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EUROPEAN COMMISSION

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2010/0100 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

of [...]

authorising Germany, Italy and Austria to introduce a special measure derogating from Article 193 of Directive 2006/112/EC and amending Decision 2007/250/EC to extend the period of validity of the authorisation granted to the United Kingdom

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

Pursuant to Article 395(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereafter: 'VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures to derogate from the provisions of that Directive, in order to simplify the procedure for collecting value added tax (VAT) or to prevent certain forms of tax evasion or avoidance.

By letters registered with the Secretariat-General of the Commission on, respectively, 3 August 2007, 23 December 2009, and 17 February 2010, Italy, Germany and Austria requested authorisation to apply a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 11 January 2010 of the request made by Germany, and by letters dated 9 March 2010 of the requests made by Italy and Austria. By letter dated 12 January 2010 the Commission notified Germany, and by letters dated 11 March 2010 Italy and Austria, that it had all the information necessary to consider the requests.

By letter registered with the Secretariat-General of the Commission on 10 February 2010, the United Kingdom requested authorisation to continue to apply a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 9 March 2010 of the request made by the United Kingdom. By letter dated 11 March 2010, the Commission notified the United Kingdom that it had all the information necessary to consider the request.

General context

As a general rule, the person liable for the payment of value added tax to the tax authorities under Article 193 of the VAT Directive, is the taxable person supplying the goods. The purpose of the derogation requested by Germany, Italy and Austria is to place that liability on the taxable person to whom the supplies are made, but only under certain conditions and exclusively in the case of particular products, notably mobile telephones and integrated circuit devices, but also some related products.

Within these trade sectors, a number of businesses engage in tax evasion by not paying VAT to the tax authorities after selling the products. However, their customers, insofar as they are taxable persons with a right of deduction, being in receipt of a valid invoice, remain entitled to a tax deduction. In the most aggressive forms of this tax evasion, the same goods are, via a 'carousel scheme', supplied several times without payment of the VAT to the tax authorities. By designating in those cases the person to whom the goods are supplied as the person liable for the VAT, the derogation would remove the opportunity to engage in that form of tax evasion. However, it would not affect the amount of VAT due.

In September 2009, the Commission adopted a proposal (COM(2009) 511) to amend the VAT Directive to allow all interested Member States to apply such a measure on a temporary basis to certain goods and services without the need to apply for a derogation under article 395 of that Directive. Those goods were mobile telephones, integrated circuit devices, perfumes and precious metals, and the services were greenhouse gas emission allowances. The ECOFIN

Council agreed on 2 December 2009 only on that part of the proposal which relates to greenhouse gas emission allowances, while the other part of the proposal will require further consideration. Pending agreement on such a proposal, the Commission committed itself to put forward a proposal for any founded request for a derogation for the application of the reverse charge mechanism to mobile phones and electronic circuit devices. Germany, Italy and Austria have made such requests. The requests by Italy and Austria include several items which either directly relate to or are of a comparable nature to mobile telephones and integrated circuit devices; for these items the same logic applies.

Austria stated that due to the scale, complexity and sophisticated nature of the carousel fraud in Austria, organisational measures alone would not be sufficient to counter the fraud. Similarly, Germany also considers that the organisational measures they have implemented are insufficient to counter the fraud, and regard the application of the reverse charge mechanism to sales of those products most affected to be an important instrument to quickly and effectively counter the threat of VAT fraud. Italy estimates that the losses due to this type of fraud have been steadily rising for some years now.

Austria and Germany have requested the application of a transaction threshold of EUR 5.000 in order to reduce the burden on small traders.

In April 2007 the United Kingdom was granted a derogation to apply such a measure to supplies of mobile telephones and integrated circuit devices (Council Decision 2007/250/EC). This measure was limited in time, and had an expiry date of 30 April 2009. This expiry date was subsequently amended to 30 April 2011 by Council Decision 2009/439/EC. The United Kingdom has requested that this expiry date accords with the expiry date of the measures proposed for the Germany, Italy and Austria.

Existing provisions in the area of the proposal

A similar derogation has been granted to the United Kingdom, and the Commission, in its proposal COM(2009) 511, proposed to amend the VAT Directive to allow all interested Member States to apply such a measure for a limited time and to limited categories of goods.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

Not applicable.

Impact assessment

The Decision proposal aims at combating VAT evasion and will therefore have a potential positive impact on VAT receipts.

Nevertheless, the measures will have an impact on the business insofar as the arrangements will be different from those applying for normal supplies of goods. This will introduce a complexity in accounting for businesses which do not deal exclusively in the goods which are the subject of the derogation. The control mechanisms envisaged will also impose additional obligations on the business sector concerned. It is therefore clear that this derogation fails the simplification test provided by Article 395, and only falls within the scope of preventing evasion.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

Authorisation for Germany, Italy and Austria to apply a measure derogating from Article 193 of the VAT Directive as regards the use of a reverse charge mechanism for domestic supplies of certain electronic devices and their components, and for the United Kingdom to continue to apply such a measure.

4. BUDGETARY IMPLICATION

The proposal has no negative impact on the EU budget.

5. OPTIONAL ELEMENTS

The proposal includes a sunset clause.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[1], and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By letters registered with the Secretariat-General of the Commission on 3 August 2007, 23 December 2009 and 17 February 2010 respectively Italy, Germany and Austria requested authorisation to introduce a special measure derogating from Article 193 of Directive 2006/112/EC as regards the person liable for payment of value added tax (hereinafter "VAT"). By letter registered with the Secretariat-General of the Commission on 10 February 2010, the United Kingdom requested to extend the period of validity of the authorisation provided for by Council Decision 2007/250/EC of 16 April 2007 authorising the United Kingdom to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax[2].

