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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

in accordance with Article 395 of Council Directive 2006/112/EC

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1. BACKGROUND

In accordance with Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply 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 or avoidance. Agreement is needed by Council prior to any change in the national legislation of a Member State. As this procedure provides for derogations from the general principles of VAT, in accordance with the consistent rulings from the European Court of Justice, such derogations should be limited in scope and proportionate.

By letter registered with the Commission on 24 February 2012, the French Republic has requested to be authorised to introduce measures derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of that Directive, the Commission informed the other Member States by letter dated 9 November 2012 of the request made by France. By letter dated 12 November 2012, the Commission notified France that it had all the information it considered necessary for appraisal of the request.

By letter registered with the Commission on 11 June 2012, the Federal Republic of Germany has requested to be authorised to introduce measures derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of that Directive, the Commission informed the other Member States by letter dated 9 November 2012 of the request made by Germany. By letter dated 12 November 2012, the Commission notified Germany that it had all the information it considered necessary for appraisal of the request.

By letter registered with the Commission on 25 July 2012, the Republic of Austria has requested to be authorised to introduce measures derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of that Directive, the Commission informed the other Member States by letter dated 9 November 2012 of the request made by Austria. By letter dated 12 November 2012, the Commission notified Austria that it had all the information it considered necessary for appraisal of the request.

2. SUMMARY OF THE REQUESTS

France requests a derogation to allow for the introduction of the reverse charge mechanism on domestic supplies between taxable persons of gas and electricity, and telecommunications services, as a VAT anti-fraud measure, specifically to deal with the threat of VAT carousel fraud.

Germany and Austria request a derogation to allow for the introduction of the reverse charge mechanism on domestic supplies between taxable persons of gas and electricity as a VAT anti-fraud measure, specifically to deal with the threat of VAT carousel fraud.

3. REVERSE CHARGE DEROGATION

The person liable for the payment of VAT pursuant to Article 193 of the VAT Directive is the taxable person supplying the goods or services. The purpose of the reverse charge mechanism is to shift that liability onto the taxable person to whom the supplies are made.

Missing trader fraud occurs when traders evade paying VAT to the tax authorities after selling their products. Their customers, however, are entitled to a tax deduction as they are in possession of a valid invoice. In the most aggressive cases of such tax evasion the same goods or services are, via a "carousel" scheme (which involves the goods or services being traded between Member States) supplied several times without payment of VAT to the tax authorities. By designating the person to whom the goods or services are supplied as the person liable for the payment of VAT in such cases, the reverse charge mechanism has been found to eliminate the opportunity to engage in that form of tax evasion.

In September 2009, the Commission proposed to amend the VAT Directive as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud (COM(2009) 511, OJ C 26, 28.01.2011, p11). Those goods were specifically mobile phones, integrated circuit devices, precious metals and perfumes, and the services were greenhouse gas emissions allowances. This list was based on information collected by the Commission relating to sectors highly affected by carousel fraud at that time. The objective of this proposal was to give the same option to all Member States and at the same time to put in place an effective evaluation mechanism in order to assess its cross-border implications.

The Council could not agree at that time to the proposal in its entirety, instead adopting, by Council Directive 2010/23/EU of 16 March 2010, only the element which related to greenhouse gas emissions allowances and undertaking to return to the outstanding elements of the proposal at a later date. Via a Council minute statement, the Council committed itself to continue discussions on the other parts of the proposal. The Commission considers that it is now time to resume these negotiations.

In combination with the Quick Reaction Mechanism proposal (COM(2012) 428), missing trader fraud in VAT would then be tackled both in the short and longer term.

4. THE REQUESTS

France requests, under Article 395 of the VAT Directive, that the Council, acting on a proposal from the Commission, authorises France to introduce special measures derogating from Article 193 as regards the application of the reverse charge mechanism to domestic supplies between taxable persons of gas and electricity, and telecommunications services. It claims that such a reverse charge mechanism is necessary in order to establish safeguards against revenue losses from carousel fraud in France.

