



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.11.1998

COM(1998) 660 final

98/0312 (CNS)

Proposal for a
COUNCIL DIRECTIVE
amending Directive 77/388/EEC as regards the determination of the person liable
for payment of value added tax

(presented by the Commission)

EXPLANATORY MEMORANDUM

Introduction

The present system of VAT is so designed that the tax receipt is directly collected by the Member State on whose territory the consumption of the goods or services sold is deemed to take place. In order to ensure this direct allocation of the tax, complex rules have been laid down to determine the place where a type of supply of goods or of services is deemed to be consumed, and where it must, consequently, be taxed.

As a result of the machinery set up by this system, traders engaged in intra-Community economic activities are often faced with tax obligations in several Member States with regard to identification, the submission of returns and payment.

Traders who wish to take full advantage of the opportunities offered by the advent of the Single Market on 1 January 1993, which required the abolition of checks and administrative procedures prior to or associated with the crossing of an internal border of the European Union, usually perceive the need to fulfil tax obligations in several Member States as a barrier to the free movement of goods and services.

This is why the Commission, in a working document dated 14 May 1997, indicated VAT obligations as an area to be examined in the second phase of the SLIM project (Simpler Legislation for the Internal Market). The Commission felt that there was a need to give early consideration to simplification measures which would reduce the burden on business in the short term.

This simplification exercise is also entirely consistent with the work programme, adopted by the Commission in July 1996, the first aim of which is to modernise the present system of VAT and to simplify it as much as possible, in order to create favourable conditions for the move to a new common system of VAT, based on the principle of a single place of taxation.

The results of the work carried out are contained in the Commission report on the SLIM project, approved by the Council (Internal Market) on 27 November 1997, which among other things, recommends that the rules applicable to tax representation should be modified.

Following this recommendation, the Commission undertook to introduce legislation to simplify tax representation. This proposal, which follows from that undertaking, was furthermore submitted for consultation by a panel of companies, which welcomed the approach chosen by the Commission.

Determination of the person liable for payment of the tax under the present system

According to the principle set out in Article 21 of the Sixth VAT Directive¹, the trader who carries out taxable transactions in a given country is himself the person liable to pay tax to the authorities.

Two important exceptions, justified by practical concerns, modify this general principle: in the case of triangular transactions², the person liable for payment of the tax must be the person for whom the supply of goods is intended. The person liable for payment of the tax is also the customer in the case of certain types of supplies of services (the services of consultancy bureaux, lawyers, the supply of services in the intra-Community transport of goods, etc.).

Apart from these exceptions, the principle is that the person liable for payment is the taxable person who carries out the taxable transactions, whether or not he is established within the territory of the country.

However, where this trader is not established in the Member State where he carries out taxable transactions, Article 21 gives Member States the option of requiring payment of the tax from someone else. A tax representative or the person for whom the supply of goods or of services is intended may be designated for this purpose.

The option given to Member States to provide that the person liable for payment of the tax should be a tax representative of the non-established taxable person or the recipient of the supply of goods or of services is designed to satisfy two concerns.

First, it enables non-established taxable persons who are not always familiar with the law, the language, or the administrative structure and procedures of the country in which they operate to delegate to a third party or to the person for whom the supply of goods or of services is intended the obligations arising out of value added tax legislation. Secondly, it enables the Member State concerned to obtain guarantees that these obligations will actually be met.

Article 21 also permits Member States to provide that someone other than the person liable for payment of the tax is held jointly and severally liable for payment of the tax.

The main features of the present legislation as regards the determination of the person liable for payment of the tax are therefore (a) its extreme complexity and (b) the wide differences in its actual application, because of the many options the Member States are allowed.

¹ OJ L 145, 13.6.1977, p. 1, as last amended by Directive 98/80/EC (OJ L 281, 17.10.1998, p. 31).

² A triangular transaction exists where enterprise A established in Member State A sells goods to enterprise B established in Member State B which itself sells them to enterprise C established in Member State C: the goods are then directly transported from Member State A to Member State C. In this case and on certain conditions, enterprise B is exempted from registering for VAT in Member State C, and enterprise C is then designated as the person liable for payment of the tax.

The resulting problems were highlighted by the Commission in a report to the Council and the European Parliament on the arrangements for taxing transactions carried out by non-established taxable persons (COM(94) 471 final of 3 November 1994), the conclusions of which are still valid today.

