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COMMISSION OF THE EUROPEAN COMMUNITIES

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2008/0228 (CNS)

Proposal for a

COUNCIL DIRECTIVE

**amending Directive 2006/112/EC on the common system of value added tax as regards
tax evasion linked to import and other cross-border transactions**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

This proposal is part of a set of conventional measures that will be presented in the short term in the context of a coordinated approach at EU level in the fight against VAT fraud.

This proposal contains amendments to the VAT Directive necessary for the implementation of two of the measures announced linked to a certain exemption from VAT upon importation and joint and several liability.

The objectives of the proposal are on the one hand to clarify the conditions for an already existing specific exemption at importation which is currently the subject of abuse through fraud schemes and on the other hand to provide tax administrations with a tool for recovering VAT from non-established traders in cases where the non-compliance of these traders with regard to their reporting obligations has facilitated the fraud.

- **General context**

At the ECOFIN meeting of 4 December 2007 the Council invited the Commission to continue its work on the conventional measures to combat VAT fraud, notably in the context of the Anti Tax Fraud Strategy (ATFS) expert group, to present its findings during the first half of 2008 and to consider legislative proposals on the conventional measures where appropriate.

Discussions that took place since then have made it clear that Member States want the Commission to accelerate the work on conventional measures concerning the fight against VAT fraud and to present to the Council legislative proposals to rectify the shortcomings encountered in the current legislation.

The Commission will, as a response to the Council's demand, present a Communication on a coordinated strategy to improve the fight against VAT fraud in the European Union, setting out a series of measures for which it intends to present legislative proposals in the short term. This Communication is also presented for adoption by the Commission today.

The present proposal is part of the first set of proposals announced in this Communication.

- **Existing provisions in the area of the proposal**

- a) Exemption from VAT upon importation

Article 143(d) of the VAT Directive (Council Directive 2006/112/EC of 28 November 2006) provides for an exemption from VAT on importation when this importation is followed by an intra-Community supply or transfer of the imported goods to a taxable

person in another Member State. The practical implementation of this provision, including the conditions for this exemption to apply, is left to the Member States and certain divergences have resulted.

Article 145(1) of the VAT Directive states that the Commission shall, where appropriate, present to the Council proposals designed to delimit the scope of the exemptions provided for in Article 143 and to lay down the detailed rules for their implementation. Up to now the Commission has not submitted such a proposal.

Fraud investigators in the Member States have drawn the attention of the Commission to the increasing use of this particular exemption at importation in the missing trader in intra-Community (MTIC) fraud schemes they have detected.

Further analysis of this issue has demonstrated that the fraudulent use of this provision is largely facilitated by the inadequate implementation of this exemption in national law, leading to a situation whereby the follow-up of the physical movement of the imported goods by the customs and tax authorities within the Community is not guaranteed.

Considering the large-scale abuse of this particular exemption, it is appropriate for the Commission to take a legislative initiative with a view to laying down detailed rules at Community level for the implementation of this provision.

b) Joint and several liability

Article 205 of the VAT Directive allows Member States to provide that a person other than the person liable for the payment of VAT is to be held jointly and severally liable for the payment of VAT. In view of the principles of proportionality, transparency and legal certainty, and in order to ensure a uniform application of this provision in cases where the person carrying out an exempt intra-Community supply of goods did not fulfil his reporting obligations, it is necessary to introduce the compulsory application of the joint and several liability in such a case and to define in detail the conditions for this liability to apply.

• **Consistency with the other policies and objectives of the Union**

Combating tax evasion is part of the Lisbon Strategy. In its communication of 25 October 2005 on the contribution of taxation and customs policies to the Lisbon strategy, the Commission stressed that tax fraud creates a significant distortion in the functioning of the internal market, prevents fair competition and erodes revenue that should be used to fund public services at national level. Increased levels of fraud result in an increasing tax burden placed on businesses that comply with the tax rules as governments are forced to make up the resulting shortfall in revenue.

