Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 77/388/EEC as regards the determination of the person liable for payment of value added tax'

(1999/C 116/04)

On 22 December 1998 the Council decided to consult the Economic and Social Committee, under Article 99 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 8 February 1999. The rapporteur was Mr Walker.

At its 361th plenary session (meeting of 24 February 1999), the Economic and Social Committee adopted the following opinion by 64 votes to six, with six abstentions.

1. **Introduction**

1.1. The present system of VAT is so designed that the tax receipt is directly collected by the Member State on whose territory the consumption of the goods or services sold is deemed to have taken place. In order to ensure this direct allocation of the tax, complex rules have been laid down to determine the place where a supply of goods or of services is deemed to be consumed and where it must, consequently, be taxed.

1.2. As a result of the machinery set up by this system, traders engaged in intra-Community economic activities are often faced with tax obligations in several Member States with regard to identification, the submission of returns and payment. These obligations are usually perceived as a barrier to the free movement of goods and services which is a fundamental principle of the Single Market.

1.3. According to the principle set out in Article 21 of the Sixth VAT Directive, the trader who carries out taxable transactions in any given country is himself the person liable to pay tax to the authorities in that country.

1.3.1. Two important exceptions modify this general principle in relation to intra-Community trading; in the case of triangular transactions([1]), the person liable for payment of the tax must be the person for whom the supply of goods is intended and in the case of certain types of supplies of services (the services of accountants, consultancy bureaux, lawyers, the supply of services in the intra-Community transport of goods etc.), the person liable for payment of the tax is the recipient of the service.

1.3.1.1. Apart from these exceptions, the universal principle is that the person liable for payment of the tax is the person who carries out the taxable transactions, whether or not he is established within the territory of the country.

1.4. However, where the trader is not established in the Member State where he carries out taxable transactions, Article 21 gives Member States the option of requiring payment of the tax from someone else. A tax representative or the person for whom the supply of goods or services is intended may be designated for this purpose.

1.4.1. This option is designed to satisfy two concerns: firstly, it enables non-established taxable persons who may not be familiar with the law, the language or the administrative structure and procedures of the country concerned to delegate to a third party or to the person for whom the supply of goods or services is intended the obligations arising out of VAT legislation; secondly, it enables the Member State concerned to obtain guarantees that these obligations will actually be met.

1.5. Article 21 also permits Member States to provide that someone other than the person liable for payment of the tax is held jointly and severally liable for payment of the tax.

1.6. The main features of the present legislation as regards the determination of the person liable for payment of the tax are, therefore, (a) its extreme complexity and (b) the wide differences in its actual application, because of the many options the Member States are allowed.

1.7. The first source of difficulty relates to identification of the person liable for payment of the tax for each transaction, since this will depend both on the type of transaction carried out and the Member State in which it is transacted.

1.7.1. The second source of difficulty concerns the wide variety of obligations incumbent on the tax representative, where the Member State requires one to be appointed. In some Member States, he has to be approved by the administration and is also sometimes required to pay a surety. Even the concept of tax representative is understood very differently from one Member State to another, so that the specific obligations it implies are different.

([1]) A triangular transaction exists where enterprise A established in Member State A sells goods to enterprise B established in Member State B which itself sells them to enterprise C established in Member State C: the goods are then directly transported from Member State A to Member State C. In this case and on certain conditions, enterprise B is exempted from registering for VAT in Member State C, and enterprise C is then designated as the person liable for payment for the tax.

1.7.2. Lastly, the financial cost for a trader in appointing a tax representative is not insignificant. A representative will only consent to assume the taxable person's obligations and liabilities in return for remuneration.

1.8. Although these difficulties are not new, they represent, in the context of the Single Market, a major obstacle to the expansion of intra-Community trade and they bear particularly heavily on small and medium-sized enterprises. Moreover, since the abolition of border checks, the incidence of Member States requiring the appointment of tax representatives has increased.

1.9. This is why the Commission, in a working document dated 14 May 1997, indicated VAT obligations as an area to be examined in the second phase of the SLIM (Simpler Legislation for the Internal Market) initiative. The Commission felt that there was a need to give early consideration to simplification measures which would reduce the burden on Business in the short term.

1.9.1. The results of the work carried out are contained in the Commission report on the SLIM project, approved by the Council (Internal Market) on 27 November 1997, which, inter alia, recommends that the rules applicable to tax representation should be modified.

