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Proposal for a

COUNCIL DIRECTIVE

amending Directive 2006/112/EC on the common system of value added tax as regards a quick reaction mechanism against VAT fraud

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In the Annual Growth Survey 2012¹ and its Annex IV ('Growth-friendly tax policies in Member States and better tax coordination in the EU'), the Commission has emphasized the need to raise the efficiency of VAT in the context of fiscal consolidation. It was pointed out that improving tax collection and tackling tax evasion more efficiently could contribute to an increase of government revenue.

VAT fraud schemes evolve rapidly and Member States are sometimes confronted with situations whereby the EU VAT law in force does not provide a legal base for the counteractions they wish to take.

Until now, such situations have been tackled either by an amendment of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax² (hereafter the 'VAT Directive') or individual derogations have been granted to Member States on the basis of Article 395 of the VAT Directive. This article currently offers the option to Member States to obtain a derogation in order to combat fraud (simplification being the other possible objective under this article). This requires a (positive) proposal from the Commission, a process which can take up to 8 months according to paragraph 4 of Article 395 of the VAT Directive, and unanimous adoption by the Council, which can lead to further delays.

In both cases, the process is, by nature, slow and cumbersome in comparison to quickly emerging fraud phenomena at international level, e.g. carousel fraud in services which are very quickly supplied on to the next trader (rather than the more traditional type of fraud in goods). The process for granting derogations or for amending the VAT Directive can therefore lead to considerable and irreparable financial losses. A recent example is the estimated loss of EUR 5 billion between June 2008 and December 2009 in relation to the greenhouse gas emission allowances trade³.

Member States may therefore be tempted to take immediate measures without an appropriate legal basis in the EU legislation. However, this situation remains unsatisfactory as these measures, even where they are appropriate and proportionate in relation to the fraud situation, could be challenged before the Courts because of the lack of a legal basis.

Making the EU VAT system more robust is also one of the key objectives set out in the Communication on the future of VAT⁴ presented on 6 December 2011 and the current proposal has been indicated as a priority action for pursuing that objective.

The purpose of this proposal is therefore to foresee a procedure in the VAT Directive which, in very specific situations, would provide a legal base for Member States to take immediate measures. This would be called the Quick Reaction Mechanism (hereafter 'QRM').

¹ COM(2011) 815, 23.11.2011.

² OJ L 347, 11.12.2006, p. 1.

³ Europol press release of 9 December 2009, 'Carbon Credit fraud causes more than EUR 5 billion damage for European Taxpayer'

⁴ COM(2011) 851 final

The purpose of the QRM is not to replace the current derogation system. Its scope is therefore limited to massive and sudden fraud situations in (a) specific economic sector(s) in a particular Member State that cannot be stopped via traditional control and enforcement means and which would lead to irreparable losses.

As this new mechanism would only bring added value if decisions can be adopted much quicker than under the current procedures, it is proposed that the Commission would make use of implementing powers as foreseen in Article 291 of the Treaty on the Functioning of the European Union as to ensure a correct implementation of the VAT Directive, and to prevent budget losses and violations of the principles of fair taxation.

For the adoption of the implementing decisions, authorising a derogating anti-fraud measure to the requesting Member State concerned, use would be made of the examination procedure, as explicitly foreseen regarding taxation in Article 2, paragraph 2, point (b)(v) of Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers⁵ (hereafter the 'Comitology Regulation'), of which the practical and legal aspects are set out in Article 5 of the said Regulation.

In conjunction with this article, the Commission would adopt immediately applicable acts on the basis of duly justified grounds of urgency, within the meaning of Article 8 of the Comitology Regulation. This is the fastest option to provide for a legal basis for a derogating measure to be applied in a Member State in short notice. This underlines, as already mentioned, the exceptional character of the QRM and explains its limited scope.

In derogation of the foreseen standard application period of 6 months in Article 8(2) of the Comitology Regulation, it is proposed to increase the application period of any authorisation given under the QRM to maximum one year. This would allow Member States in the meantime to follow the standard procedure provided for under Article 395 of the VAT Directive or to implement other anti-fraud measures which do not require a derogation.

In accordance with Article 8(3) of the Comitology Regulation, the act would have to be submitted to the relevant Comitology committee, which would be the Standing Committee on Administrative Cooperation (SCAC), within 14 days of its adoption by the Commission. Article 3(5) of the Comitology Regulation provides the possibility, in duly justified cases, to obtain the committee's opinion by written procedure and the Commission has the intention to make use of that option with a view to speeding up the procedure as much as possible. As allowed under the second paragraph of Article 3(5) of the Comitology Regulation, it will not be possible for a Member State to terminate the written procedure upon request in order to convene a meeting as this would considerably slow down the whole procedure. It is to be understood that, should the committee deliver a negative opinion, the Commission has to immediately repeal the derogation in accordance with Article 8(3) of the Comitology Regulation.

As to the content of the derogations which could be authorised under the QRM, it is proposed to define and agree a list of anti-fraud measures as, once a QRM request is submitted, there will be little or no time for a fundamental debate between Member States on the type of anti-

⁵ OJ L 55, 28.2.2011, p. 13.

fraud measures. This will also allow the Commission to work on the basis of, to a large extent, pre-established texts, thereby reducing timeframes for case-handling and translations.