The proposal offers Member States more certainty on the scope of some of the measures they can take to fight fraud more effectively and to ensure the collection of the VAT due on specific transactions when the supplier knowingly contributed to the risk that a VAT loss occurs on their territory.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

The technical work in this particular field was carried out with experts from the Member States.

Summary of responses and how they have been taken into account

a) Exemption from VAT upon importation

The work carried out by the experts on importation resulted in a number of recommendations. Some of these recommendations were that the importer of the goods should be identified for VAT purposes in the Member State of importation or appoint a fiscal representative in that Member State, as already provided for in Article 214(1)(a) of the VAT Directive. In addition this importer should communicate to the officials that deal with the VAT obligations upon importation the VAT identification number of the taxable person established in another Member State and to whom the goods will be sent. Furthermore, it should be ensured that this importer should be able to prove at the time of importation that the goods will leave the Member State of importation in order to be dispatched or transported to another Member State. These recommendations are the basis for the proposed modification of Article 143(d) of the VAT Directive.

Other recommendations concerned more administrative practices which do not require an amendment of the VAT Directive.

b) Joint and several liability

The basic conditions for the cross border application of the joint and several liability principle were equally discussed with experts of the Member States and these elements have been incorporated in the draft legal text.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

Both measures concern more technical adaptations to two Articles of the VAT Directive in order to further clarify the application of these two Articles.

As no substantial changes to the existing Community VAT legislation are involved, an impact assessment was not considered necessary. There are no additional burdens on business involved, nor will this lead to additional costs for operators or for tax administrations.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposal aims at modifying two existing Articles of the VAT Directive.

a) Exemption from VAT upon importation

The first measure will further specify the conditions that should apply for a certain exemption upon importation to be applied correctly.

b) Joint and several liability

The second measure intends to impose a joint and several liability on the taxable person making the intra-Community supply, for the VAT due on the intra-Community acquisition of these goods in another Member State, in which he is not established, when he did not or not timely submit a recapitulative statement or when this recapitulative statement did not contain the relevant information.

- **Legal basis**

Article 93 of the EC Treaty

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason(s).

In this instance, Council Directive 2006/112/EC lays down the rules governing the functioning of the Community VAT system. In order to further clarify two of these harmonised provisions in force, they have to be amended by an act adopted by the Community. The Member States cannot adopt national legislation that is contrary to Community law.

Community action will better achieve the objectives of the proposal for the following reason(s).

Measures taken at Community level enable tax evasion to be combated more effectively.

It will also guarantee that the provisions are applied in a harmonised manner.

a) Exemption from VAT upon importation

In order to avoid that importation with an exemption from VAT is shifted to Member States that do not apply such strict conditions, it is necessary to establish these additional conditions at European level.

b) Joint and several liability

The principle of legal certainty requires that all traders established in the EU must know that they can be held jointly and severally liable for the payment of VAT due on the intra-Community acquisition of goods in another Member State and what the conditions are that crystallise the application of this joint and several liability to apply to them. These conditions need to be precise and must apply equally in all Member States.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

The proposed modifications to the Directive are minimal.

a) Exemption from VAT upon importation

The supplementary conditions for using the VAT exemption on importation should in fact already today be applicable and they are only inserted to assist Member States in adopting a harmonised approach to control the practical application of the exemption. The information the importer has to submit is not different to the information that is already currently comprised in the exemption for VAT due upon importation. The importer must simply show that the import is followed by an exempt intra-Community supply or transfer of the goods to another Member State and he must declare this in his recapitulative statement.

No additional financial burdens are imposed and the administrative burdens are not new, they are very minor and limited to importers wanting to make use of the customs 4200 procedure, thus avoiding having to pay the VAT on importation when the importation is followed by an intra-Community supply or a transfer of the goods to another Member State. In fact this information should even today already be available to these importers.

b) Joint and several liability

For joint and several liability, a specific conditional and obligatory joint and several liability rule is introduced in all EU Member States for cases whereby the supplier contributed by omission to a loss of the VAT payable in respect of the intra-Community acquisition of these goods in another Member State by not submitting or submitting late his recapitulative statement or submitting a recapitulative statement not containing all the information related to this intra-Community supply. The supplier must also be allowed to prove before the tax administration of the Member State where the VAT on the intra-Community acquisition is due, that his omission is duly justified and that the shortcomings in his reporting obligations were merely unintended material errors.

