

COMMISSION OF THE EUROPEAN COMMUNITIES

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**PROPOSAL FOR
A COUNCIL DIRECTIVE
ON THE HARMONIZATION OF THE LAWS
OF THE MEMBER STATES RELATING TO TURNOVER TAXES**

**ABOLITION OF CERTAIN DEROGATIONS PROVIDED FOR
IN ARTICLE 28(3) OF DIRECTIVE 77/388/EEC
AND IN THE SECOND SUBPARAGRAPH OF ARTICLE 1(1)
OF DIRECTIVE 89/465/EEC**

(presented by the Commission)

Explanatory memorandum

A. Introduction

The common system of value added tax should in principle include a uniform basis of assessment. This objective was not entirely achieved by the Sixth Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes,¹ Article 28(3) of which authorizes Member States to apply, for a transitional period, certain derogations to the normal arrangements of the common system of value added tax.

These derogations were established to give the Member States and the economic sectors concerned time to make the necessary adjustments.

The Sixth Directive also lays down that the Council, acting on the basis of a report from the Commission, must review the situation regarding the derogations referred to in Article 28(3) and decide whether some or all of them should be abolished.

A first report was presented to the Council on 17 January 1983. Acting on a proposal from the Commission, the Council decided in its Directive of 18 July 1989² that some of the derogations should be abolished. The number of derogations listed in Annex E was reduced from 13 to 4 (two of them never having been used); the list in Annex F was reduced from 27 to 14 derogations.

1 OJ No L 145, 13.6.1977, p. 1.

2 OJ No L 226, 3.8.1989, p. 21.

B. Purpose of the proposal

Under Article 3 of the Eighteenth Directive (89/465/EEC), the Council provided for reviewing the remaining derogations resulting from

- Article 28(3) of the Sixth Directive of 17 May 1977, and
- the second subparagraph of Article 1(1) of the Eighteenth Directive of 18 July 1989,

and of deciding, on the basis of a proposal from the Commission, whether these derogations should be abolished, having regard to any distortions of competition which have resulted from their having been applied or which might arise from measures to complete the internal market.

The Commission has sent a report to the Council in which it examines the derogations in respect of which the Commission has undertaken or undertakes to present specific proposals, and the consequences resulting from application of the other derogations.

On the basis of the report, the Commission has drawn up this proposal for a Directive, the main purpose of which is to reduce significantly the number of derogations not withdrawn by the Eighteenth Directive, and of abolishing those which were renewed by that same Directive.

C. Analysis of the proposal

The proposal contains eight articles, some of which require comment.

Article 1

This Article provides for the abolition of most of the derogations provided for in Article 28(3) other than those for which the Commission has undertaken or undertakes to formulate specific proposals, i.e. derogations

E15, F27 and
Art. 28(3)(g) : travel agents;
F10 : transactions of hospitals;
F17 : passenger transport
F26 : transactions concerning gold;

Annex E transactions

Paragraph 1 lays down that three derogations referred to in Annex E relating to transactions which are normally exempted but which some Member States continue to subject to VAT shall be abolished from 1 January 1993. These are the following:

E2 : services supplied by dental technicians, and dental prostheses supplied by dentists and dental technicians;
E7 : activities of public radio and television bodies other than those of a commercial nature;
E11 : supplies of buildings not newly constructed, in so far as they are made by taxable persons who were entitled to deduction of input tax on the building concerned.

- There do not appear to have been any significant distortions of competition resulting from the maintenance of derogations E2 and E11. However, these derogations cannot be made permanent. The Commission is asking that they be abolished in order to complete the common system of value added tax and make it as neutral as possible for business.

- Derogation E7 allows some countries to tax non-commercial activities of public radio and television bodies which are normally exempt under Article 13A(1)(q) of the Sixth Directive.

Abolition of this derogation would therefore confirm the distinction made between taxable commercial activities and exempted non-commercial activities. This situation would be unsatisfactory.

In the first place, the Commission notes that services supplied to television viewers by a public channel are basically no different to those provided by a private one. At the same time, the public and private channels are seeking to attract an ever wider audience and thus compete vigorously with each other.

Moreover, new technologies (cable, satellite television, etc.) help to break down the frontiers between States and encourage the emergence of transfrontier television; a national public channel is thus able to compete directly with foreign channels (public or private).

In addition, current developments on the European audiovisual scene are also characterized by the internationalization of production and the market.