The first source of difficulty relates to identification of the person liable for payment of the tax for each transaction, since this will depend on both the type of transaction carried out and the Member State in which the transaction is carried out.

The second source of difficulties concerns the wide variety of obligations incumbent on the tax representative, when the Member State requires one to be appointed. In some Member States, he has to be approved by the administration, and he is also sometimes required to pay a surety.

Even the idea of tax representative is understood very differently from one Member State to another, so that the specific obligations it implies are different.

Lastly, the financial cost for a trader in appointing a tax representative is not insignificant. A representative will only agree to take over the taxable person's obligations and liabilities in return for remuneration.

All these difficulties are perceived as constraints which are sometimes very irksome, in particular for small and medium-sized enterprises.

While it is true that these difficulties are not new, they now represent, in the context of the Single Market, a major obstacle to the expansion of intra-Community trade.

In the same report, the Commission made a number of recommendations, which, if applied, would resolve the major difficulties facing non-established taxable persons. The recommendations advocate simplification of the obligations incumbent on non-established taxable persons.

The general principle that the Commission wished to see adopted by the Member States was that the person liable for payment of the tax should be the taxable person (whether or not he is established) and that there should be as few exceptions (tax representative or person for whom the supply is intended) as possible to this rule.

However, it can today be seen that the Member States have not done enough to implement these recommendations.

It was therefore only to be expected that traders would again draw attention to the difficulties they perceive in this area in the context of the SLIM exercise in October 1997.

The proposed amendments

In order to allay traders' concerns, expressed during the SLIM exercise, while continuing to observe the principle of fractioned payments which is one of the cornerstones of the common system of VAT and which is recalled in the Report from the Commission to the Council and the European Parliament on the arrangements for taxing transactions carried

out by non-established taxable persons (COM(94) 471 final of 3 November 1994), the present proposal for a Directive supports the idea that there should be only one person liable for payment per type of transaction, irrespective of the Member State in which that transaction was carried out.

It is stated as a general principle that the taxable person who carries out the taxable transaction must be the person liable for payment of the tax, whether or not that taxable person is established within the territory of the country.

The main advantage will be the simplicity of a more harmonised Community legislation, which all traders can understand, so that there will no longer be any doubts as to the determination of the person liable to pay the tax.

It will also be a major step forward in reducing the burdens on business and in particular on SMEs.

At this same time, the recipient of the goods or the purchaser of the service can no longer be designated as the person liable for payment of the tax; this meets the concern, consistently expressed by the Commission, in particular when it was drafting the report published in 1994 on the person liable for payment of the tax, that the "reverse charge" system, which runs counter to the principle of fractioned payments, should not be developed.

The person, referred to in Article 28c(E)(3), for whom a triangular transaction is destined³, the customer for a service referred to in Article 9(2)(e)⁴, and the customer, identified for VAT purposes within the territory of the country, for whom a service referred to in Article 28b (C), (D), (E) and (F)⁵ is performed, nevertheless remain persons liable for payment of the tax. These are exceptions, limited to the definition of the taxable person as the person liable for payment of the tax, which are obligatory for the Member States and do not stand in the way of harmonised implementation of the legislation.

Member States also still have the option of designating a person other than the person liable for payment of the tax as jointly and severally liable for payment of the tax. The only change is a statement to the effect that this option must not give rise to provisions which create a disadvantage specifically for non-established taxable persons.

³ A triangular transaction exists where enterprise A established in Member State A sells goods to enterprise B established in Member State B which itself sells them to enterprise C established in Member State C: the goods are then directly transported from Member State A to Member State C. In this case and on certain conditions, enterprise B is exempted from registering for VAT in Member State C, and enterprise C is then designated as the person liable for payment of the tax.

⁴ Services such as supplies of publicity, supplies in design offices or of lawyers and banking financial and insurance transactions.

⁵ These are the supply of services in the intra-Community transport of goods and services ancillary to the intra-Community transport of goods, the supply of services rendered by intermediaries and the supply of services relating to valuations or work on movable tangible property.

However, the existence of a legal framework laid down by Directives 76/308/EEC⁶ and 77/799/EEC⁷ organising mutual assistance between the Member States now no longer justifies the existence of provisions transferring all the obligations of the non-established taxable person to a third party (tax representative). It is, of course, true that the Member States today still make little use of these assistance arrangements. This is why the Commission recently presented a proposal (COM(98) 364 final of 25 June 1998) designed considerably to improve the way they function. As a result, it will be easier to recover the tax owed by a non-established taxable person.