Furthermore, the current jurisprudence of the European Court of Justice remains applicable to this provision. This rule introduces a clear and precise obligation on the taxable person making the intra-Community supply so that he may know without

ambiguity what his rights and obligations are so that he can take measures accordingly. Therefore the proposed measure respects the condition of legal certainty for the trader involved.

The fact that the supplier has to submit a correct recapitulative statement does not constitute an additional administrative burden on business as this obligation is already currently applicable in the Community VAT legislation. It is important to recall that the information Member States receive through the recapitulative statements submitted by the suppliers of goods is their main, if not only piece of information in relation to intra-Community acquisitions taking place on their territory. Therefore, it is essential that this information is submitted and transmitted and that it reflects correct data, so that it can be used as a control tool.

This taxable person making the intra-Community supply will furthermore, only risk to be held jointly and severally liable insofar the acquirer has not submitted his VAT return related to the intra-Community acquisition.

Both proposed measures are therefore well targeted and limited in scope and respect the proportionality principle as well as the requirement for legal certainty.

- **Choice of instruments**

Proposed instruments: directive.

Other means would not be adequate for the following reason(s).

The proposal aims at modifying two Articles of the VAT Directive and therefore the amending instrument should also be a Directive.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

- **Correlation table**

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and this Directive.

- **Detailed explanation of the proposal**

- a) Exemption from VAT upon importation

The modification to Article 143(d) of the VAT Directive envisages the introduction of the following three conditions for the exemption to apply, namely:

- the obligation for the importer to be identified for VAT purposes or to appoint a fiscal representative in the Member State of importation;

- the obligation for the person invoking this exemption to indicate that the goods will leave the Member State of importation in order to be transported or dispatched to another Member State;
- the obligation for the importer to provide at the time of importation, the VAT identification number of the taxable person identified for VAT purposes to whom the goods will be sent in that other Member State.

Therefore, the person importing the goods and wanting to make use of a VAT exemption because the goods are destined to go to another Member State, will have to show that he is identified for VAT purposes in the Member State of importation and he has to indicate at the time of importation that the goods will be subject to an exempt intra-Community supply in or transfer from the Member State of importation. For this second condition to be fulfilled he will have to prove that the above mentioned conditions are fulfilled.

On the other hand, the correct application of this exemption depends on a smooth flow of information between the national customs and tax authorities and between the tax administrations of the different Member States concerned. This latter obligation to collect and transmit this information is a competence for Member States' tax and customs administrations. Only a combined and joined approach from the Commission, to provide for a stricter legal framework for applying this exemption and from Member States to collect and transmit this information to the different parties involved can guarantee that this becomes an effective tool to fight the above mentioned abuse.

b) Joint and several liability

The modification of Article 205 concerns the obligation for Member States to make the supplier of the goods, who is not established on their territory, jointly and severally liable for the VAT due on the intra-Community acquisition of these goods by his customer when certain obligations are not fulfilled thus implicitly contributing to a VAT loss in the Member State where the intra-Community acquisition takes place. These conditions are that the supplier did not fulfil his obligation to submit the recapitulative statement for the supply and that the VAT was not declared in the VAT return by the person making the intra-Community acquisition of these goods. This way the Member State where the intra-Community acquisition is located is not informed that goods arrive on its territory. Furthermore, in order to respect the general principles of proportionality and legal certainty, this supplier can refute the presumption created in this Article by duly justifying his shortcoming to the competent tax authorities.

