



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.06.1997
COM(97) 325 final

97/0186 (CNS)

Proposal for a

COUNCIL DIRECTIVE

amending Directive 77/388/EEC
on the common system of Value Added Tax
(the Value Added Tax Committee)

(presented by the Commission)

EXPLANATORY MEMORANDUM

The purpose of this proposal is to introduce measures which will ensure the Community-wide uniform application of the common system of value added tax.

With the adoption of the Sixth VAT Directive¹, as amended by the transitional arrangements, an important step was taken towards the establishment of a common system of VAT.

The present transitional system of VAT has contributed to the completion of a Single Market by removing tax barriers in the area of indirect taxes. For the common VAT system to meet the requirements of a true Single Market, it is however essential that neutrality of taxation is ensured and the remaining obstacles to the free movement of goods and services between Member States are eliminated.

In this respect, experience so far, particularly with the operation of the transitional arrangements for taxation of transactions between Member States, has shown that different administrative procedures in Member States impede the neutrality of the VAT system and represent major obstacles for businesses wanting to take advantage of the Single Market. This is the result of existing differences in interpretation and application of the common VAT rules between Member States.

At the national level, the normal procedure for establishing legal rules is, that the legislative body makes the political choices and decides the general rules. The detailed, technical questions of practical application of the legislation are typically dealt with by the executive body (the administration), which issues circular notices or other binding guidelines, which are published.

At Community level, implementing powers have similarly been conferred on the Commission in most areas of Community legislation. Council has adopted a Decision on the legal form under which these implementing powers should be exercised². Due to the special characteristics of Community legislation, this exercise of implementing powers is usually done via a system of committees, composed of the representatives of the Member States. The Commission submits to the committee a draft of the measures to be taken, and if it agrees a decision is taken by the Commission on the proposed measures. If the committee does not agree with the proposed measures, the matter may be referred to the Council. At present, around 400 such committees assist the Commission in implementing Community legislation.

¹ 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 (OJ No L 145, 13.6.1977, p. 1) as last amended by Directive 96/95/EC.

² Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ No L 197, 18.7.1987, p. 33).

Concerning VAT, the Sixth Directive constitutes only the framework of the common VAT system. Detailed rules for its uniform application have not been adopted at Community level. At present no implementing powers are conferred on the Commission to make such rules other than as a proposal to Council. Consequently, differences in application of the common VAT system have evolved between Member States, which conflict with the concept of a Single Market.

To achieve completion of the Single Market, appropriate measures have to be taken to ensure the uniform application of the common VAT mechanism provided for in the Sixth Directive.

When the Sixth Directive was adopted such measures were not taken. It is true that the VAT Committee was established with the purpose of facilitating the uniform application of the provisions of the Directive and enabling closer co-operation between the Member States and the Commission. But, in pursuing this objective, the Committee was given very limited means.

In its advisory capacity the Committee, chaired by the Commission, is required to adopt guidelines on questions raised by Member States or the Commission and to examine points on which the Committee according to the Directive must be consulted. Frequently, questions are raised in the Committee on issues relating to the distinction between or classification of goods and services. When such decisions are taken they can have repercussions on where and under what conditions the transaction in question should be taxed.

The guidelines which are adopted by the VAT Committee should result in the provisions of the Directive being applied uniformly throughout the Community. However, even where the Committee agrees unanimously on a common interpretation, such decisions are not necessarily adhered to by all Member States.

Member States are not obliged to implement guidelines adopted by the VAT Committee, because they have no legal status and are not published. Moreover, the existing guidelines do not constitute any part of the accession agreements for the new Member States. In practice, it is often found that not all Member States adhere to a given guideline. A Member State may itself decide to deviate from the common interpretation, but deviations may also be the result of court decisions which disallow practices which are based upon common interpretations. The Committee's guidelines, having no legal standing, cannot be relied upon by the parties involved in a court case.

Thus, the objective of guidelines, which is to ensure the uniform application of the common VAT system, is frustrated. The result is that not only traders but also Member States are left without legal certainty and, with cross-border transactions, exposed to the risk of double taxation or non-taxation.

At present, such matters may be solved through Community legislation to be adopted by Council. This is, however, a very time consuming procedure and thus not very suitable for dealing with questions arising e.g. from rapid technical and economic developments.