The only anti-fraud measure currently specified in this proposal is the so-called reverse charge mechanism, under which the taxable recipient becomes liable for the payment of the VAT instead of, as a general rule, the supplier of the goods or services. Insofar as the recipient disposes of a full right of deduction, he will account and deduct the VAT in the same VAT return and the result is that no effective payment or refund is taking place; thus reducing the possibilities of fraud. This measure, and notwithstanding its possible medium-term negative side-effects, has proven to be an effective tool in stopping fraud (and in particular carousel fraud) when targeted to certain specific sectors.

The other measures would have to be determined by the Council, acting unanimously upon a proposal from the Commission, so that these measures are established before being considered as part of any QRM request.

In procedural terms, Member States should send an application to the Commission outlining their intention of introducing a derogation measure on the basis of the QRM system. The exceptional circumstances of the fraud situation should be explained in detail as to justify the application of the QRM; the Commission shall ask for additional information when required. Once all the necessary information is available, the Commission will either authorise the measure or inform the Member State concerned of its refusal within one month.

In order to streamline the process as much as possible, the request of a Member State would be based on a standardised form, adopted by the Commission, containing a pre-established list of questions allowing for a quicker and more comprehensive examination and assessment of the fraud situation for which the derogation demand is lodged. As regards its internal organisation, the Commission will ensure that an accelerated decision-making procedure is in place. The derogation would be granted by the Commission itself without the need to wait for a decision of the Council and even before an opinion is delivered by the competent committee. Furthermore, since only one Member State would be concerned, the adoption of the Decision could take place on the basis of one single language version. The combination of all these factors should make it possible that the deadline of 1 month, after the Commission having obtained all the necessary information, is met.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Public consultation as to the possible use of a QRM was already held in the context of the above-mentioned Communication on the future of VAT. Prior to that public consultation, discussions took place with the Member States (via the Anti Tax Fraud Strategy Group) showing that there was a genuine interest for such a mechanism to be put in place.

The current proposal is mainly of a procedural nature. Its purpose is to speed up, in cases of urgency, the possibility already existing for Member States to obtain an authorisation to derogate from the provisions of the VAT Directive. An impact assessment was therefore irrelevant in this context. Only the subsequent national measures, authorised under the QRM (like those authorised today under Article 395), could have a certain impact which, in any case, should not be significant given the limited scope and duration.

Furthermore, as it is not known for which concrete and specific cases a Member State might ask for the proposed QRM procedure, it is not possible to estimate any quantitative impact the QRM could have compared to the current derogation procedure, as this would obviously always depend on the specific case.

3. LEGAL ELEMENTS OF THE PROPOSAL

With a view to assist the Member States better in their fight against aggressive forms of VAT fraud, the proposed measure complements the procedure for adopting certain derogatory measures to ensure a quicker and, as a result, a more adequate and effective response to these phenomena. This proposal therefore amends the VAT Directive.

The EU action is justified on grounds of subsidiarity following the legal basis for work in the area of indirect taxation provided for in Article 113 of the Treaty on the Functioning of the European Union. Use is made of the implementing powers of the Commission on the basis of Article 291 of the TFEU and in accordance with the Comitology Regulation, which stipulates that the examination procedure is to be used for taxation issues. The risk of irreparable financial losses justifies the use of immediately applicable acts. As a consequence, the procedure for adopting this type of derogation measure will be speeded up.

The above-mentioned sudden and massive fraud phenomena very often have an international dimension (e.g. so-called carousel and missing trader fraud). When confronted with new forms of trade (e.g. internationally tradable services), Member States are not in a position to individually counter these (intangible) fraud circuits which involve several countries at the same time. Therefore, the objective of combating fraud can be better achieved at EU level via a Directive which offers the possibility to Member States to obtain, in exceptional cases, a legal basis for a derogating measure in a much quicker way than that which is currently possible. This does therefore not go beyond what is necessary to achieve the objective.

The proposed instrument is a Directive as the legislation being amended is a Directive and so no other legislative act would be suitable.

4. BUDGETARY IMPLICATION

The proposal has no negative impact on the EU budget.

Proposal for a

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amending Directive 2006/112/EC on the common system of value added tax as regards a quick reaction mechanism against VAT fraud

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament⁶,

Having regard to the opinion of the European Economic and Social Committee⁷,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Tax fraud in the field of value added tax (VAT) leads to considerable budget losses and affects the conditions of competition and thus the operation of the internal market. Specific sudden and massive forms of tax fraud have recently developed especially via the use of electronic means which facilitate rapid illegitimate trade on a large scale.
- (2) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax⁸ allows Member States to apply for a derogation from that Directive in order to prevent certain forms of tax evasion or avoidance. Authorisation of such derogation requires a proposal from the Commission and its adoption by the Council. Recent experience has demonstrated that the process for granting derogations is not always flexible enough to ensure a prompt and suitable reaction to requests by Member States.
- (3) In order to ensure the principle of fair taxation and the implementation of Directive 2006/112/EC in cases where the current derogation procedure is not appropriate, it is necessary to establish a new procedure for granting derogations, called 'Quick reaction mechanism'.