This way, Member States receive an additional legal base allowing them to collect the VAT due upon the intra-community acquisition from a taxable person involved in a fraudulent transaction or chain of transactions, thus increasing the risks and costs for those fraudsters and complicating the setting up of such fraud schemes. At the same time this will create an incentive for the supplier to submit timely a correct and complete recapitulative statement thus improving the quality of the data to be transmitted through the VIES (value added tax information exchange) system.

(Explanatory memorandum validated - 10 456 characters - complying with DGT norm.)

Proposal for a

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amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to import and other cross-border transactions

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the European Economic and Social Committee³,

Whereas:

- (1) The Council, in the Conclusions of its meeting on Economic and Financial Affairs of 28 November 2006, has agreed to establish an Anti-tax fraud Strategy implemented at Community level, especially for tax fraud in the field of indirect taxation, in order to complement national efforts.
- (2) Two measures which have been discussed in that context require an amendment of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax⁴.
- (3) The importation of goods is exempt from value added tax (VAT) if followed by a supply or transfer of those goods to a taxable person in another Member State. The conditions under which that exemption is granted are laid down by Member States. Experience, however, shows that divergences in application are exploited by traders to avoid payment of VAT on goods imported under those circumstances.
- (4) In order to prevent that exploitation and based on the obligation for the Commission to present, where appropriate, to the Council proposals designed to delimit the scope of exemptions granted upon importation and to lay down the detailed rules for their

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006. Directive last amended by Directive 2008/8/EC, OJ L 44, 20.2.2008

implementation, it is necessary to specify the conditions under which this exemption applies.

- (5) VAT is payable by the person liable for the payment to the tax authorities. To safeguard payment of VAT, Member States may however provide that under appropriate circumstances another person is held jointly and severally liable for the payment of that VAT.
- (6) In order to guarantee that a supplier of goods who contributes to a VAT loss occurring when the goods supplied exempt of VAT are acquired by another person, may also be held jointly and severally liable for the payment of VAT due on the intra Community acquisition of those goods in a Member State where the supplier concerned is not established (non-established supplier), it is appropriate to provide for that possibility.
- (7) To satisfy the requirement for legal certainty for the non-established supplier, it is necessary that all Member States apply the same rule and that the conditions for application are transparent.
- (8) Since, for those reasons, the objectives of the proposed actions with a view to address the problem of VAT evasion, cannot be sufficiently achieved by the Member States themselves and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (9) Directive 2006/112/EC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/112/EC is amended as follows:

- (1) Article 143 is amended as follows:
 - (a) the introductory words are replaced by the following:
 - "1. Member States shall exempt the following transactions:"
 - (b) the following paragraph is added:
 - "2. The exemption provided for in point (d) of paragraph 1 shall apply only if at the time of importation the importer has clearly indicated to the competent authorities of the Member State of importation all the following information:
 - (a) his VAT identification number or the VAT identification number of his fiscal representative in the Member State of importation;
 - (b) the VAT identification number of the customer to whom the goods are supplied in another Member State, or his own VAT identification

number in the Member State of arrival of the goods when the goods are subject to a transfer from the Member State of importation in accordance with the conditions laid down in Article 138(2)(c);

- (c) the proof that the imported goods will be transported or dispatched from the Member State of importation to another Member State."

(2) Article 205 is replaced by the following:

“Article 205

1. In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.
2. In the situation referred to in Article 200, the person supplying goods in accordance with the conditions laid down in Article 138, shall be held jointly and severally liable for the payment of the VAT due on the intra-Community acquisition of those goods where he has not complied with the obligation provided for in Articles 262 and 263 to submit a recapitulative statement containing the information concerning the supply or the recapitulative statement submitted by him does not set out the information concerning this supply as required under Article 264.

However, the first subparagraph shall not apply in the following situations:

- (a) the customer has, for the period during which the tax became chargeable on the transaction concerned, submitted a VAT return as provided for in Article 250 containing all the information on this transaction;
- (b) the person supplying goods in accordance with the conditions laid down in Article 138 can duly justify to the satisfaction of the competent authorities his shortcoming referred to in the first subparagraph of this paragraph."

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2009 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*