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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

Pursuant to 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 introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. As this procedure provides for derogations from the general principles of VAT, such derogations should be proportionate and limited in scope.

By letter registered at the Commission on 18 June 2015, the Republic of Austria, the Republic of Bulgaria, the Czech Republic and the Slovak Republic have requested to be authorised to introduce a measure derogating from Article 193 of the VAT Directive. In accordance with the second paragraph of Article 395 of that Directive, the Commission informed the other Member States by letter dated 2 July 2015 of the request made by these four Member States. By letter dated 7 July 2015, the Commission notified the Republic of Austria, the Republic of Bulgaria, the Czech Republic and the Slovak Republic that it had all the information it considered necessary for appraisal of the request.

These Member States request to be authorised to derogate from Article 193 of the VAT Directive as regards the person liable for the payment of the VAT to the tax authorities and to apply the so-called ‘reverse charge mechanism’.

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.

3. THE REQUEST

The Republic of Austria, the Republic of Bulgaria, the Czech Republic and the Slovak Republic request, under Article 395 of the VAT Directive, that the Council, acting upon a proposal of the Commission, would authorise a special measure derogating from Article 193 of the VAT Directive as regards the application of the reverse charge mechanism in relation to all supplies of goods or services above €10.000 with a view of combating fraud.

This would authorise the Member States concerned to impose the application of the reverse charge mechanism to any sector, to any individual type of good or service they would choose, possibly to the whole national economy. This would fundamentally alter the current fractionated payment mechanism, one of the fundamental principles on which the current VAT system is based.

4. 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.

Apart from the question whether the requested measure would indeed be an effective way to combat carousel and other types of fraud or to reduce the VAT gap in general, and apart from the de-harmonization such a totally optional system would create, it is clear that such a far-reaching measure goes beyond the scope of a derogation under Article 395 of the VAT Directive. The Commission has already pointed out that a global and undistinctive application of the reverse charge mechanism to, in this case, potentially all goods and services can no longer be regarded as a special measure within the meaning of the above-mentioned article¹.

It is necessary to demonstrate that the application of the reverse charge mechanism is justified by a particular fraud problem and that it does not go beyond what is necessary to combat that fraud situation, which necessarily implies that the measure has to be targeted. It excludes, in any case, that such a measure would be applicable to large parts or even the whole economy and to different production and distribution stages.

This follows from the jurisprudence of the European Court of Justice that has ruled that measures, taken in application of Article 395 of the VAT Directive in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance, have to be necessary and appropriate for realising the specific objective which they pursue and have as little effect as possible on the objectives and principles of the VAT Directive².

Given the overall scope of the requested measure, the fundamental principle of the fractionated payment on which the harmonised VAT system is based, would clearly be affected.

It is also the Commission's view that any substantial change to the principles of the VAT system should be decided at EU level in the context of the reform of the VAT system, and not through stand-alone national solutions.

5. CONCLUSION

On the basis of the above-mentioned elements, the Commission objects to the request made by the Republic of Austria, the Republic of Bulgaria, the Czech Republic and the Slovak Republic.

¹ See in this context COM(2015)214

² See for example case C-489/09, *Vandoorne NV*, par. 27