



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.12.2005
COM(2005)635 final

Proposal for a

COUNCIL DECISION

**amending Decisions 98/161/EC, 2004/228/EC and 2004/295/EC as regards
the extension of measures to prevent evasion of value added tax in the waste sector**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

Pursuant to Article 27(1) of the Sixth Council Directive 77/388/EEC of 17th 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, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

By letters registered with the Secretariat-General of the Commission on 3 August 2005, 25 October 2005 and 26 September 2005: Spain; the Netherlands and Italy respectively have requested to be authorised to renew measures derogating from either Article 21, or Articles 2 and 28a(1) of Directive 77/388/EEC. In accordance with Article 27(2) of that Directive the Commission informed the other Member States by letters dated 6 September 2005, 26 October 2005 and 24 October 2005 of these requests. The Commission informed Spain, the Netherlands and Italy by letters dated respectively 7 September 2005, 27 October 2005 and 25 October 2005 that it had all the information it considered necessary for appraisal of the request.

- **General context**

The Member States concerned have all experienced problems in the past of VAT losses in the waste and recycling sector. The most common abuse consists of the non payment to the tax authorities of invoiced VAT by small businesses involved in the waste trade who subsequently disappear and become untraceable. The recipient is left with an invoice which is valid for tax deduction whilst at the same time the output tax remains unpaid. These problems led to separate derogations based on the needs and approaches of the Member States concerned.

Thus the Kingdom of Spain and Italy applied for, and received, authority to apply special measures derogating from Article 21 until at the latest 31 December 2005, whilst the Netherlands received an authority to apply special measures derogating from Articles 2 and 28a(1) to the same date. In the event of the coming into force of a special scheme for the application of VAT to the waste sector amending the Sixth VAT Directive, the extant Decisions provide for the termination of the authority.

Believing the measures concerned to be effective and that there is a continuing need to retain them, the Member States involved have now requested an extension to their respective authorities. Although a reverse charge in the waste sector is proposed as an option within the 6th Directive as part of Commission proposal COM(2005)89 to rationalise the number of Article 27 derogations, it is by no means certain that agreement will be reached on the dossier before 31 December 2005. An extension is therefore necessary to ensure the continuity of the legal base for the existing measures.

As a general rule, Article 21(1)(a) of Directive 77/388/EEC, stipulates that the taxable person supplying goods or services is normally liable to pay value added tax. Both Spain and Italy, however, would like to continue to apply a reverse charge procedure

which derogates from this by making the taxable person to whom the supplies of goods or services are made, liable for the payment of VAT. In the circumstances of the waste and recycling market this will have the effect of simplifying the application of the tax and of safeguarding revenue, which will be paid by the person who is also deducting the VAT charged, rather than by a supplier with a tendency to disappear.

Although supplies in the sector concerned would normally be taxable at the standard rate, the Netherlands wishes to maintain their derogation from Article 2 and 28a(1) which authorises the application of an exemption, subject to some additional criteria, to supplies and intra-community acquisitions of used and waste materials.

- **Existing provisions in the area of the proposal**

France and Greece enjoy similar derogations to the Netherlands in that they allow for the application of an exemption from VAT in certain circumstances to operations involving fresh industrial waste and recuperable material.

- **Consistency with other policies and objectives of the Union**

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Not relevant.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposed Decision aims to maintain derogations which simplify the procedure for charging the tax and which combat VAT evasion or avoidance.

Given the narrow scope of application, and the fact that the proposed Decision simply renews existing derogations, the impact will in any case be limited.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

Decision renewing authorisations granted until 31 December 2005 to the Netherlands to apply an exemption, and for Italy and Spain to apply a reverse charge, to supplies made in the waste sector.

- **Legal basis**

Article 27(1) of the Sixth 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 assessment.

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s):

This Decision concerns authorisations granted to a number of Member States on their own request and do not constitute any obligations.

Given the limited scope of the derogation, the special measures are proportionate to the aim pursued.

- **Choice of instruments**

Proposed instruments: other.

Other means would not be adequate for the following reason(s):

Under Article 27 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes, derogation from the common VAT rules is only possible with the authorisation of the Council acting unanimously on a proposal from the Commission. A Council Decision is the only suitable instrument since it can be addressed to individual member states.

4) **BUDGETARY IMPLICATION**

The proposal has no implication for the Community budget.

5) **ADDITIONAL INFORMATION**

- **Review/revision/sunset clause**

The proposal includes a sunset clause.

- **Detailed explanation of the proposal**

The proposal only changes the expiry date for each of the identified Decisions. Because of the wording of the existing derogations, this will have the effect of authorising the derogation in each case until the earlier of 31 December 2009 or the date of entry into force of the so called "rationalisation Directive" (currently proposal COM(2005)89) containing a special scheme for the application of VAT to the waste sector. As proposed, this will allow all Member States to apply a reverse charge to certain supplies, including waste, after consultation with the VAT Committee (established under Article 29 of Directive 77/388/EEC.) The special scheme referred to will therefore essentially be an option within the 6th directive.