In the absence of common implementing rules, taxpayers often resort to national courts asking them to determine how the general rules of the Sixth VAT Directive should be implemented. In a number of these cases national courts are requesting the European Court of Justice to give a preliminary ruling on these specific and technical questions. Thus, the lack of an appropriate mechanism to establish common implementing measures of Community VAT legislation leads to unnecessary litigation, which is expensive and leads to uncertainty for businesses as well as for Member States' administrations.

Instead, a change in the role of the VAT Committee could be instrumental in achieving significant progress towards uniform application of common rules, thus creating more harmonised conditions for businesses in line with the needs for completion of the Single Market. To address the difficulties encountered by traders due to this lack of uniform application and to provide traders and Member States with sufficient legal certainty, the Committee should be changed into a regulatory Committee. Its task would be to assist the Commission in implementing Community legislation on VAT. It is proposed that this should be done in accordance with the procedure provided for in Article 2 III (a) of Council Decision 87/373/EEC. Through their representatives in the Committee, Member States will have their say in the establishment of such legally binding uniform interpretation and implementation of Council legislation. This will not detract from the powers of Council since it does not deal with such matters today.

While it is not anticipated that the European Parliament should play a part in a legal context in this decision-making process, the Commission has every intention of living up to its commitment to take into consideration the views of the Parliament, as stipulated in the inter-institutional arrangements in force.

In its work with the VAT Committee, the Commission will establish contacts with businesses, in order to take full account of their views on the functioning of the Community VAT legislation. The Commission is currently reviewing the role and the functioning of the Advisory Committee on Customs and Indirect Taxation, which is established as a forum for exchanges of information between the business community and the Commission on customs and tax matters. This committee could provide an appropriate framework for exchanges of views on a more regular basis, through which the VAT Committee could obtain useful input for its work from the business side.

The proposal would achieve immediate improvement of the functioning of the present, transitional VAT arrangements. By conferring implementing powers upon the Commission and by changing the status of the VAT Committee, giving the decisions legal force and official publication it would ensure that rules are applied on a uniform basis throughout the Community.

At the same time, the proposal forms part of phase one of the changeover to the new common system of VAT. One of the key elements in the design of the new common system of VAT, for which the Commission presented its working programme in July 1996³, is the achievement of an overall simplification in comparison with the present transitional arrangements and hence a significant reduction of compliance costs of businesses, especially SMEs. However, regardless of the simplifications to be included as part of the new common system, there will, in any event, be a need to ensure common application by the Member States of the future rules, to avoid reproducing the difficulties existing today.

The proposed regulatory role of the Commission assisted by the VAT Committee should, above all, encompass interpretation of concepts in the Community VAT legislation in areas where the absence of such common interpretations can lead to double taxation or to non-taxation. Furthermore it should deal with the regulation of matters specifically delegated to it by Council. Already, in its present form, the Committee addresses questions of interpretation and issues guidelines on them. The proposal implies that these guidelines, by means of which a common application of a specific element of the Directive is established, shall become decisions of the Commission, legally binding and made public. This would alleviate the obstacles currently faced by businesses which trade across the Community and the problems experienced by the Member States owing to differences of interpretation.

Double taxation is detrimental to businesses, whereas non-taxation can distort competition between businesses and, at the same time, represents an unacceptable loss to Member States' treasuries and to the Community's VAT own resource.

Double taxation could arise, for example, in cases where, due to divergencies in classification, the rules on place of supply are applied differently by Member States. This could be the case in a situation where services covered by Article 9 (1) are provided by a supplier whose main place of business is in State A and who carries out some activities in State B, e.g. leasing of passenger cars. If State B considers that these activities create a fixed establishment from which the supplies are made, whereas State A disagrees with this interpretation, double taxation would occur which could not be rectified under existing Sixth Directive provisions.

³ A Common System of VAT. A programme for the Single Market, COM(96) 328 final of 22.7.1996.

An example of non-taxation could be the transfer of a footballer. If State A regards such a service, when supplied to a taxable person, as being covered by Article 9 (2) (e), according to which the place of supply is where the taxable customer has his place of business (in State B), this should result in the use of the reverse charge mechanism (tax is accounted for by the customer in State B). However, if State B regards the transfer as falling under Article 9 (1), which stipulates the place of supply - and of taxation - to be where the supplier of the service is established (State A), the combined result would be that no taxation would take place.

