



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.7.2004
COM(2004) 535 final

Proposal for a

COUNCIL DECISION

**authorising Austria to apply a measure derogating from Article 21 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

1. Under Article 27 of the Sixth Council Directive 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 the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of the Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.
2. In a request submitted to the Commission and registered by the Commission's Secretariat-General on 03.03.2004, the Austrian Government sought authorisation to introduce three measures derogating from Article 21(1) (a) of Directive 77/388/EEC.
3. In accordance with Article 27(2) of the Sixth Directive, the Commission informed the other Member States by letter of 26.03.2004 of the request made by the Austrian Government and by letter of 30.03.2004 the Commission notified Austria that it had all the information it considers necessary for appraisal of the request.
4. Article 21(1) of Directive 77/388/EEC, in the version of Article 28g of the said Directive, stipulates that, under the internal system, the taxable person supplying taxable goods or services is normally liable to pay value added tax (VAT).
5. The purpose of the derogation requested by Austria is to make the recipient liable for the value added tax due in three specific cases: Firstly on the supply of goods provided as security by one VAT taxable person to another in execution of that security; secondly on the supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee; and thirdly on the supply of immovable property in a judicial sale at public auction to another VAT taxable person, if the supplier has opted for taxation under Article 13 C of the 6th Directive. The requested measures are to be considered as measures to prevent certain types of tax evasion or avoidance in the described sectors.
6. Goods are often supplied as collateral by one VAT taxable person to another in execution of a security. This usually reflects a situation where the supplying guarantor has a limited capacity to settle his debts, including his tax debts. When the receiving collateral taker exercises his rights and sells the collateral to a third party, this sale also generates a supply from the guarantor to the collateral taker. In this case the collateral taker profits both from the proceeds of the sale of the collateral goods and the deduction of input tax on the guarantor's transfer to him. He usually does not pay the guarantor the turnover tax due on the supply to him. Even if part of the proceeds of the sale is passed on to the guarantor, there is still no guarantee that the later will use those proceeds to pay the turnover tax. In fact VAT losses occurred in many cases where the receiving collateral taker could not be refused his right to deduct and the supplying guarantor could not be held responsible because he was insolvent or had disappeared. The number of such cases prevents the Austrian tax administration to adopt exclusively fiscal and non-fiscal measures aiming at increasing administrative supervision of business. They would be insufficient

¹ OJ L 145, 13.6.1977, p.1. Directive last amended by Directive 2003/92/EC (OJ L 260, 11.10.2003, p.8)

because the Austrian fiscal administration would not be able to identify that many non-compliant operators or achieve identification too late to recover lost VAT. The dimension of the problems encountered by the Austrian administration requires legal measures. The envisaged liability of the recipient for VAT only concerns businesses which can usually exercise their right to deduct and does not cover private persons. A similar derogation has already been granted to Germany (Council Decision 2002/439/EC of 2 June 2002 – OJ L 151/12 of 11 June 2002).

7. The second scenario concerns a supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee: In cases where a buyer of goods has a limited capacity to settle his debts for the purchase, the supplier of the goods may reserve the ownership and cede the right to exercise this reservation and the purchase price claim to a third party, usually a bank, as a security for a loan granted by the third party to the buyer. If the buyer of the goods discontinues settling his debts for the loan, the bank will exercise its right of ownership; this involves a supply of the goods from the original buyer to the bank. In such a case the bank would usually not pay the original buyer the turnover tax due on the supply to it, but use it to settle the original buyer's debt for the loan, with the consequence that the Austrian fiscal authorities cannot recover VAT from the original buyer. Even if part of the proceeds of the sale were passed on to the original buyer, there is still no guarantee that the later will use those proceeds to pay the turnover tax. Therefore this second scenario is similar to the execution of a security described above. In fact, in most of these scenarios the original buyers are insolvent or disappear before the Austrian tax administration can identify them and recover VAT.
8. The third scenario concerns the supply of immovable property sold at public auction to another VAT taxable person in the course of the judicial liquidation of the enterprise that owned the immovable property. The relevant cases are those in which the supplier has opted for tax liability although at the time of supply he is not in a financial position to pay the tax authorities the tax which he has invoiced to the purchaser. The buyer can usually exercise his right to deduct and the supplier will pay no VAT to the fiscal authorities. The effect is that the creditors of the seller get more money paid back from their debtor than they would normally get if the sale had been exempt from VAT. This is, however, to the disadvantage of the fiscal authorities, who cannot recover VAT from the supplier because in the meantime he has declared his insolvency. The dimension of the problem encountered by the Austrian administration requires legal measures. Immovable property is a high value good; thus also the taxable amount and the losses in terms of VAT - even on one single transaction - are particularly high. The abolishing of the option to render a supply of immovable property taxable is no solution. The value of the immovable property usually contains hidden VAT and the maintaining of the option is therefore necessary to keep the VAT system neutral. Against this background, it appears that the envisaged liability of the recipient for VAT is in fact the most appropriate solution in the specific circumstances and for the particularly high risk involved. The requested derogation avoids the loss of VAT because there is no VAT paid from the fiscal authorities to one of the economic operators involved. The solution also avoids a double tax responsibility of supplier and recipient, which might involve a higher economic risk for the recipient if he is jointly liable. The solution relieves the fiscal authorities from burdensome recovery procedures, where they could only address the

recipient when recovery from the supplier proves to be impossible. It renders the fiscal responsibility of a third person like a notary, usually resulting in higher charges for supplier and recipient, superfluous. As in practice the derogation will only cover supplies between taxable persons, it is limited to specific cases; in fact, the option to make the supply taxable, is only used, where the recipient can usually exercise his right to deduct. Similar derogations have already been granted to Germany (Council Decisions 2002/439/EC of 2 June 2002 – OJ L 151/12 of 11 June 2002 and 2004/291/EC of 30 March 2004 – OJ L 94/59 of 30 March 2004).

