



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.07.1997
COM(97)405 final

Proposal for a

COUNCIL DECISION

**authorizing the United Kingdom to extend application
of a measure derogating from Article 28e(1) 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**

(presented by the Commission)

EXPLANATORY MEMORANDUM

By letter registered by the Commission's Secretariat-General on 21 February 1997, the United Kingdom Government requested authorization, pursuant to Article 27 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,¹ to extend application of the derogation granted to it by Council Decision 92/546/EEC of 23 November 1992.²

The United Kingdom was authorized by that Decision to introduce a special measure allowing the appropriate authorities to direct that the open-market value be taken as the taxable amount for intra-Community acquisitions of goods where the person acquiring the goods is not a fully taxable person and there are family, legal or business ties, specified in national legislation, between the person acquiring the goods and the supplier.

In accordance with the above-mentioned Article 27, the other Member States were informed of the United Kingdom's request by letter dated 6 May 1997.

According to the normal rules of the common VAT system, and in particular Article 28e(1) of the Sixth Directive, the taxable amount for the intra-Community acquisition of goods is established on the basis of the same elements as those used in accordance with Article 11(A) to determine the taxable amount for the supply of the same goods within the country.

Article 11(A) establishes the principle that the taxable amount for supplies of goods and services is everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies.

However, by Council decision deemed to have been adopted on 11 April 1987³ in accordance with Article 27(4) of the Sixth Directive, the United Kingdom was authorized to derogate from Article 11.

The United Kingdom is empowered by that decision to direct that the open-market value be taken as the taxable amount for supplies of goods or services or imports where the recipient is a totally or partially exempt person and there are family, legal or business ties, specified in national legislation, between the person effecting the supply of goods or services and the recipient or between the person importing the goods and the person to whom payment for them must be made.

¹ OJ No L 145, 13.6.1977, p.1. Directive as last amended by Directive 96/95/EC (OJ No L 338, 28.12.1996, p. 89).

² OJ No L 351, 2.12.1992, p. 34.

³ OJ No L 132, 21.5.1987, p. 22.

The transitional arrangements for taxing intra-Community trade introduced, with effect from 1 January 1993, the concept of the intra-Community acquisition as a taxable transaction under the common VAT system. The United Kingdom was accordingly authorized by Decision 92/546/EEC to supplement the special measure by derogating from Article 28e(1) of the Sixth Directive concerning the taxable amount for the intra-Community acquisition of goods.

The special measure in question is an anti-avoidance provision directed towards preventing a taxable person from artificially depressing the price charged to a person connected with him. For example, the measure is designed to combat tax avoidance in a situation where an exempt or partially exempt company sets up or uses a connected wholly taxable company, which buys large quantities of goods, recovers the input tax, and then makes a minimal charge for some or all of those goods or part of those goods to the totally or partially exempt company.

Decision 92/546/EEC was adopted on a temporary basis. As it is a specific measure covering only intra-Community acquisitions - taxable transactions characteristic of the transitional arrangements - the expiry date (31 December 1999) coincides with that scheduled for the introduction of the definitive VAT system and, therefore, for the abolition of the transitional arrangements.

As the transitional arrangements are still being applied, the Commission considers that the United Kingdom should be authorized to extend application of the measure derogating from Article 28e(1) of the Sixth Directive until 31 December 1999.

On 10 July 1996 the Commission adopted a work programme for introducing a common VAT system,⁴ which provides for stage-by-stage progress towards the new system. As presentation of the final package of proposal is scheduled for mid-1999, it would seem appropriate to limit the period of validity of this decision to 31 December 1999 so as to enable an assessment to be made at that time as to whether the derogation is consistent with the approach adopted under the new common VAT system.