Double taxation and non-taxation are both contrary to the proper functioning of the internal market and Member States have an obvious interest in a body which can deal in an efficient manner with such situations.

The VAT Committee in its new role would also assist the Commission on proposals for technical adjustments to the common VAT system to deal with questions arising from rapid technological or economic developments, where such questions have been explicitly delegated by Council.

Recent political developments have changed the role of NATO and there have also been changes in international relations which have altered partnerships in international co-operation. These developments have not been accompanied by the requisite modifications to the scope of VAT exemptions granted to such organisations. To rectify these shortcomings, the Commission, assisted by VAT Committee according to the procedure of the so-called regulatory committee should be empowered to adopt the necessary adjustments to Article 15 (10) of the Sixth VAT Directive under which exemption is granted to diplomatic and consular missions, international organisations and NATO forces. One of the tasks should be to decide the details, form and contents of the VAT exemption certificate, which serves as a supporting document to the supplier when exempted supplies of goods and services are made to the above mentioned entitled organisations. Already, with the adoption of the Second Simplification Directive¹, the Council has, in a statement to the minutes, authorised the Committee to establish such a certificate. However, a specific delegation of powers to the Commission, assisted by the VAT Committee would ensure the proper legal status and publication of that certificate.

¹ Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax - scope of certain exemptions and practical arrangements for implementing them (OJ No L 102 of 5.5. 1995, p. 18).

Clearly, conferring implementing powers upon the Commission and changing the role of the VAT Committee should not interfere with the policy-making competence of the Council. For that reason, questions relating to politically sensitive issues should not be decided upon by the Commission assisted by a technical committee but should remain with the Council on the basis of a proposal of the Commission. Community tax policy should always be formulated by the Council.

Taking this into consideration, the proposal explicitly excludes from the new procedure the issue of VAT rates which is generally considered as politically sensitive by Member States. Furthermore, the Committee would only be authorised to decide on issues which are regulated by the Sixth Directive. This means that where general rules have not been decided upon by the Council or where options have been left open for Member States to apply different rules, the Commission assisted by the Committee would not be in a position to deal with the matter. For example, due to the lack of specific rules, certain elements of Article 22 would fall outside the scope of the power conferred to the Commission assisted by the VAT Committee. The same applies to those provisions of Article 16 which, according to their wording, may be applied differently by Member States. The Committee may, however, still decide to deal with such matters in its advisory capacity.

If the Intergovernmental Conference decided to introduce qualified majority voting as the rule for adoption of Community legislation on taxation, some of the problems outlined above would be alleviated, as legislation could be adopted through a less time-consuming process. However, there would still be need to adopt implementing measures of a technical nature in a quick and flexible manner. Member States would in any case be assured of having a proper influence on the result through their representatives in the Committee and through the rules of proceedings provided in Article 2 III (a) of Council Decision 87/373/EEC.

The new role of the VAT Committee opens the possibility for Council to delegate powers to the Commission assisted by the Committee to adopt adjustments of the common VAT system where these are necessitated due to rapidly changing economic or technical conditions. The procedure of the VAT "regulatory committee" would give the Council room to manoeuvre in the sense that, where it is considered useful, specific issues of a technical nature can be delegated. Use of this instrument would in each case require the Council explicitly to delegate the power to decide on these new issues to the Commission, assisted by the VAT Committee. Such measures could be seen as appropriate by the Council when, for example, with the introduction of the Single European Currency or the accession of new Member States, technical adaptations need to be introduced at short notice.

Commentary on the Articles

Article 1

- changing the legal status of the VAT Committee

It is proposed that the VAT Committee is changed from an advisory Committee to a Committee acting in the framework of the so-called "regulatory committee" procedure, which, on the basis of drafts submitted by the Commission, delivers its opinions by qualified majority voting. The establishment of the Committee, and its working procedure is proposed according to the provisions of III, variant (a), set out in Article 2 of the Council Decision of 13 July 1987⁵ laying down the procedures for the exercise of implementing powers conferred on the Commission.