Finally, exemption has the effect of maintaining distortions of competition to the detriment of public channels, much of whose revenue comes from licence fees. Unlike their competitors in the private sector, public channels cannot fully deduct the tax charged on goods and services acquired for the purposes of their activity.

The only means of ensuring that all broadcasting bodies are treated equally is to tax non-commercial activities.

In addition, taxation would have a very limited impact on the level of such fees since Member States could apply a reduced rate. And since the level of the fee is fixed by the public authorities, Member States may choose, if they wish, not to pass on the tax in the fee paid by users of the public service.

Consequently, the Commission proposes that the derogation be abolished and that the Sixth Directive be amended to make all the transactions of the said bodies taxable in all Member States.

However, account should also be taken of the particular social and cultural concerns of each Member State regarding public service radio and television. Member States might wish to see such concerns prevail over economic considerations linked to competition between public and private television and radio broadcasters.

It is therefore planned that those Member States which currently exempt the non-commercial transactions of public radio and television bodies may continue to do so after 1 January 1993.

At all events, the VAT status of such bodies will be reviewed by the Commission, and the Council will have to take a decision about this derogation on the basis of a Commission proposal which will be put forward by 31 December 1996.

Annex F transactions

The purpose of paragraph 2 is to abolish from 1 January 1993 all Annex F derogations which currently authorize some Member States to continue exempting transactions which should normally be subject to VAT.

These transactions are as follows:

- F1 admission to sporting events;
- F2 services supplied by lawyers and other members of the liberal professions, other than the medical and paramedical professions, in so far as these are not services specified in Annex B to the Second Council Directive of 11 April 1967;
- F5 telecommunications services supplied by public postal services and supplies of goods incidental thereto;
- F6 services supplied by undertakers and cremation services, together with goods related thereto;
- F7 transactions carried out by blind persons or workshops for the blind provided these exemptions do not give rise to significant distortions of competition;
- F8 the supply of goods and services to official bodies responsible for the construction, setting out and maintenance of cemeteries, graves and monuments commemorating war dead;
- F12 the supply of water by public authorities;

F23 the supply, modification, repair, maintenance, chartering and hiring of aircraft, including equipment incorporated or used therein, used by State institutions;

F25 the supply, modification, repair, maintenance, chartering and hiring of warships.

- Exemption of the transactions referred to at points F1, F6, F7 and F8 do not appear to have led to competition being distorted between Member States, nor does their continuation seem any more likely to create such distortion in the single market. However, these derogations can be applied only by those Member States which, at the time of the entry into force of the Treaty or their accession, already exempted the transactions concerned. Thus, the Commission proposes that the derogation be abolished and, at the same time, that a right of option be granted to each Member State (cf. comments concerning Article 3).
- As regards the supply of services by lawyers and other members of the liberal professions, most of which are covered by Article 9(2)(e) of the Sixth Directive, it would appear that the objective of neutrality with regard to VAT can be achieved only if the transactions in question are made subject to uniform tax arrangements in each Member State. The Commission thus proposes that these derogations be abolished so that any distortion of competition can be avoided in future.
- In the case of services supplied by authors, artists and performers, the Commission considers it appropriate to await the final adoption of the special arrangements for small and medium-sized enterprises before taking steps to abolish the derogation, and so proposes that it be maintained.
- Derogation F5 allows for the exemption of telecommunications services supplied by the public postal services in certain Member States.

The main consequences of this exemption are that it strengthens the position of the public body as compared to any competitors it might have and distorts competition between the Member States. Competition is distorted all the more because it is in fact very keen in this strongly expanding sector.

The decision by some Member States to end the derogation they applied and the factors outlined above fully justify abandoning this derogation, thereby making all services and goods related thereto taxable whatever the status of the supplier.

- Abolition of derogations F7 and F12 is recommended by the Commission because maintaining them would create a real distortion of competition between those taxable persons who are exempt and those persons or bodies not covered by the derogation who carry on the same activity or carry out similar transactions.

- Derogations F23 and F25 allow certain transactions relating to aircraft used by the institutions of a Member State or to warships to be exempted. The Commission wants the transactions in question to be taxable so that the businesses concerned can exercise their right to deduct and the Member States no longer need to calculate the compensation resulting from taking into account the transactions of Annex F, as they are required to do under the third indent of Article 2(2) of Council Regulation 1553/89.

Other derogations under Article 28(3)

Paragraph 3 abolishes, with effect from 1 January 1993, the derogations laid down by Article 28(3)(c), (e) and (f).