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard the Sixth 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 assessment² and in particular Article 27 paragraph 1 thereof,

Having regard to the proposal from the Commission³,

Whereas:

- (1) In a request submitted to the Commission and registered by the Commission's Secretariat-General on 03.03.2004, the Austrian Government sought authorisation to introduce three measures derogating from Article 21(1) (a) of Directive 77/388/EEC,
- (2) The purpose of the derogation requested by Austria is to make the recipient liable for the value added tax due in three specific cases: Firstly on the supply of goods provided as security by one VAT taxable person to another in execution of that security, secondly on the supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee and thirdly on the supply of immovable property in a judicial sale at public auction to another VAT taxable person, if the supplier has opted for taxation under Article 13 C of the 6th Directive. The requested measures are to be considered as measures to prevent certain types of tax evasion or avoidance in the described sectors,
- (3) Where goods are supplied as collateral by one VAT taxable person to another in execution of a security, this usually reflects a situation where the guarantor supplying the goods has a limited capacity to settle his debts, including his tax debts. When the collateral taker who received the goods exercises his rights and sells the collateral to a third party, this sale also generates a supply from the guarantor to the collateral taker. In such scenarios VAT losses occurred in many cases because the collateral taker could not be refused his right to deduct and the supplying guarantor could not be held responsible because he was insolvent or had disappeared. The dimension of the

² OJ L 145,13.06.1977,p.1., Directive last amended by Directive 2003/92/EC (OJ L 260,11.10.2003,p.8).

³ OJ C , , p. .

problems encountered by the Austrian administration requires legal measures. The envisaged liability of the recipient for VAT only concerns businesses which can usually exercise their right to deduct and does not cover private persons. A similar derogation has already been granted to Germany (Council Decision 2002/439/EC of 2 June 2002⁴).

- (4) In cases where a buyer of goods has a limited capacity to settle his debts for a purchase, the supplier of the goods will reserve the ownership and may cede the right to exercise this reservation as well as the purchase price claim to a third party, usually a bank, as a security for a loan granted by the bank to the buyer. If the buyer of the goods discontinues settling his debts for the loan, the bank will exercise its right of ownership; this involves a supply of the goods from the original buyer to the bank. In such a case the bank would usually not pay the original buyer the turnover tax due on the supply to it, but use it to settle the original buyer's debt for the loan, with the consequence of VAT losses for the fiscal authorities because the original buyers are usually insolvent or have disappeared before the tax administration can identify them and recover VAT. Therefore this scenario is similar to the execution of a security described above.
- (5) VAT losses also occurred in cases of supplies of immovable property sold at public auction to another VAT taxable person in the course of the judicial liquidation of the enterprise that owned the immovable property and where the supplier had opted for tax liability although at the time of supply he was not in a financial position to pay the tax authorities the tax which he has invoiced to the purchaser. The buyer could usually exercise his right to deduct and the supplier did not pay VAT to the fiscal authorities. The dimension of the problem encountered by the Austrian administration requires legal measures. Immovable property is a high value good; thus also the taxable amount and the losses in terms of VAT - even on one single transaction - are particularly high. The value of the immovable property usually contains hidden VAT and the maintaining of the option is necessary to keep the VAT system neutral. Against this background, it appears that the envisaged liability of the recipient for VAT is the most appropriate solution in the specific circumstances and for the particularly high risk involved. The requested derogation avoids the loss of VAT because there is no VAT paid from the fiscal authorities to one of the economic operators involved. The solution also avoids a double tax responsibility of supplier and recipient, which would involve a higher economic risk for the recipient and burdensome recovery procedures for the fiscal authorities which could only address the recipient, when recovery from the supplier proved to be impossible. It avoids the fiscal responsibility of a third person like the notary, which would result in higher charges for supplier and recipient. As in practice the derogation will only cover supplies between taxable persons, it is limited to specific cases. Similar derogations have already been granted to Germany (Council Decisions 2002/439/EC of 2 June 2002⁵ and 2004/291/EC of 30 March 2004⁶).

⁴ OJ L 151, 11.06.2002 , p.12

⁵ OJ L 151, 11.06.2002 , p.12

⁶ OJ L 94, 30.03.2004, p.59

- (6) The derogation in question does not affect the amount of value added tax due at the final consumption stage and has no adverse impact on the European Communities' own resources from valued added tax

HAS ADOPTED THIS DECISION:

Article 1

By derogation from Article 21(1)(a) of Directive 77/388/EEC, as amended by Article 28g thereof, Austria is hereby authorised to designate the recipient of the supplies of goods referred to in Article 2 of this Decision as the person liable to pay value added tax.

Article 2

In the following instances the recipient of the supply may be designated as the person liable to pay value added tax:

1. The supply of goods provided as security by one VAT taxable person to another in execution of that security;
2. The supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee;
3. The supply of immovable property sold at public auction to another VAT taxable person in the course of the judicial liquidation of the enterprise that owns the immovable property sold, if the supplier has exercised his right to tax the supply.

Article 3

This Decision shall expire on 31 December 2008.

Article 4

This Decision is addressed to Austria

Done at Brussels,

*For the Council
The President*