According to the proposal, the Commission, assisted by the Committee can decide on a common application of provisions in the Sixth Directive, particularly where the absence of uniform application can lead to double taxation or non-taxation. Where the Sixth Directive does not regulate an area, or where Member States are left with the option of applying the common VAT system differently, the Commission, assisted by the VAT Committee will not be in a position to take implementing measures.

Questions of VAT rates, including transitional rates, are explicitly excluded from the scope of the proposed procedure.

In addition to the proposed powers in the framework of the "regulatory committee" procedure, the VAT Committee shall continue to perform its functions as an advisory Committee, i.e. examining points on which the Committee according to the Directive must be consulted, and deciding on questions raised by the chairman or by a member.

- scope of the exemption granted under Article 15 (10)

Article 15 (10) provides for exemption for supplies of goods and services to diplomatic and consular missions, to international organisations and to NATO forces, but only when these forces participate in the common defence effort.

⁵ Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ No L 197, 18.7.1987, p. 33).

It is proposed to allow the Commission, assisted by the VAT Committee to decide adjustments of the scope of this exemption in situations where this is required by developments in international relations. With the exemption being applicable throughout the Community, adoption of measures adjusting the scope should be limited to cases where a common interest in granting the exemption can be established. This would, for example, apply to NATO activities which fall outside the common defence effort as is the case where forces of NATO countries and forces of other States participate in activities under the Partnership for Peace Agreement.

The exemption is subject to limitations laid down by the Member State hosting the entitled body. In case of supplies between Member States, right of exemption is established by means of a document. In establishing the form and contents of this document the Commission should be assisted by the VAT Committee as is done by the Excise Committee in the excise area.

Proposal for a

COUNCIL DIRECTIVE

amending Directive 77/388/EEC
on the common system of Value Added Tax
(the Value Added Tax Committee)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 99 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas experience with the operation of the transitional arrangements for charging VAT in intra-Community trade has demonstrated a need for a more uniform application of Community legislation, in particular to avoid double taxation or non-taxation,

Whereas the Commission in its programme for introducing the new Common System of VAT has included changing the status of the VAT Committee from an advisory into a regulatory Committee,

Whereas the Council in its decision of 13 July 1987⁶ has laid down the procedures for the exercise of powers of implementation conferred on the Commission,

HAS ADOPTED THIS DIRECTIVE:

⁶ Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ No L 197, 18.7.1987, p. 33).

Article 1

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

1. Article 29 is replaced by the following:

"Article 29

1. The measures required for the application of the provisions of this Directive, with the exception of provisions relating to VAT rates, shall be adopted by the Commission in accordance with the procedures laid down in paragraphs 2-4. In addition, the Commission shall, under the same procedure, adopt the provisions necessary for the adjustment of Article 15 (10).
2. The Commission shall be assisted by a Committee on Value Added Tax, hereinafter referred to as "the Committee". The Committee shall be composed of the representatives of the Member States and chaired by the Commission representative.
3. The Commission representative shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighed in the manner set out in that Article. The chairman shall not vote.
4. (a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.
(b) If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by qualified majority.
(c) If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.
5. In addition to the measures referred to in paragraph 1, the Committee shall examine the points subject to the consultation provided for under this Directive and the matters referred to it by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of Community provisions on value added tax."

2. In Article 15 (10), the second paragraph is replaced by the following:

“The scope of this exemption can be adjusted, subject to conditions established in accordance with the procedure provided for in Article 29.

This exemption shall be subject to limitations laid down by the host Member State until common Community tax rules are adopted. The information necessary to carry out this exemption shall be exchanged by means of a uniform document. The form and contents of this document shall be established according to the procedure provided for in Article 29.”

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1998. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President

Financial statement

The proposed change in the legal status of the VAT Committee from an advisory to a regulatory committee leads to a corresponding change in the budget line, to which its activities are attributed (from A 2511 to A 2510). However, the proposal does not imply any change in the frequency of meetings of the Committee, and the expenses linked to its activities will therefore remain unchanged.

The proposed Directive, when adopted, will have no consequences for the collection of Community own resources.

ISSN 0254-1475

COM(97) 325 final

DOCUMENTS

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Catalogue number : CB-CO-97-315-EN-C

ISBN 92-78-21718-2

Office for Official Publications of the European Communities

L-2985 Luxembourg