Proposal for a

COUNCIL DECISION

**amending Decisions 98/161/EC, 2004/228/EC and 2004/295/EC as regards
the extension of measures to prevent evasion of value added tax in the waste sector**

(Only the Dutch, Spanish and Italian versions are authentic)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relation to turnover taxes – Common system of valued added tax: uniform basis of assessment¹, and in particular Article 27 thereof,

Having regard to the proposal from the Commission²,

Whereas:

- (1) Under Article 27(1) of Directive 77/388/EEC, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from that Directive in order to simplify the procedure for charging the valued added tax (VAT) or to prevent certain types of tax evasion or avoidance.
- (2) By letter registered by the Secretariat-General of the Commission on 25 October 2005 the Netherlands requested an extension of Council Decision 98/161/EC of 16 February 1998 authorising the Kingdom of the Netherlands to apply a measure derogating from Articles 2 and 28a(1) of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes³.
- (3) By letter registered by the Secretariat-General of the Commission on 3 August 2005 Spain requested an extension of Council Decision 2004/228/EC of 26 February 2004 authorising Spain to apply a measure derogating from Article 21 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes⁴.

¹ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2004/66/EC (OJ L 168, 1.5.2004, p. 35).

² OJ C [...], [...], p. [...].

³ OJ L 53, 24.2.1998, p. 19. Decision as last amended by Decision 2004/514/EC (OJ L 219, 19.6.2004, p. 11).

⁴ OJ L 70, 9.3.2004, p. 37.

- (4) By letter registered by the Secretariat-General of the Commission on 26 September 2005 Italy requested an extension of Council Decision 2004/295/EC of 22 March 2004 authorising Italy to apply a measure derogating from Article 21 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes⁵.
- (5) In accordance with Article 27(2) of Directive 77/388/EEC, the Commission informed the other Member States of the mentioned requests. In letters dated 27 October 2005; 7 September 2005; and 25 October 2005, the Commission respectively notified the Netherlands, Spain and Italy that it had all the information it considered necessary for the appraisal of their individual requests.
- (6) Decision 98/161/EC authorised the Netherlands to apply, until 31 December 1999, certain measures to prevent evasion connected with the supply and intra-community acquisition of used and waste materials. Decision 2000/435/EC⁶ extended the expiry date of Decision 98/161/EC until 31 December 2003. It was subsequently followed by Decision 2004/514/EC⁷ which further extended the authorisation given under Decision 98/161/EC until the earlier of the date of entry into force of a special scheme for the application of VAT to the recycled waste sector or 31 December 2005.
- (7) Decision 2004/228/EC authorised Spain to apply a measure to prevent evasion of VAT in the waste recycling sector. The Decision expires on the earlier of the date of entry into force of a special scheme for the application of VAT to the recycled waste sector or 31 December 2005.
- (8) Decision 2004/295/EC authorised Italy to apply a measure to prevent evasion of VAT in the waste recycling sector. The Decision expires on the earlier of the date of entry into force of a special scheme for the application of VAT to the recycled waste sector or 31 December 2005.
- (9) The measures are proportionate to the objectives pursued since they are intended to apply to specific supplies which pose considerable risks of tax evasion.
- (10) The matters of law and of fact which justified the application of the special measures in question have not been changed and still pertain. However, on 16 March 2005 the Commission submitted a proposal for a Council Directive amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion and avoidance, and repealing certain Decisions granting derogations⁸. The proposed Directive would, if adopted, empower Member States to designate the recipient of certain goods and services in the waste sector as the person liable to pay the tax.
- (11) Consequently, it is necessary to extend the application of Decisions 98/161/EC, 2004/228/EC and 2004/295/EC, until 31 December 2009 or until the date of entry into force of a special scheme for the application of VAT to the recycled waste sector amending Directive 77/388/EEC, whichever is the earlier.

⁵ OJ L 97, 1.4.2004, p. 63.

⁶ OJ L 172, 12.7.2000, p. 24

⁷ OJ L 219, 19.6.2004, p. 11.

⁸ COM(2005) 89.

(12) The extension of the derogation has no adverse impact on the Communities' own resources accruing from VAT, nor does it have any effect on the amount of VAT charged at the final stage of consumption,

HAS ADOPTED THIS DECISION:

Article 1

In Article 1 of Decision 98/161/EC, the date "31 December 2005" is replaced by the date "31 December 2009"

Article 2

In Article 3 of Decision 2004/228/EC, the date "31 December 2005" is replaced by the date "31 December 2009"

Article 3

In Article 3 of Decision 2004/295/EC, the date "31 December 2005" is replaced by the date "31 December 2009"

Article 4

This Decision is addressed to the Kingdom of the Netherlands, the Kingdom of Spain and the Italian Republic.

Done at Brussels,

*For the Council
The President*