Commission, the Council, national administrations and traders - special measures under Article 27 or Article 30 should be enacted in accordance with a simple, transparent procedure so that there can be no doubt as to their compliance either with the Treaty or with general principles of Community law.

The procedure laid down in Article 27(1) and the first paragraph of Article 30 (the Council unanimously adopts a decision acting on a proposal from the Commission) does meet these criteria.

If the tacit approval clauses were removed, therefore, this would be the rule for all decisions under Article 27/30, which would require a proposal from the Commission and a formal decision by the Council.

Other amendments to the procedure

The main change to Articles 27 and 30 is the removal of the tacit approval option but other aspects of the procedure need to be reviewed as well.

The procedure is initiated by a Member State presenting a request to the Commission, supported by all relevant information.

In practice the Commission often needs to ask the requesting Member State exactly what the measures it envisages would entail, so it writes to the competent authorities asking for further particulars.

This means there is a period in which the requesting Member State does not know whether the Commission is satisfied with the information it already has or would like further facts.

This defect could be remedied by inserting a clause requiring the Commission to keep the requesting Member State up to date with the proceedings by notifying it once it has all the relevant information.

As pointed out already, the Commission does its best to prevent adoption of decisions by the tacit approval procedure, by laying the matter before the Council in the form of either a proposal for a decision or a communication setting out grounds for opposing a particular measure.

Nothing in Articles 27 and 30 require the Commission to put forward a communication where it objects to a measure; this is simply a practice that has become customary over the years.

However, it is a practice that suits the Member States, so it would be a good idea to incorporate it explicitly in the two Articles.

This means that for every request lodged by a Member State the Commission will present either a proposal or a communication to the Council setting out all the information the Council needs to consider the request.

In the Commission's view, that would make the current requirement that it circulate the request for information to all the other Member States superfluous. The rationale for this rule was the possibility of tacit approval, since if there is no Commission proposal the only information on which a Member State can judge whether it would like the case discussed by the Council is the request itself.

The new procedure

The procedure is triggered when a Member State lodges a request.

If the Commission feels it needs further information it notifies the requesting Member State in writing.

Once it has all the particulars it needs to appraise the request it notifies the requesting Member State.

It then has three months from the time it sends that notification to the requesting Member State to present to the Council either a proposal for a decision or, where it objects to a particular measure, a communication.

IMPLEMENTING MEASURES

One of the main objectives of the strategy launched by the Commission to improve the operation of the VAT system within the context of the internal market is to ensure more uniform application of existing rules.

This is only possible if the existing provisions of the Sixth Directive are implemented in the same way throughout the Community.

The current situation

The VAT Committee

The Sixth Directive constitutes the general framework of the common VAT system. It lays down the fundamental VAT rules but does not provide a mechanism whereby measures may be taken for the implementation of these rules.

The VAT Committee was set up to examine questions raised by the Commission or Member States and agree guidelines on how the provisions of the Sixth Directive must be applied. It only acts as a consultative body, however, and has not been given the legal powers permitting it to assist the Commission to take binding decisions.

Measures have been taken to improve the operation of the VAT Committee, resulting in improvements to the organisation of meetings and the system by which agreement on minutes and guidelines is reached and opening the way for Member States to publish the guidelines agreed by the committee.

None of these measures allow for the committee to reach definitive conclusions as to the application of the common VAT rules. The guidelines agreed still have no legal status and are not published at Community level. Member States are therefore not legally bound by these guidelines nor can they be relied upon before a court, be it a national court or the Court of Justice, leaving both traders and national administrations without any legal certainty.

To be able to ensure uniform application of existing VAT provisions, it is necessary to find a way of giving the guidelines agreed by the VAT Committee legal status.

Reform of the VAT Committee

In line with the procedure used in most areas of Community legislation, the Commission proposed in 1997 to convert the VAT Committee into a regulatory committee assisting the Commission in implementing existing provisions¹.

As far as VAT is concerned, several Member States believe that all legislative powers must remain with the Council. To confer implementing powers on the Commission is therefore not acceptable to these Member States.

While the proposed reform of the VAT Committee still offers the most suitable solution, it is not likely to take place in the short term. It continues, however, to be the long-term Commission goal.

In its communication to the European Convention on the institutional architecture², the Commission argued that it should have sole responsibility for implementation of Community law. Qualified majority voting should become the rules and unanimity should no longer be required for tax issues.

¹ Proposal for a Council Directive amending Directive 77/388/EEC on the common system of value added tax (the Value Added Tax Committee) (COM(97) 325 final, 25.6.1997).

² COM(2002) 728 final, 4.12.2002.

Changing the VAT Committee's status to make it a committee governed by the Comitology procedure would be wholly in line with the Commission's aims under the Convention, but those aims can only be achieved if the Treaty is amended. That takes time; the European Convention itself is only the first stage in the process.

Note that such a change would be quite compatible with the proposal to amend Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission³ sent to the Council in relation to matters coming under the co-decision procedure.

Proposed amendment

The Commission regrets that the proposal for a directive changing the status of the VAT Committee has made so little headway in the Council; indeed, it has not been discussed at all for years. Only a Treaty amendment, as mentioned above, is likely to revive this dossier.

To improve the unsatisfactory state of affairs in the short term, the Commission would like to introduce a temporary procedure allowing the Council to adopt VAT implementing measures. It has no intention of withdrawing its 1997 proposal, however.

Indeed, Article 202 of the EC Treaty envisages the Council as the legislative body conferring implementing powers on the Commission acting as the executive body. The Council may, however, in specific and substantiated cases, reserve the right to exercise directly the power to implement the rules it lays down.