(2) The Commission informed the other Member States by letter dated 11 January 2010 of the request by Germany and by letter dated 9 March 2010 of the requests by Italy, Austria and the United Kingdom. By letter dated 12 January 2010 the Commission informed Germany and by letter dated 11 March 2010 Italy, Austria and the United Kingdom, that it had all the information it considered necessary for the appraisal of the request.

(3) The person liable for the payment of VAT under Article 193 of Directive 2006/112/EC is the taxable person supplying the goods. The purpose of the derogations requested by Germany, Italy and Austria is to place that liability on the

1 OJ L 347, 11.12.2006, p. 1.
2 OJ L 109, 26.4.2007, p. 42.

taxable person to whom the supplies are made, but only under certain conditions and only in the case of particular products, notably mobile telephones, integrated circuit devices and certain related goods.

(4) A significant number of traders in particular products, notably mobile telephones, integrated circuit devices and certain related goods, evade paying VAT to the tax authorities after selling their products. Their customers, however, are entitled to a tax deduction as they are in possession of a valid invoice. In the most aggressive cases of such tax evasion the same goods are, via a 'carousel' scheme, supplied several times without payment of the VAT to the tax authorities. By designating the person to whom the goods are supplied as the person liable for the VAT in such cases, the derogation would eliminate the opportunity to engage in that form of tax evasion. It would not affect the amount of VAT due.

(5) For the purposes of ensuring the effective operation of the derogation and preventing the tax evasion from being shifted to other products or towards the retail level, Germany, Italy and Austria should introduce appropriate control and reporting obligations. The Commission should be informed of the specific measures adopted in view of monitoring the operation of the derogation, as well as of its overall evaluation.

(6) The measure is proportionate to the objectives pursued since it is not intended to apply generally, but only to specific groups of products, where there is a high risk of tax evasion and where the scale of the tax evasion has resulted in considerable tax losses.

(7) The authorisation should be valid only for a short period, because it cannot be established with certainty that the objectives of the measure will be achieved nor can the impact of the measure on the functioning of the VAT systems within those Member States who apply it, or in other Member States, be gauged in advance.

(8) The United Kingdom should be allowed to continue to apply its existing special measure until the date of expiry of the authorisation granted to Germany, Italy and Austria.

(9) The derogation has no negative impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS IMPLEMENTING DECISION:

Article 1

1. By way of derogation from Article 193 of Directive 2006/112/EC, Germany is authorised to designate the taxable person to whom supplies of the following goods are made as the person liable to pay the VAT:

(a) mobile telephones, being devices made or adapted for use in connection with a licensed network and operated on specified frequencies, whether or not they have any other use;

(b) integrated circuit devices such as microprocessors and central processing units in a state prior to integration into end user products.

2. The derogation shall apply in respect of supplies of goods for which the taxable amount is equal to or higher than EUR 5 000.

Article 2

By way of derogation from Article 193 of Directive 2006/112/EC, Italy is authorised to designate the taxable person to whom supplies of the following goods are made as the person liable to pay the VAT:

(a) mobile telephones, being devices made or adapted for use in connection with a licensed network and operated on specified frequencies, whether or not they have any other use, their components and accessories;

(b) personal computers, their components and accessories.

Article 3

1. By way of derogation from Article 193 of Directive 2006/112/EC, Austria is authorised to designate the taxable person to whom supplies of the following goods are made as the person liable to pay the value added tax (hereinafter "VAT"):

(a) mobile telephones, being devices made or adapted for use in connection with a licensed network and operated on specified frequencies, whether or not they have any other use;

(b) integrated circuit devices such as microprocessors and central processing units in a state prior to integration into end user products;

(c) electronic storage media and PC cards for use with computers or with any of the devices referred to in points (a) and (d);

(d) electronic devices for the storage, processing or recording of electronic data as follows:

(i) handheld devices for recording or playing of sound and/or images;

(ii) handheld digital audio players;

(iii) handheld digital video players and portable DVD players;

(iv) wireless devices providing email, telephone, text messaging, web browsing and other wireless data access, and handheld computers;

(v) handheld or portable positional determination devices for satellite navigation systems;

(vi) games consoles with a screen, or of a kind used with a television or computer.

2. The derogation shall apply in respect of supplies of goods for which the taxable amount is equal to or higher than EUR 5 000.

Article 4

The derogation provided for in Articles 1, 2 and 3 is subject to Germany, Italy and Austria introducing appropriate and effective control and reporting obligations on taxable persons who supply goods to which the reverse charge applies in accordance with this Decision.

Article 5

Germany, Italy and Austria shall inform the Commission where they have adopted the measures referred to in Articles 1 to 4 accordingly and shall, by 31 December 2013, submit a report to the Commission on the overall evaluation of the operation of the measures concerned, in particular as regards the effectiveness of the measures and any evidence of shifting tax evasion to other products or to the retail level.

Article 6

Article 4 of Decision 2007/250/EC is replaced by the following:

"Article 4

This Decision shall expire on 31 December 2014."

Article 7

This decision and Decision 2007/250/EC shall expire on the date of entry into force of the Union rules allowing all Member States to adopt such measures, but on 31 December 2014 at the latest.

Article 8

This implementing Decision is addressed to the Federal Republic of Germany, the Italian Republic, the Republic of Austria, and the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels,

For the Council
The President