The principle that the non-established taxable person must be the person liable for payment of the tax will clearly not prevent him (or the established taxable person) from appointing an agent responsible for complying with the obligations laid down by Article 22 of the Sixth Directive in his place if he is unable to do so himself because of linguistic, administrative or organisational barriers. For the sake of transparency, he must inform the administration of the agent's name and the taxable person is responsible for the agent's actions vis-à-vis the administration.

It will still be possible to designate a tax representative in a limited number of duly authorised cases. This is why, in the case of non-established taxable persons who are nationals of countries with which there is no agreement providing for mutual assistance procedures similar to those which exist within the Community and which are laid down by Directives 76/308/EEC⁸ and 77/799/EEC⁹, it will still be possible for the Member State to require that a tax representative be designated as person liable for payment of the tax instead of the non-established taxable person. This possibility would not, however, be justified where that taxable person was engaged only in activities exempt under Articles 13 and 15 of the Sixth Directive, i.e. where no actual recovery of a tax debt was involved.

It should also be pointed out that this proposal for a Directive is not intended to encroach on the Member States' freedom to determine the person liable for payment of the tax on importation.

Lastly, this proposal will have no impact on the VAT own resources of the European Communities.

Conclusion

If the principles of this proposal and of the proposal on the right to deduct (COM(98) 377 final of 17 June 1998) - which leads to the abolition of the refund procedure under the Eighth VAT Directive (79/1072/EEC) - are implemented, the tax obligations of traders operating in several Member States will be substantially simplified.

⁶ OJ L 73, 19.3.1976, p. 18.

⁷ OJ L 336, 27.12.1977, p. 15.

⁸ OJ L 73, 19.3.1976, p. 18.

⁹ OJ L 336, 27.12.1977, p. 15.

The objective of these simplifications is to help to develop the transnational activities of firms and in particular of SMEs, while protecting the legitimate interests of the tax administrations by ensuring that the tax is collected.

This proposal also forms part of the exercise of simplifying and modernising the common system of VAT now being undertaken by the Commission, which should pave the way for the introduction of a new common system of VAT based on the principle of a single place of taxation.

The ultimate simplification of the obligations of non-established traders can only result from the adoption of this new system in which the taxable person will make one return only in his Member State, covering all his activities in the European Union.

Presentation of each of the provisions of Articles 1 and 2 of the Directive

Ad Article 1(1)

The purpose of this Article is to amend a minor point in Article 10 of the Sixth Directive in order to prevent certain cases of tax avoidance in the case of continuous supplies (e.g. the supply of gas, water, electricity or the leasing of movable property) which do not give rise to pre-established successive statements of account and payment.

As Article 10 is worded at present, the tax becomes chargeable at the time when the periods to which such statements of account or payments pertain expire. Where there is no statement of account or where the taxable person maintains that these statements of account will be presented at some time well in the future, the tax administration may be powerless to insist on payment of the tax.

The new wording of Article 10 therefore also provides that in the absence of pre-established successive statements of account and payment, the tax shall in any event become chargeable at intervals of one year. Continuous supplies will therefore in future give rise at least to an annual payment of tax, even where the taxable person has provided for statements of account at longer intervals or where no statement of account is provided for.

Ad Article 1(2), (3) and (4)

These points amend certain provisions, relating to the determination of the person liable for payment of the tax, in the transitional system for the taxation of trade between Member States.

Ad Article 1(2)

The purpose of this provision is to adapt the wording of the last indent of Article 28c(E)(3) to the new numbering of Article 21. Paragraph 1(a) of that Article has thus become paragraph 1(c).

Ad Article 1(3)

Point 3 provides for the complete rewriting of Article 28g, i.e. of Article 21 to which it refers.

The new Article 21(1)(a) provides that the person liable to pay the tax is the taxable person carrying out the taxable supply of goods or of services. Consequently, the Member States no longer have the option of deciding that the person liable to pay the tax is another person (the taxable person's tax representative or the person for whom the supply of goods or of services is intended).

The new point (b) deals with supplies of services for which, as an exception to the general principle, the person liable for payment of the tax is the person for whom these services are intended.

The former point (a) on triangular transactions becomes the new point (c). For such transactions, the person liable for payment of the tax remains the person for whom the goods are intended.

The former point (c) becomes the new point (d).

The former point (d) becomes the new point (e). However, Member States no longer have the option of determining the person liable for payment of the tax; this must always be the person who effects the intra-Community acquisition.