2. **The Commission's proposals**

2.1. The present proposal for a Directive supports the idea that there should be only one person liable for payment per type of transaction, irrespective of the Member State in which that transaction is carried out.

2.1.1. It is stated as a general principle that the taxable person who carries out the taxable transaction must be the person liable for payment of the tax, whether or not that taxable person is established within the territory of the Member State in which the transaction takes place.

2.1.2. The Commission sees the main advantage of this as being the simplicity of a more harmonized Community legislation, which all traders should be able to understand, so that there will no longer be any doubts as to the determination of the person liable to pay the tax. It is also seen by the Commission as constituting a major step forward in reducing the burdens on Business and, in particular, on SMEs.

2.2. The recipient of the goods or the purchaser of the service could no longer be designated as the person liable for the payment of the tax; this meets the concern, consistently expressed by the Commission, that the 'reverse charge' system, which runs counter to the principle of fractionated payments, should not be developed.

2.2.1. However, there are exceptions to this general rule :

a) the person, referred to in Article 28c (E) (3), for whom a triangular payment is destined;

b) the customer for services covered by Article 9 (2) (e);

c) the customer, identified for VAT purposes within the territory of the country, for whom a service referred to in Article 28b (C), (D), (E) and (F) is performed.

These all remain persons liable for payment of the tax.

2.2.2. In addition, Member States would still have the option of designating a person other than the person liable for payment of the tax as jointly and severally liable for payment of the tax. The only change is a statement to the effect that this option must not give rise to provisions which create a disadvantage specifically for non-established taxable persons.

2.3. The existence of a legal framework laid down by Directives 76/308/EEC and 77/799/EEC, organizing mutual assistance between the Member States, removes the justification for the existence of provisions transferring all the obligations of the non-established taxable person to a third-party tax representative. The Commission acknowledges that Member States still make little use of these assistance arrangements. This is why it recently presented a proposal[1] designed to improve considerably the way in which they function. This should make it easier to recover the tax owed by a non-established taxable person.

2.3.1. It will still be possible for the Member States to require the designation of a tax representative in a limited number of duly authorized cases. In the cases of non-established taxable persons who are nationals of countries with which the Member State has no agreement providing for mutual assistance procedures similar to those which exist within the Community and which are laid down by Directives 76/308/EEC and 77/779/EEC, Member States may continue to require that a tax representative be designated as the person liable for payment of the tax instead of the non-established taxable person. This possibility would not, however be regarded as being justified where that taxable person was engaged only in activities exempt under Articles 13 and 15 of the Sixth Directive, i.e. where no actual recovery of a tax debt was involved.

2.4. The principle that the non-established taxable person must be the person liable for payment of the tax would not prevent that person (or an established taxable person) from appointing an agent to act on his behalf in complying with the obligations laid down by Article 22 of the Sixth Directive if he is unable to do so himself because of linguistic, administrative or organizational barriers. For the sake of transparency, he must inform the administration of the agent's name and the taxable person would be responsible for the agent's actions vis-à-vis the administration.

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[1] COM(1998) 364 final, 25.6.1998.

3. **General comments**

3.1. In opinion after opinion, the ESC has consistently stated its support for the SLIM initiative. It reiterates that position again and therefore welcomes this Commission proposal as being entirely in line with the objectives of the SLIM project.

3.2. The Committee has also frequently expressed its concern that, because of the differences in the way in which VAT is applied and administered in the various Member States, the single market is effectively segmented into fifteen different tax areas. It has, on numerous occasions, pointed out that differences in procedures and the interpretation and application of the common VAT rules between the Member States create more difficulties for Business and constitute a greater barrier to intra-Community trade than variations in the VAT rates.

3.2.1. For this reason, the Committee welcomes any proposal, such as the present one, which is designed to bring about an improvement, however small, in this situation.

3.3. Such measures reduce the compliance costs for business and, by introducing a higher degree of uniformity, create a climate of greater certainty for traders and Member State administrations alike; they therefore contribute to the development of the Single Market.

3.4. The ESC accepts the proposition that the taxable person who carries out a taxable transaction should logically assume the liability for payment of the tax. It considers that ideally, there should be as few exceptions as possible to this general rule.

4. **Specific Comments**

4.1. Under the proposed Directive, the recipient of the goods or the purchaser of the service(s) could no longer be designated as the person liable for payment of the tax, except in certain specified circumstances.

4.1.1. The Committee has no problem with this as a general principle but notes the Commission's concern that the 'reverse charge' mechanism should not be developed and the importance which the Commission attaches to 'continuing to observe the principle of fractionated payments'.