- Article 28(3)(c):

This provision has the effect of maintaining the right of option which may be offered by a Member State to a taxable person and which, when it is exercised, has the effect of making transactions taxable even though they are exempted by the Member States by way of an Annex F derogation, or of exempting them even though they are taxable for a transitional period (Annex E derogations).

Subject to the application of Article 28(3)(c) by the Member States to the transactions referred to at points E15, F2, F10, F16, F17, F26 and F27, it should be possible to abolish this derogation given that abolition of all the other derogations of Annexes E and F is proposed.

- Article 28(3)(e):

This provision first authorizes derogation from Articles 5(4)(c) and 6(4) of the Sixth Directive. Application of these derogations has the effect of treating an intermediary acting in his own name as merely a supplier of services and not as a taxable person who himself carries out purchase/resale transactions where he is acting under the terms of a contract under which commission is payable on purchase or sale (Article 5(4)(c)), or who personally supplies services to a customer (Article 6(4)).

Maintaining this derogation in the final arrangements would be liable to distort competition each time the purchase of a commission agent established in the country of final consumption enabled a non-taxable person to buy in a low-rate Member State goods which, if the commission agent were considered to be a buyer/re-seller, would be subject to the higher rate of the country of consumption. The Commission therefore proposes its abolition.

Article 28(3)(e) also permits derogation from Article 11A(3)(c) of the Sixth Directive. Consequently, the Member States have been able to include in the taxable amount for VAT repayments of expenses paid out by a taxable person in the name and for the account of his purchaser or customer. There is no reason to maintain this derogation, and its abolition is therefore also proposed.

- Article 28(3)(f):

Under the terms of this derogation relating to certain supplies of buildings and building land, the taxable amount consists of the difference between the selling price and the purchase price.

Most Member States do not apply this derogation. As the purchase price of the goods in question is a component of the cost price for enterprises buying them, enterprises in Member States which do not apply the derogation bear a heavier burden than those in other Member States.

Article 2

The second subparagraph of Article 1(1) of the Eighteenth VAT Directive (89/465/EEC) authorizes the United Kingdom to continue taxing the transactions referred to in Article 13A(1)(m) and (n) of the Sixth Directive, which would normally be exempt. Article 2 of the proposal for a Directive sets out to abolish this derogation.

This is because allowing a Member State to tax an activity exempted under Article 13A(1) on the basis of Article 13A(2)(a) goes against the basic rules and objectives of the Sixth Directive by rendering Article 13A devoid of any meaning.

Each of the provisions of Article 13 is to be interpreted restrictively and a Member State may not take advantage of Article 13A(2)(a) to tax transactions expressly exempted by Article 13A(1)(m) and (n).

The Commission also notes that conditions which might be applicable to bodies other than the public bodies referred to in Article 13A(2) may apply solely to such bodies and cannot be used to achieve an objective contrary to that envisaged by the Sixth Directive, i.e. exemption.

Finally, the first subparagraph of Article 1(1) of the Eighteenth Directive clearly abolishes the derogations referred to in points 4 and 5 of Annex E.

For these reasons, the Commission requests that the derogation introduced by the Eighteenth Directive be abolished.

Article 3

The main effect of Article 1 is to delete from Annex F the transactions referred to in points 1, 6, 7 and 8, i.e.:

- admission to sporting events;
- services supplied by undertakers and cremation services, together with goods related thereto;
- transactions carried out by blind persons or workshops for the blind;
- the supply of goods and services to official bodies responsible for the construction, setting out and maintenance of cemeteries, graves and monuments commemorating war dead.

The Commission observes that the exemption of these transactions by some Member States does not result in competition being distorted between the Member States, and it does not therefore intend to deprive the Member States concerned of the ability to exempt these transactions.

It also notes that some Member States do not at present enjoy the benefits of any derogation. Moreover, Member States which do apply derogations may now wish to exempt transactions which were not exempt at the time when they signed or acceded to the Treaty.

For all of these reasons, the Commission proposes that all Member States be allowed to exempt the above-mentioned transactions. To this end, Article 3 of the proposal for a Directive provides for the granting of a right of option in respect of these transactions, which it is proposed should be referred to specifically in Article 13C of the Sixth Directive.

Articles 4 and 5 and 6

These Articles concern the activities of public radio and television bodies other than those of a commercial nature, which are in principle exempt but continue to be taxed in some Member States on the basis of point 7 of Annex E.