The reason for this request by France is that the current fraud prevention measures will not work effectively and whilst there is currently no detected fraud in these sectors in France, a large number of suspicious firms or individuals have gained access to the French gas and electricity market and are being investigated. France, therefore, fears that the fraud will migrate from greenhouse gas emissions allowances to other tradable goods and services such as gas and electricity, and telecommunications services. As of 1 April 2012 France changed its legislation to apply a reverse charge to these supplies.

Germany and Austria request, under Article 395 of the VAT Directive, that the Council, acting on a proposal from the Commission, authorises Germany and Austria to introduce special measures derogating from Article 193 as regards the application of the reverse charge mechanism to domestic supplies between taxable persons of gas and electricity. They claim that such a reverse charge mechanism is necessary in order to establish safeguards against revenue losses from carousel fraud in Germany and Austria.

The reason for these requests by Germany and Austria is that the current fraud prevention measures have been exhausted and will not work effectively in the medium to long term. Although they have not provided information on any proven fraud cases at present a large number of suspicious firms or individuals have gained access to the German and Austrian gas and electricity market and are being investigated. There is a fear that the fraud will migrate from greenhouse gas emissions allowances to other tradable goods and services such as gas and electricity.

5. THE COMMISSION'S VIEW

When the Commission receives requests in accordance with Article 395, these are examined to ensure that the basic conditions for their granting are fulfilled i.e. whether the proposed specific measure simplifies procedures for taxable persons and/or the tax administration or whether the proposal prevents certain types of tax evasion or avoidance. In this context, the Commission has always taken a limited, cautious approach to ensure that derogations do not undermine the operation of the general VAT system, are limited in scope, necessary and proportionate.

In the view of the Commission, the requests received from France, Germany and Austria do not fulfil the basic condition of Article 395, i.e. in that they neither simplify procedures for the taxable persons and/or the tax administration, nor do they prevent certain types of tax evasion or avoidance. There is indeed no evidence from France or Austria of tax evasion in these requesting Member States as regards supplies of gas and electricity, and telecommunications services in France, and whilst the French request mentions a detected fraud case in Germany, the German request does not.

More importantly, it is the Commission's view that the application of the reverse charge mechanism for supplies of gas and electricity and telecommunications services would have a considerable negative impact on other Member States and on the Internal Market as a whole. Indeed, fraud in these types of goods and services can very quickly move from one Member State to another, because of the pan European integration of these types of markets and also because a high quantity of transactions can be undertaken in a short period of time at a distance, without the need for any physical contact between operators.

In the case of gas and electricity, as was the case with greenhouse gas emission allowances, it is common for sellers and buyers to be established in a Member State other than that of the market where the supply is registered. This means that markets in Member States which have a derogation could still be used to commit VAT fraud in other Member States without a derogation, and importantly without the ability to react quickly through legislative changes.

Therefore, the only appropriate and effective approach to tackle this type of fraud is to amend the VAT Directive in a similar way to that which was done for greenhouse gas emissions allowances in Council Directive 2010/23/EU, thereby providing all Member States with the

same anti-fraud measures and allowing them to react quickly if and when this type of fraud moves across borders.

This view is shared by the Council, as confirmed in the minutes statement to Council Directive 2010/23/EU, in which it not only committed itself to further discussion on the application of the reverse charge mechanism to counter specific types of fraud, but also recognised the exceptional nature of a derogation allowing for the introduction of such a measure in order to urgently tackle a fraud which has resulted in substantial losses in a Member State.

6. CONCLUSION

Accordingly, the Commission concludes that the requests made by France, Germany and Austria do not fulfil the conditions laid down in Article 395 of the VAT Directive and would have a considerable negative impact on other Member States and on the Internal Market as a whole. It therefore objects to the derogations requested.

The Commission also reminds the Council of its proposal from September 2009 on an optional mechanism which would be available to all Member States and should be the adequate response to the concerns expressed by France, Germany and Austria. The Commission supports the inclusion of gas and electricity, as well as telecommunications services, in the list of goods and services currently under negotiation. It is the Commission's view that other goods and services for which Member States are currently authorised to apply a reverse charge and for which the migration of fraud would have a negative impact on the Internal Market should be treated in a consistent manner as supplies of gas and electricity, and telecommunications services.