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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, in accordance with the consistent rulings from the European Court of Justice[1], such derogations should be proportionate and limited in scope.

By letter registered at the Commission on 12 February 2015, Italy has 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 16 March 2015 of the request made by Italy. By letter dated 17 March 2015, the Commission notified Italy that it had all the information it considered necessary for appraisal of the request.

Italy requests to be authorised to apply the reverse charge mechanism in relation to all supplies to so-called large retailers.

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

Italy requests, 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 supplies to so-called large retailers, a concept which refers to hypermarkets, supermarkets and hard discount stores which would be identified via their activity code. The derogation would be applicable to all types of consumer goods supplied to these large retailers and intended to be sold by them to final consumers. The measure, being dependent on the authorisation of the Council, has not entered into force yet in Italy.

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

[1] See e.g. Case C 489/09, par. 27

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.

Any derogation from the system of the fractionated payment can therefore not be more than a last resort and an emergency measure in proven cases of fraud, and must offer the 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. The reverse charge procedure is not to be used systematically to make up for inadequate surveillance by a Member State's tax authorities.

Against this background, it should be recalled that it has been the Commission's policy to consider derogations on the reverse charge mechanism only when, at the same time, the goods at stake cannot reach the final consumption, a weak taxpayer in the beginning of a business chain is replaced by a reliable one, there is no risk of shift of fraud to the retail level or to other Member States that do not use the mechanism.

The request is based on macro-economic figures provided by Italy which would indicate that the degree of evasion in the retail sector would be around 11% lower than for the economy as whole (16,04% as compared to 27,12%). By shifting the liability to a part of the retail economy (i.e. the large retailers), Italy expects that the VAT income will increase.

First, the Commission has reason to doubt that such a global and undistinctive application of the reverse charge mechanism to a very high number of products, in this case essentially destined for final consumption, could still be regarded as a special measure within the meaning of Article 395 of the VAT Directive.

In addition it can be pointed out, insofar necessary, that neither the nature nor the extent has been demonstrated of possible specific fraud problems in relation to suppliers (of which a part are themselves large and medium-sized companies) to the large retail sector. Subsequently, it is not ascertained that the reverse charge mechanism would be an appropriate measure in this context since this mechanism, although maybe suitable for e.g. carousel fraud, is not able to counter all forms of fraud (such as the so-called 'black economy', which is taking place without fulfilment of any VAT obligations) or, more general, for other causes of non-collection of VAT. In the present context, the Commission has serious doubts that the requested measure would have the positive impact expected by the Italian authorities.

Moreover, the Italian authorities did not demonstrate that the type of goods at stake is of a nature which should make auditing through conventional control means impossible therefore justifying the need to implement the reverse charge mechanism.

By shifting, for a considerable part of the consumer market, the liability for the payment of the total amount of VAT in relation to goods destined for final consumption to the retail level, the measure would be likely to shift fraud to that retail level without any guarantee that it would effectively also have a positive impact. The measure is further likely to shift fraud to other Member States by enabling goods to be obtained 'VAT free' under the reverse charge mechanism (in economic terms) in view of being sold on the black market anywhere in the European Union.

On the basis of these elements, it is the Commission's view that a derogation in this field cannot be justified.

5. CONCLUSION

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