4.1.2. In its Opinion 'A common System of VAT a programme for the Single Market'[1] the Committee stated that 'The ESC believes that, even if a decision is eventually taken to retain the fractionated payment system, alternatives should be considered, especially as some of them may well improve the cash flow of SMEs'. The Committee reiterates this position.

4.1.3. Permitting transactions between registered traders to be conducted free of VAT would be a greater measure of simplification and would do more to reduce the compliance burdens for Business than any other conceivable reform. The Committee is aware that there would be significant problems to be overcome in devising a system with adequate safeguards and accepts the possibility that such difficulties might, in the event, prove to be insuperable but it considers that this should not be taken for granted and believes that all feasible alternatives should be carefully examined before a final decision is made.

4.1.4. It is likely that many of the difficulties envisaged in departing from the principle of fractionated payments would be reduced, or even eliminated, by closer approximation of VAT rates. As an approximation will, in any case, be an essential prerequisite of the new common system of VAT based on taxation in the country of origin, it appears possible that such an arrangement might be incorporated in the new common system of VAT and the Committee urges the Commission to explore this possibility fully at the appropriate time.

4.2. The Committee accepts the necessity for the exceptions which the Commission has elected to retain to the general principle that the recipient of the goods or purchaser of the service(s) can not be the person liable for payment of the tax and agrees with the Commission that, as these exceptions are clearly defined and mandatory for the Member States, they are unlikely to stand unduly in the way of harmonized implementation of the legislation.

4.3. The Committee is of the opinion that the vast majority of traders who carry out taxable transactions in a country in which they are not established will be forced to continue to employ an agent to fulfil their obligations to the tax authorities in that country, because of their lack of knowledge of the language, the customs, the procedures, the law and the administrative structure. This is particularly true of SMEs.

4.3.1. As the agent appointed will usually require to be a national of the country in which the transactions have taken place, this will continue to involve traders in additional expense and administrative overheads but the Committee accepts that this should be less than they will incur at present where there is a need to appoint a tax representative who assumes the trader's liabilities.

4.4. The Committee welcomes the fact that Member States will no longer be able to require the appointment of a tax representative, except in limited and clearly-specified circumstances, but notes that they will still have the option to designate a person other than the person liable for payment of the tax as being jointly and severally liable for payment of the tax. The only restriction on the exercise of this option is a statement to the effect that it must not give rise to provisions which create a disadvantage specifically for non-established taxable persons.

[1] OJ C 296, 29.9.1997, p. 51.

4.4.1. The Committee questions the need to retain this option and hopes that Member States will not take advantage of it to negate the effects of this proposed Directive by stipulating that where a trader appoints an agent, whether it be a person or a firm, to act on his behalf in fulfilling his obligations to the VAT authorities that agent shall be jointly and severally liable with the trader for payment of the tax, regardless of whether or not the trader is established in the territory of that Member State.

4.4.2. The Committee also feels that the scope granted to Member States to designate a person other than the person liable for payment of the tax as being jointly and severally liable for payment of the tax is rather wide-ranging and should be more clearly delineated.

4.5. The Committee notes with approval that the proposed directive is not intended to encroach on the freedom of the Member States to determine the person liable for payment of the tax on importation.

5. **Conclusions**

5.1. The ESC welcomes the proposed Directive as constituting a fundamental improvement on the existing position, which will reduce the burdens imposed on Business by compliance costs, facilitate the development of the Single Market, create a climate of greater certainty for traders and national administrations alike and pave the way for the introduction of a new common system of VAT.

5.2. It has some concern that these benefits might be impaired or nullified if Member States exercised their option to designate a person other than the person liable for payment of the tax as being jointly and severally liable for payment of the tax in such a way as to make this a general requirement for all traders, both non-established and established, who appointed an agent to act on their behalf in complying with their statutory obligations. The Committee expresses the hope that Member States will not act in this way.

5.3. Whilst it supports the present proposal as constituting an improvement on the present situation the Committee reiterates the position which it has adopted in numerous previous opinions to the effect that modifications to the existing transitional system cannot do more than tinker with problems which can only be fully and finally resolved by the introduction of a new definitive system of VAT : it expresses, once again, its concern at the length of time which it is taking to bring thus about and urges the Member States to adopt a constructive and cooperative approach to the system of VAT reform.

Brussels, 24 February 1999.

The President

of the Economic and Social Committee

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