



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.09.2004
COM(2004) 579 final

Proposal for a

COUNCIL DECISION

authorising Germany to apply a measure derogating from Article 17 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes

(presented by the Commission)

EXPLANATORY MEMORANDUM

By letter registered at the Commission's Secretariat-General on 22.03.2004, the German authorities requested authorisation, under Article 27 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment¹ (hereafter referred to as the Sixth Directive), to continue to apply a special measure, which the Council had initially authorised by Article 1 of its Decision 2000/186/EC of 28 February 2000.²

In accordance with Article 27(2) of the Sixth Directive, the Commission informed the other Member States by letter of 06.08.2004 of the request made by the German Government and by letter of 10.08.2004 the Commission notified Germany that it had all the information it considers necessary for appraisal of the request.

Article 1 of Decision 2000/186/EC authorises a measure, which consists in completely excluding expenditure on goods and services from the right to deduct VAT when less than 10% of those goods and services are used for business purposes.

Under Article 3 of the Decision the authorisation expired on 31 December 2002. That Article also provides for retroactive application of the Decision. In the light of a pending ECJ proceeding, the authorisation was only prolonged until 30 June 2004 by Council Decision 2003/354/EC of 13 May 2003³ to evaluate the conclusions of the ECJ for a future prolongation.

In fact, the validity of Decision 2000/186/EC of 28 February 2000 had to a certain extent been questioned in preliminary Court proceeding C-17/01, where the German "Bundesfinanzhof" had asked for a preliminary ruling on the validity of the procedure for adoption of this decision and on the validity of the retroactive effect of Article 3 of Decision 2000/186/EC. In its recent judgement of 29 April 2004, the Court decided that consideration of the procedure prior to the adoption of Council Decision 2000/186/EC of 28 February 2000 had disclosed no irregularity such as to affect the validity of that decision. The Court also decided that Article 3 of Decision 2000/186/EC is only invalid in that it provides for the authorisation granted by the Council of the European Union to the Federal Republic of Germany to have retroactive effect from 1 April 1999.

Germany is now requesting authorisation to continue to apply the measure provided for in Article 1 of the Decision. The Commission already stated in its proposal⁴ prior to Decision 2000/186/EEC that it considers the measure in question to be compatible with Article 27 of the Sixth VAT Directive and in particular that the derogation is justified by the need to simplify the procedure for charging VAT; it affects the amount of tax due at the final consumption stage only to a negligible extent. In the above-mentioned ruling the Court has not questioned the validity of Article 1 of Decision 2000/186/EEC. Therefore the derogation should be granted.

¹ OJ L 145, 13.6.1977, p. 1. Directive last amended by Directive 2004/7/EC (OJ L 27, 30.1.2004, p. 44).

² OJ L 59, 4.3.2000, p. 12.

³ Council Decision 2003/354/EC of 13 May 2003, OJ L 123, 17.5.2003, p. 47.

⁴ COM(1999)690 final.

The question as to the validity of the retroactive effect provided for in Article 3 of the Decision has no influence on a prolongation of the measure provided for in Article 1 for the future.

The validity of the authorisation should therefore be prolonged until 31 December 2009.

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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/CEE of 17 May 1977 on the harmonisation 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(1) thereof,

Having regard to the proposal from the Commission⁵,

Whereas:

- (1) In a letter registered by the Commission's Secretariat-General on 22.03.2004 the German authorities requested authorisation to continue to apply a derogation which had been granted by Article 1 of Council Decision 2000/186/EC⁽³⁾
- (2) The other Member States were informed of the request on 06.08.2004,
- (3) The derogating measure is intended to exclude expenditure on goods and services completely from the right to deduct VAT when the goods and services are used more than 90 % for the private purposes of the taxable person, or of his employees, or for non-business purposes in general. This measure is a derogation from Article 17 of Directive 77/388/EEC, as amended by Article 28f of that Directive and is justified by the need to simplify the procedure for charging VAT; it affects the amount of tax due at the final consumption stage only to a negligible extent.
- (4) The authorisation expired on 30 June 2004⁶, although the legal situation and the facts which justified application of the simplification measure in question have not changed and continue to exist.
- (5) In its recent judgement of 29 April 2004 in case C-17/01, the Court decided that consideration of the procedure prior to the adoption of Council Decision 2000/186/EC of 28 February 2000 had disclosed no irregularity such as to affect the validity of that decision; the duration of the new authorisation should be prolonged until 31 December 2009.

⁵ OJ C , , p. .

⁶ Council Decision 2003/354/EC of 13 May 2003, OJ L 123, 17.5.2003, p. 47.

(6) The derogation will not adversely affect the Communities' own resources from VAT,
HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 17(2) of Directive 77/388/EEC Germany is authorised to exclude expenditure on goods and services from the right to deduct VAT when the goods and services in question are used more than 90 % for the private purposes of a taxable person or of his employees, or, more generally, for non-business purposes.

Article 2

This Decision shall apply until 31 December 2009.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

*For the Council
The President*