⁶ OJ C , , p. .

⁷ OJ C , , p. .

⁸ OJ L 347, 11.12.2006, p. 1.

- (4) In order to allow for a quicker adoption of the necessary derogations and to ensure uniform conditions for the implementation of Directive 2006/112/EC, implementing powers should be conferred on the Commission as regards the authorisation given to the requesting Member State to introduce derogation measures in the specific framework of the Quick Reaction Mechanism. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers⁹.
- (5) The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to the authorisation given to the requesting Member State to introduce derogating measures, imperative grounds of urgency so require. Immediately applicable implementing acts are necessary in cases of sudden and massive forms of fraud that could lead to considerable and irreparable losses.
- (6) It is necessary to extend the maximum period of validity of immediately applicable implementing acts in order to allow the Member State concerned to establish more permanent measures in the meantime. This would also, if need be, provide sufficient time for the application of the derogation procedure set out in Article 395 of Directive 2006/112/EC.
- (7) The designation of the recipient as person liable for the payment of the VAT (reverse charge) is an effective measure to stop at once the most well-known types of tax evasion in certain sectors. However, as the situation may evolve over time, it may also be necessary to allow for other measures. To that end, the Council should, where appropriate, upon proposal of the Commission, determine any other measure as falling within the scope of the Quick Reaction Mechanism. The type of measures that could be authorised should be established in order to minimise the time necessary for the authorisation of the derogations by the Commission.
- (8) It is also necessary to establish the standardised form of requests by Member States in order to facilitate their understanding and subsequent treatment. In order to ensure uniform conditions for the implementation of Directive 2006/112/EC, implementing powers should be conferred on the Commission as regards that standardised form.
- (9) In order to accelerate the adoption of implementing acts relating to the authorisation given to the requesting Member State to introduce derogation measures in the specific framework of the Quick Reaction Mechanism, the chair of the Committee should apply the written procedure within the meaning of Article 3(5) of Regulation (EU) No 182/2011. It is also necessary to exclude the possibility for a committee member to request the termination of the written procedure without result.
- (10) Since the objective of the action to be taken, to address sudden and massive fraud phenomena in the field of VAT which very often have an international dimension, cannot be sufficiently achieved by the Member States, as they are not in a position to individually counter the fraud circuits related to new forms of trade which involve several countries at the same time, and can therefore, by reason of ensuring a quicker and, as a result, a more adequate and effective response to these phenomena, be better

⁹ OJ L 55, 28.2.2011, p. 13.

achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. 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.

(11) Directive 2006/112/EC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

In Chapter 2 of Title XIII of Directive 2006/112/EC, the following Section 1a is inserted:

"Section 1a Quick reaction mechanism against VAT fraud

Article 395a

1. The Commission may adopt implementing acts authorising any Member State to introduce the following special measures by derogation from this Directive, in order to combat sudden and massive forms of tax fraud in the field of VAT which could lead to considerable and irreparable financial losses:
 - (a) the designation of the recipient as person liable to pay VAT on specific supplies of goods and services by derogation from Article 193, following a request referred to in paragraph 2 of this Article for such measure;
 - (b) any other measure determined by the Council acting unanimously on a proposal from the Commission.

For the purposes of point (a), the special measure shall be subject to appropriate control measures by the Member States with respect to taxable persons who supply the goods or services to which that measure applies.

The implementing acts referred to in the first subparagraph of this paragraph shall be adopted in accordance with the examination procedure referred to in Article 395b(2).

On duly justified imperative grounds of urgency relating to the authorisation given to the requesting Member State to introduce derogating measures referred to in the first subparagraph of this paragraph, the Commission shall adopt immediately implementing acts in accordance with the procedure referred to in Article 395b(3). Those acts shall remain in force for a period not exceeding one year.

2. A Member State wishing to introduce a measure as provided for in paragraph 1 shall send an application to the Commission. The Member State shall provide it with the information indicating the sector concerned, the type and the features of the fraud, its sudden and massive character and its consequences in terms of

considerable and irreparable financial losses. If the Commission considers it does not have all the necessary information, it shall contact the Member State concerned within one month of receipt of the application and specify what additional information is required.

Once the Commission has all the information it considers necessary for appraisal of the request it shall, within one month, either authorise the special measure or, in case the Commission objects to the requested measure, inform the Member State concerned thereof.

3. The Commission shall adopt an implementing act establishing a standardised form for submission of information referred to in the first subparagraph of paragraph 2. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 395b(2).

Article 395b

1. The Commission shall be assisted by the committee established by Article 58 of Council Regulation (EU) No 904/2010(*). That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council(**).
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

Where the opinion of the committee is to be obtained by written procedure, that procedure shall be terminated without result only when, within the time-limit for delivery of the opinion, the chair of the committee so decides.

(*) OJ L 268, 12.10.2010, p. 1.

(**) OJ L 55, 28.2.2011, p. 13."

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2013 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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*