New common provisions are added at the end of paragraph 1:

It is made clear that every taxable person (whether or not he is established) who appoints an agent to fulfil the obligations of Article 22 on his behalf must inform the administration of the agent's name. The taxable person, who, in any event, remains the only person liable to pay the tax is responsible to the administration for the agent's actions. If he ceases to use such an agent, he will of course have to inform the administration.

The proposal enables Member States to require the appointment of a tax representative when two conditions are simultaneously met:

- the taxable person is not established and is a national of a country with which there is no agreement establishing mutual assistance procedures similar to those which exist within the European Union and which are laid down by Directives 76/308/EEC and 77/799/EEC;
- the taxable person effects transactions other than those which are exempt under Articles 13 and 15 of the Sixth Directive (for which no payment of VAT is involved).

This is a protective measure which ensures that the Member States still have some means of action to recover the tax owed by non-established taxable persons who are nationals of countries with which there is no agreement for mutual assistance and recovery.

Lastly, Member States may provide that someone other than the person liable for payment is held jointly and severally liable for payment of the tax, provided that this does not give rise to discriminatory provisions against non-established taxable persons.

Article 21(2) remains unchanged. Member States are therefore still completely free to designate the person liable for payment of the tax on importation.

Ad Article 1(4)

Point (4) makes two amendments to Article 28h, i.e. to Article 22 to which it refers.

Ad Article 1(4)(a)

The first indent of Article 22(1)(c) is amended to take account of the amendment of Article 21. The reference to the exceptions to the principle that the person liable for payment of the tax is the taxable person who effects the taxable transaction is now Article 21(1)(b) and (c).

Ad Article 1(4)(b)

Article 22(7) is amended to take account of the amendment of Article 21. The only reference now is to Article 21(1) in general in order to refer to cases in which the Member State can still insist on the designation of a tax representative (apart from cases where an agreement exists for mutual assistance in recovery). Furthermore, the second sentence refers to the idea of joint and several liability which is also laid down in Article 21(1).

Proposal for a
COUNCIL DIRECTIVE
amending Directive 77/388/EEC as regards the determination of the person liable
for payment of value added tax

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 Commission¹⁰,

Having regard to the opinion of the European Parliament¹¹,

Having regard to the opinion of the Economic and Social Committee¹²,

1. Whereas the present rules laid down by Article 21 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 assessment¹³, as last amended by Directive 98/80/EC¹⁴, as regards the determination of the person liable for payment of the tax, create serious problems for business and in particular for the smallest businesses;
2. Whereas Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties¹⁵, and Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation¹⁶, both of which were last amended by the Act of Accession of Austria, Finland and Sweden, organise mutual assistance between the Member States as regards the correct establishment of VAT and its recovery;

¹⁰ OJ C

¹¹ OJ C

¹² OJ C

¹³ OJ L 145, 13.6.1977, p. 1.

¹⁴ OJ L 281, 17.10.1998, p. 31.

¹⁵ OJ L 73, 19.3.1976, p. 18.

¹⁶ OJ L 336, 27.12.1977, p. 15.

3. Whereas the Member States have not implemented to a sufficient extent the recommendations made by the Commission in its report to the Council and the European Parliament on arrangements for taxing transactions carried out by non-established taxable persons¹⁷, the aim of which was to reduce the obligations incumbent on traders as regards the determination of the person liable for payment of the tax;
4. Whereas it emerges from the report's conclusions that replacement of the tax representation system by the reverse charge system (designation of the recipient as the person liable for payment of the tax) cannot be a solution to the problems created since this system would run counter to the principle of fractioned payments which lies at the heart of the common system of value added tax;
5. Whereas the Commission report on the second phase of the SLIM (Simpler Legislation for the Internal Market) project recommends a study of the possibilities and different ways of reforming the tax representation system laid down by Article 21 of Directive 77/388/EEC;
6. Whereas the only change which can in fact substantially simplify the common system of VAT in general, and the determination of the person liable for payment of the tax in particular, is to rule out any option in how to determine that person and to state clearly the general principle that the taxable person (whether or not he is established) is the person liable for payment of the value added tax and the only person responsible for its actual payment;
7. Whereas, when a taxable person (whether or not he is established) appoints an agent to fulfil the obligations set out in Article 22 of Directive 77/388/EEC in his place, he must inform the administration of the agent's name, since he is responsible for the agent's actions;
8. Whereas, lastly, where non-established taxable persons are nationals of countries with which no legal instrument exists which organises mutual assistance similar to that laid down within the Community, it will be possible for the Member States to continue to require such non-established taxable persons to designate a tax representative to be the person liable for payment of the tax in their stead;
9. Whereas, however, the latter option cannot exist in cases where the non-established taxable person carries out only the exempt activities referred to in Articles 13 and 15 of Directive 77/388/EEC;
10. Whereas Member States will continue to be entirely free to designate the person liable for payment of the tax on importation;
11. Whereas Member States may continue to provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax, provided that this does not give rise to any discrimination against non-established taxable persons;

¹⁷ COM(94) 471 final, 3.11.1994.

