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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. As this procedure provides for derogations from the general principles of VAT, in accordance with the consistent rulings from the Court of Justice of the European Union, such derogations should be limited in scope and proportionate.

By letter registered with the Commission on 1 March 2013, Germany has requested to be authorised to continue a measure 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 25 April 2013 of the request made by Germany. By letter dated 26 April 2013, the Commission notified Germany that it had all the information it considered necessary for appraisal of the request.

Germany requests to be authorised to continue to apply the reverse charge mechanism in relation to mobile phones and integrated circuit devices for which it previously had obtained a derogation in November 2010<sup>1</sup>.

The derogation of Germany, for which an extension is requested, should be seen against the background of a derogation which was previously granted to the United Kingdom.

In April 2007, the United Kingdom was granted a derogation to apply the reverse charge mechanism in relation to supplies of mobile telephones and integrated circuit devices<sup>2</sup>. This measure was limited in time, and had an expiry date of 30 April 2009. This expiry date was subsequently extended to 30 April 2011<sup>3</sup>.

Following this last extension, Germany requested a similar derogation by letter registered with the Commission on 23 December 2009. Eventually, this resulted in the above-mentioned derogation granted in November 2010. The relevant Council Implementing Decision authorised, at the same time, Italy and Austria to apply a similar derogating measure concerning mobile telephones and integrated circuit devices since these Member States were also confronted with fraud in these sectors. In addition, by the same Decision the derogation measure for the United Kingdom was extended again, having for effect that the authorisations for all the Member

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<sup>1</sup> Council Implementing Decision 2010/710/EU of 22 November 2010 authorising Germany, Italy and Austria to introduce a special measure derogating from Article 193 of Directive 2006/112/EC and amending Decision 2007/250/EC to extend the period of validity of the authorisation granted to the United Kingdom (OJ L 309, 25.11.2010, p. 5)

<sup>2</sup> Council Decision 2007/250/EC of 16 April 2007 authorising the United Kingdom to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 109, 26.4.2007, p. 42)

<sup>3</sup> Council Decision 2009/439/EC of 5 May 2009 amending Decision 2007/250/EC authorising the United Kingdom to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 148, 11.6.2009, p. 14)

States concerned would expire at the same day, namely on 31 December 2013. Finally, also the Netherlands requested in October 2012 a similar derogation for, amongst other items, mobile phones and integrated circuit devices but accepted that the derogation would also end on 31 December 2013, so as to enable an alternative and more harmonised VAT fraud policy in the future<sup>4</sup>.

It should also be stressed that the derogation granted to Germany in November 2010 was not intended to be a long term measure. It should indeed be recalled that during recent Council negotiations of similar types of derogations, a number of Member States have expressed their concern, stressing that any derogation from the system of fractionated payment cannot be more than a last resort and an emergency measure in proven cases of fraud, and must offer guarantees as to the necessity and exceptional nature of the derogation granted, the duration of the measure and the specific nature of the products concerned. Moreover, those Member States have pointed out that the reverse charge mechanism always entails a risk of the fraudulent activities being transferred to other Member States, and they have recalled that the reverse charge procedure shall not be used systematically to make up for inadequate surveillance by a Member State's tax authorities.

## **2. REVERSE CHARGE**

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.

## **3. THE REQUEST**

Germany requests, under Article 395 of the VAT Directive, that the Council, acting upon a proposal of the Commission, authorises Germany to continue the special measure derogating from Article 193 of the VAT Directive as regards the application of the reverse charge mechanism in relation to mobile phones and integrated circuit devices such as microprocessors and central processing units in a state prior to integration into end-users products.

## **4. THE COMMISSION'S VIEW**

When the Commission receives requests in accordance with Article 395 of the VAT Directive, these are examined to ensure that the basic conditions for their granting

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<sup>4</sup> Council Implementing Decision 2013/116/EU of 5 March 2013 authorising the Kingdom of the Netherlands to apply a measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 64, 7.3.2013, p. 4)

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.

As mentioned above, the derogating measure granted to Germany in November 2010 was never intended to be a long term solution and was intended to allow Germany to put in place other conventional anti-fraud measures in this sector. In this context, an automated evaluation mechanism, linked to specific VAT declaration obligations, was put in place. As a result, and according to the German request, the fraud has disappeared or, at least, moved to other sectors where close monitoring would be sufficient to manage the risk. Hence, there is no particular reason why, in the specific sector of mobile phones and integrated circuit devices, Germany should be entitled to apply the reverse charge mechanism beyond the end of the period for which it had been allowed to rely on this derogation from Article 193 of the VAT Directive, i.e. beyond 31 December 2013.

Moreover, the multiple requests for derogation in the aftermath of the granting of the derogation to the United Kingdom also clearly indicate that fraud in these sectors has shifted between Member States (the United Kingdom, Austria, Germany, Italy and the Netherlands). It is therefore now clearly established that the first derogating measure has had a negative impact on fraud in other Member States and therefore an adverse impact on the Internal Market as a whole. In addition, when a new Member State is affected by this type of fraud and in the absence of any quick reaction mechanism<sup>5</sup>, it needs to wait several months under the current derogation procedure to be granted a similar derogation, which further increases the negative impact it has to bear. These side effects are much more important than originally assessed.

At the same time, the fact that all these derogations end at the same date should allow for an EU wide solution to be agreed upon.

## 5. CONCLUSION

On the basis of the above-mentioned elements, the Commission objects to the request made by Germany.

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<sup>5</sup> Such as proposed via COM(2012)428 of 31.7.2012