The Commission believes that, in the case of VAT, there is a rationale for some powers to be reserved for the Council, for the time being at least. Raising taxes is part of the basic economic and budgetary strategy of Member States. Since value added tax constitutes a major source of revenue for Member States, the potential budgetary implications of measures taken in this area are of major concern.

Experience from proceedings in the VAT Committee shows that many discussions centre around the rules governing the place of supply of goods and services. If these rules are applied differently by Member States, this may lead to double taxation in cross-border trade. Addressing this problem, which is clearly essential if the internal market is to function properly, will however inevitably affect the right of individual Member States to tax certain transactions.

It is therefore proposed that the measures necessary for the implementation of existing provisions shall be adopted by the Council, acting unanimously on a proposal from the Commission. This procedure is comparable to the simplified procedure already provided for under Articles 27 and 30 of the Sixth Directive.

How will the proposed new procedure operate?

The implementing measures to be adopted by the Council under the proposed new procedure involve detailed technical questions of practical application. To facilitate the adoption of such measures by the Council without further delay, we should take advantage of the fact that these matters have already been examined by technical experts on the VAT Committee.

³ COM(2002) 719 final, 11.12.2002.

Questions raised by Member States or the Commission in the VAT Committee will serve as a tool for the Commission in identifying those areas where action is required. The unanimous VAT Committee guidelines should be examined to see whether they can be converted into binding legal instruments. This examination should involve the VAT Committee, which should in any event be consulted before the Commission submits any proposal to the Council.

Where the Committee feels that the outcome of its proceedings should be enshrined in a binding legal text to ensure harmonised interpretation, the Commission will present a proposal for a decision to the Council.

Since these will all be measures implementing provisions of the Sixth Directive, the decision could be adopted along the lines laid down by Articles 27 and 30 for derogations; in other words, because of the limited scope of the measures there is no need to consult Parliament or the European Economic and Social Committee.

Proposal for a

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Parliament,²

Having regard to the opinion of the European Economic and Social Committee,³

Whereas:

- (1) Articles 27 and 30 of Council Directive 77/388/EEC 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 assessment⁴ lay down procedures that may result in the tacit approval of derogations by the Council.
- (2) In the interests of transparency and legal certainty, it is preferable to ensure that every derogation authorised under Article 27 or Article 30 of Directive 77/388/EEC takes the form of an explicit decision adopted by the Council acting on a proposal from the Commission.
- (3) The possibility of tacit approval by the Council on the expiry of a given period should therefore be removed.
- (4) In order to ensure that a Member State which has submitted a request for derogation is not left in doubt as to what action the Commission plans to take in response, time-limits should be laid down within which the Commission must present to the Council either a proposal for authorisation or a communication setting out its objections.

¹ OJ C

² OJ C

³ OJ C

⁴ OJ L 145, 13.6.1977, p. 1. As last amended by Directive 2002/93/EC (OJ L 331, 7.12.2002, p. 27).

- (5) The procedure provided for in Articles 27 and 30 requires further amendment; in particular, the Commission should no longer be obliged to notify the other Member States of requests, since that is only justifiable in the context of tacit approval.
- (6) In order to enable Member States to follow more closely the processing of their requests, the Commission should be required, once it has all the information it considers necessary for appraising a request, to notify the requesting Member State accordingly.
- (7) In the absence of any mechanism for the adoption of binding measures to govern the implementation of Directive 77/388/EEC, the application of rules laid down in that Directive varies from one Member State to another.
- (8) In order to improve the functioning of the internal market, it is essential to ensure more uniform application of the current VAT system. The introduction of a procedure for the adoption of measures to ensure the correct implementation of existing rules would represent a major step forward in that respect.
- (9) Those measures should, in particular, address the problem of double taxation of cross-border transactions which can occur as the result of divergences between Member States in the application of the provisions of Directive 77/388/EEC governing the place of supply.
- (10) However, the scope of each implementing measure would remain limited since, albeit designed to clarify a provision laid down in Directive 77/388/EEC, it could never derogate from such a provision.
- (11) Although the scope of the implementing measures would be limited, it cannot be excluded that in some cases there might be a significant budgetary impact for one or more Member States.
- (12) The potentially significant impact of such measures on the budgets of Member States justifies the Council reserving the right to exercise powers for the implementation of Directive 77/388/EEC itself.
- (13) Given the restricted scope of the measures envisaged, measures implementing Directive 77/388/EEC should be adopted by the Council acting unanimously on a proposal from the Commission in accordance with a procedure similar to that laid down by the same Directive in respect of derogations.
- (14) Since, for those reasons, the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone and can therefore be better achieved by at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (15) Directive 77/388/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is amended as follows:

- (1) In Article 27, paragraphs 3 and 4 are replaced by the following:
 - “3. Once the Commission has all the information it considers necessary for appraisal of the request it shall notify the requesting Member State accordingly.
 4. Within three months of giving the notification referred to in paragraph 3 the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections.”
- (2) In Title XVII, the following Article 29a is inserted:

“Article 29a

Implementing measures

The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive.”

- (3) Article 30 is replaced by the following:

“Article 30

International agreements

1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to conclude with a third country or an international organisation an agreement which may contain derogations from this Directive.

A Member State wishing to conclude such an agreement shall bring the matter to the notice of the Commission and provide all the information necessary for it to be considered.
2. Once the Commission has all the information it considers necessary for appraisal of the request it shall notify the requesting Member State accordingly.
3. Within three months of giving the notification referred to in paragraph 2 the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections.”

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the Council
The President