12. Whereas Article 10 of Directive 77/388/EEC should be clarified in order to prevent certain cases of tax avoidance in the case of continuous supplies which do not give rise to pre-established successive statements of account or payments;
13. Whereas Directive 77/388/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

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

1. In the first subparagraph of Article 10(2), after the second sentence, the following sentence is inserted:
"In the absence of pre-established successive statements of account and payments, the tax shall in any event become chargeable at intervals of at least one year."
2. In the fifth indent of Article 28c(E)(3), the words "Article 21(1)(a)" are replaced by "Article 21(1)(c)".
3. In Article 28g, Article 21 is replaced by the following:

"Article 21

Persons liable to pay tax to the authorities

1. Under the internal system, the following shall be liable to pay value added tax:
 - (a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).
 - (b) persons to whom services covered by Article 9(2)(e) are supplied, or persons, identified for value added tax purposes within the territory of the country, to whom services referred to in Article 28b(C), (D), (E) or (F) are supplied, when the service is carried out by a taxable person not established within the territory of the country;
 - (c) the person to whom the supply of goods is made when the following conditions are met:
 - the taxable operation is a supply of goods made under the conditions laid down in Article 28c(E)(3),

- the person to whom the supply of goods is made is another taxable person or a non-taxable legal person identified for the purposes of value added tax within the territory of the country,
 - the invoice issued by the taxable person not established within the territory of the country conforms to Article 22(3).
- (d) any person who mentions the value added tax on an invoice or other document serving as invoice;
- (e) any person effecting a taxable intra-Community acquisition of goods.

Where the person liable for payment of the tax has appointed an agent responsible for fulfilling the obligations laid down in Article 22, he shall inform the administration of the agent's name. The person liable to pay tax shall be responsible to the administration for the actions carried out by the agent on his behalf.

Where the supply of goods or of services is effected by a taxable person who is not established within the territory of the country and no legal instrument exists, with the country in which that taxable person is established, which organises mutual assistance similar to that laid down by Directives 76/308/EEC and 77/799/EEC, Member States may take steps to provide that the person liable for payment of the tax shall be a tax representative designated by the non-established taxable person. However, designation of a tax representative as person liable for payment of the tax may not take place where the non-established taxable person carries out only supplies of goods or of services which are exempt under Articles 13 and 15 of this Directive.

Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax, provided this option is applied without discrimination against non-established taxable persons.

2. On importation, value added tax shall be payable by the person or persons designated or accepted as being liable by the Member State into which the goods are imported."

4. In Article 28h, Article 22 is amended as follows:

(a) In paragraph 1(c), the first indent is replaced by the following:

"- every taxable person, with the exception of those referred to in Article 28a(4), who within the territory of the country effects supplies of goods or of services giving him the right of deduction, other than provisions of services for which tax is payable solely by the customer or the recipient in accordance with Article 21(1)(b) and (c). However, Member States need not identify certain taxable persons referred to in Article 4(3)."

(b) Paragraph 7 is replaced by the following:

"7. Member States shall take the measures necessary to ensure that the tax representatives who, in accordance with Article 21(1), are considered to be liable to pay the tax instead of the taxable person comply with the obligations set out in this Article, relating to declaration and payment; they shall also take the measures necessary to ensure that those persons who, in accordance with Article 21(1), are held to be jointly and severally liable for the payment of the tax comply with the obligations relating to payment, set out in this Article."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on 1 January 2000. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, 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 reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive, and a table correlating the provisions of this Directive with the provisions of national law adopted for its implementation.

Article 3

This Directive shall enter into force on the twentieth day following that 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**

ISSN 0254-1475

COM(98) 660 final

DOCUMENTS

EN

09 10 01 02

Catalogue number : CB-CO-98-660-EN-C

Office for Official Publications of the European Communities

L-2985 Luxembourg