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⁴ COM(96) 328 final, 22.7.1996.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to 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,¹ and in particular Article 27 thereof,

Having regard to the previous Council Decision 92/546/EEC of 23 November 1992,²

Having regard to the proposal from the Commission,

Whereas, pursuant to Article 27(1) of the Sixth VAT Directive, the Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce or extend special measures for derogation from that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion and avoidance;

Whereas, by letter officially received by the Commission's Secretariat-General on 21 February 1997, the United Kingdom Government requested authorization to extend application of the derogation previously granted to it by Council Decision 92/546/EEC until 31 December 1996;

Whereas the other Member States were informed on 6 May 1997 of the United Kingdom's request;

Whereas, pursuant to Decision 92/546/EEC, the United Kingdom is authorized to introduce a special measure allowing the appropriate authorities to direct that the open-market value be taken as the taxable amount for intra-Community acquisitions of

¹ OJ No L 145, 13.6.1977, p.1. Directive as last amended by Directive 96/95/EC (OJ No L 338, 28.12.1996, p. 89).

² OJ No L 351, 2.12.1992, p. 34.

goods where the person acquiring the goods is not a fully taxable person and there are family, legal or business ties, specified in national legislation, between the person acquiring the goods and the supplier;

Whereas Decision 92/546/EEC empowered the United Kingdom to supplement a special measure authorized by Council decision,³ deemed to have been adopted on 11 April 1987, permitting the United Kingdom to direct that the open-market value be taken as the taxable amount for supplies of goods and services or imports where the recipient is a totally or partially exempt person and there are family, legal or business ties, specified in national legislation, between the person supplying the goods or services and the recipient or between the person importing the goods and the person to whom payment for them has to be made;

Whereas the purpose of the measure in question is to prevent persons with family, legal or business ties, specified in national legislation, from artificially reducing the prices of taxable transactions;

Whereas according to the case law of the Court of Justice of the European Communities⁴, national derogation measures which are intended to prevent fraud or tax avoidance are to be interpreted strictly and can be used to derogate from the rules for determining the taxable amount only within the limits strictly necessary to achieve this objective;

Whereas, the special measure is to apply only in cases where the administration is able, based on the facts, to conclude that the determination of the taxable amount provided for in article 28e(1) is influenced by family, business or legal ties between the person who acquires the goods and the supplier; whereas the administration may not act on mere presumptions, and the parties concerned must be allowed to adduce evidence to the contrary where they dispute the level of the open market value established by the administration;

Whereas the measure is limited in scope in so far as it will apply only to taxable transactions where the recipient is a totally or partially exempt person;

Whereas, given the limited scope of the derogation, the special measure is proportionate to the aim pursued;

Whereas the Commission adopted on 10 July 1996 a work programme,⁵ accompanied by a schedule of proposals, providing for gradual, stage-by-stage progress towards a common VAT system for the single market;

Whereas, as the final package of proposals is scheduled for mid-1999, the authorization is being granted until 31 December 1999 so as to enable an assessment to be made at that time as to whether the derogation is consistent with the overall approach adopted under the new common VAT system;

Whereas this derogation will have no impact on the European Communities' own resources arising from VAT,

³ OJ No L 132, 21.5.1987, p. 22.

⁴ See judgements of 10 April 1984, the Commission / Belgium (324/82, Reports 1984, p.1861, item 29) and of 29 May 1997, Werner Skripalle (63/96, Reports 1997, p.0000).

⁵ COM(96) 328 final, 22.7.1996

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 28e(1) of Directive 77/388/EEC, the United Kingdom is hereby authorized, until 31 December 1999, to apply a special measure allowing the appropriate authorities to direct that the open-market value be taken as the taxable amount for intra-Community acquisitions of goods when the following two conditions are met:

- the person who acquires the goods is not a fully taxable person and there are family, legal or business ties specified in national legislation, between the person acquiring the goods and the supplier;
- a number of facts make it possible to conclude that these family, business or legal ties have influenced the determination of the taxable amount provided for in article 28e(1) referred to above;

Article 2

This Decision is addressed to the United Kingdom.

Done at Brussels,

For the Council

The President

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