In Article 1, the Commission proposes that derogation E7 be abolished. However, merely abolishing the derogation would have the effect of confirming the distinction established by the Sixth Directive between commercial and non-commercial transactions.

For the reasons indicated above, the Commission also proposes that the Sixth Directive be amended so as to make all transactions carried out by the said bodies taxable:

- Article 4 withdraws the exemption of non-commercial transactions by deleting Article 13A(q) of the Sixth Directive;
- Article 5, which amends Annex D to the Sixth Directive, widens the scope of taxation to cover all the activities of radio and television bodies.

Yet in order to take account of the impact which the immediate taxation of non-commercial transactions might have the Commission proposes that the Member States should be able to continue exempting the said transactions (see Article 6).

Proposal for a Council Directive

on the harmonization of the laws of the Member States
relating to turnover taxes - Abolition of certain
derogations provided for in Article 28(3) of
Directive 77/388/EEC and in the second subparagraph
of Article 1(1) of Directive 89/465/EEC

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Article 99 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 Economic and Social Committee,³

Whereas Article 28(3) of the Sixth Council Directive 77/388/EEC of
17 May 1977 on the harmonization of the laws of the Member States relating
to turnover taxes - Common system of value added tax: uniform basis of
assessment,⁴ allows the Member States to apply measures derogating from the
normal rules of the common system of value added tax during a transitional
period; whereas that period was originally fixed at five years; whereas the
Council undertook to determine, on a proposal from the

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4 OJ No L 145, 13.6.1977, p. 1.

Commission, before the expiry of that period, whether any or all of these derogations should be abolished;

Whereas Directive 89/465/EEC⁵ abolished some of the derogations laid down in Article 28(3) of Directive 77/388/EEC and, under the second subparagraph of Article 1(1), renewed certain others;

Whereas many of the derogations maintained give rise, under the Communities' own resources system, to difficulties in calculating the compensation provided for in Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax;⁶ whereas, in order to ensure that the system operates more efficiently, the remaining derogations should be abolished;

Whereas these derogations prejudice the harmonization of national laws on turnover taxes and may, in the majority of cases, lead to substantial distortion of competition between the Member States;

Whereas some Member States did not, in their act of accession, request the option of derogating from the normal arrangements of the common system of value added tax so that the maintenance of the remaining derogations would not guarantee equality of treatment with other Member States;

5 OJ No 226, 3.8.1989, p. 21.

6 OJ No L 155, 7.6.1989, p. 9.

Whereas, in the case of the derogations for which abolition is recommended, such abolition should occur not later than 1 January 1993,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is hereby amended as follows:

1. The transactions referred to in points 2, 7 and 11 of Annex E shall be deleted with effect from 1 January 1993;
2. The transactions referred to in points 1, 5 to 8, 12, 23 and 25 of Annex F shall be deleted with effect from 1 January 1993; the derogation relating to services supplied by lawyers and other members of the liberal professions (Annex F, point 2) shall be abolished with effect from 1 January 1993;
3. The derogations provided for in Article 28(3)(c), (e) and (f) shall also be abolished with effect from 1 January 1993.

Article 2

The derogation referred to in the second subparagraph of Article 1(1) of the Eighteenth Directive, 89/465/EEC, shall be abolished with effect from 1 January 1993.

Article 3

With effect from 1 January 1993 the following shall be added at the end of Article 13C of Directive 77/388/EEC:

"Member States shall be free to opt for exemption of the following transactions:

- (1) admission to all or some sporting events;
- (2) services supplied by undertakers and cremation services, together with goods related thereto;
- (3) transactions carried out by blind persons or workshops for the blind provided these exemptions do not give rise to significant distortion of competition;
- (4) the supply of goods and services to official bodies responsible for the construction, setting out and maintenance of cemeteries, graves and monuments commemorating war dead."

Article 4

Article 13A(q) of Directive 77/388/EEC shall be deleted with effect from 1 January 1993.

Article 5

Point 13 of Annex D to Directive 77/388/EEC shall be amended as follows with effect from 1 January 1993:

"13. The activities of radio and television bodies".

Article 6

The following shall be added to Article 28 of Directive 77/388/EEC:

"3a. The Member States which at present exempt the non-commercial transactions of public radio and television bodies may maintain that exemption."

Article 7

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than on the dates set out in Articles 1 to 5.

They shall forthwith inform the Commission thereof.

2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be laid down by Member States.

Article 8

This Directive is addressed to the Member States.

Done at Brussels, For the Council

The President

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