

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.8.2004
COM(2004) 553 final

Proposal for a

COUNCIL DECISION

authorising Italy to apply a measure derogating from Article 2(1) 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 30 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 conclude with a third country or any international organisation an agreement, which may contain derogations from this Directive.

2. In a request submitted to the Commission and registered by the Commission's Secretariat-General on 24.03.2004, the Italian Government sought authorisation to conclude an agreement with Switzerland that includes provisions derogating from Article 2(1) of Directive 77/388/EEC.

3. In accordance with Article 30(2) of the Sixth Directive, the Commission informed the other Member States by letter of 11.05.2004 of the request made by the Italian Government and by letter of 12.05.2004 the Commission notified Italy that it had all the information it considers necessary for appraisal of the request.

4. Article 2(1) of Directive 77/388/EEC stipulates that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such shall be subject to value added tax (VAT).

5. The purpose of the derogation requested by Italy is to seek authorisation to conclude an agreement with Switzerland that includes provisions derogating from Article 2(1) of Directive 77/388/EEC and exempt tolls for the Gran San Bernardo tunnel from VAT. The reasons for this request are twofold: Firstly the introduction of VAT on tolls for the Gran San Bernardo tunnel as of 1 January 2003 has led to competitive distortions in multi-journey season ticket sales. Secondly the breakdown of proceeds for VAT purposes in proportion to the physical demarcation between the countries causes high administrative costs because the proceeds are calculated and distributed in accordance with economic criteria reflecting the breakdown of tunnel management and maintenance costs. These tunnel management costs do not only concern the tunnel itself but include a highway linking the tunnel on Italian territory to the Italian road net.

6. Article 21 of the Italian Law No 289 of 27 December 2002 (the 2003 Budget) repealed Article 9(11) (international services and services relating to international trade) of Presidential Decree No 633 of 26 October 1972 on the introduction and implementation of value-added tax and lead to the levying of VAT (by the Italian tunnel operator) on tolls for the Gran San Bernardo tunnel as of 1 January 2003. However, Switzerland does not apply VAT or any similar tax on the toll; under the 1958 Convention concluded between Italy and Switzerland before the introduction of a common VAT system, Switzerland cannot be obliged to apply and collect Italian VAT on tolls for the Gran San Bernardo tunnel. Therefore the introduction of VAT only on tolls collected by the Italian operator led to a difference in user costs and distorted competition in season-ticket sales. Users can pay for their multi-journey

[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)

season tickets at either end of the tunnel and purchase them where they are cheaper, which is in Switzerland.

7. The tunnel crosses an international border and is run by an Italo-Swiss joint venture and two operating companies, based in their respective countries. The Italian operator, in line with the territoriality principle, should levy VAT (at 20%) only in respect of the part of the tunnel on Italian soil. However, under a legally binding agreement between the operators concluded in 1963 and applied until today, the proceeds of the toll are not shared out in proportion to the physical demarcation between the countries but must be shared in line with economic criteria reflecting the breakdown of tunnel management and maintenance costs (57,5% for the Italian operating company and 42,5% for the Swiss operating company). The tunnel management and maintenance costs also include the use of a section of motorway which gives access to the tunnel. This means that the exact amount of the proceeds divided and distributed in accordance with these criteria can only be established a posteriori. For VAT purposes this amount must then be recalculated to obtain a breakdown reflecting the territoriality principle, extrapolating management and maintenance costs for the use of a section of motorway which gives access to the tunnel. Such a burdensome ex post calculation and collection of VAT generates high administrative costs and cannot be rendered consistent with a consumption tax system requiring that VAT is levied and collected immediately.

8. Against this background, the only viable option is in fact to authorise Italy to conclude an agreement with Switzerland in view of exempting tolls for the Gran San Bernardo tunnel from VAT. The derogation will allow Italy to lift any reservations on the implementation of Article 8 of the Convention between Italy and Switzerland which stipulates that: "Les questions de douane, de police, monétaires, fiscals et socials soulevées par la construction et l'exploitation du tunnel feront l'objet d'accords particuliers entre le Gouvernement italien et le Gouvernement Suisse." The derogation represents a major simplification for the Italo-Swiss joint venture and its two operating companies.

9. The requested exemption will have an impact on the European Communities' own resources from valued added tax. The Italian government has calculated this possible impact on the basis of declarations by the Italian operating company in 2002. In 2002 the Monte Bianco Tunnel was closed because of works in progress and consequently more traffic was rolling through the Gran S.Bernardo Tunnel. Therefore the amount calculated on this basis must be considered as a "peak value" which will be much lower in the following years. The declarations of the operating company reflect a taxable amount of approximately EUR 7.5 million in 2002. The Italian government estimates that exemption from VAT will therefore not exceed a loss of revenue of approximately EUR 1.5 million a year. According to the Italian government about a quarter of the services are rendered to persons entitled to deduct VAT, so that the taxable amount should actually be closer to EUR 5.625 million a year and the loss of revenue caused by a derogation would be EUR 1.125 million. In terms of own resources the possible loss of revenue to the Community budget from the derogation would in any case be lower than EUR 28 125 from 2004 onwards, if levied on EUR 5.625 million at the maximum rate of 0.5% under the Berlin decision of 24-25 March 1999. It is therefore necessary that the Italian Republic estimates every year the amount of losses in VAT at the stage of final consumption and adds an equivalent

compensation to the VAT base which is used for establishing its contributions to the Community's own resources.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to 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 assessment[2], and in particular Article 30 thereof,

Having regard to the proposal from the Commission[3],

Whereas:

(1) In a request submitted to the Commission and registered by the Commission's Secretariat-General on 24.03.2004, the Italian Government sought authorisation to conclude an agreement with Switzerland which include provisions derogating from Article 2(1) of Directive 77/388/EEC.

(2) The reasons for this request are twofold: Firstly the introduction of VAT on tolls for the Gran San Bernardo tunnel as of 1 January 2003 has led to competitive distortions in multi-journey season ticket sales. Secondly the breakdown of proceeds for VAT purposes in proportion to the physical demarcation between the countries causes high administrative costs because the proceeds are calculated and distributed in accordance with economic criteria reflecting the breakdown of tunnel management and maintenance costs. These tunnel management costs do not only concern the tunnel itself but include a highway linking the tunnel on Italian territory to the Italian road net.

(3) As of 1 January 2003, the Italian tunnel operator levies and collects VAT on tolls for the Gran San Bernardo tunnel. However, Switzerland does not apply VAT or any similar tax on the toll; under the 1958 Convention concluded between Italy and Switzerland before the introduction of a common VAT system, Switzerland cannot be obliged to apply and collect Italian VAT on tolls for the Gran San Bernardo tunnel. Therefore the introduction of VAT only on tolls collected by the Italian operator led to a difference in user costs and distorted competition in season-ticket sales. Users can pay for their multi-journey season tickets at either end of the tunnel and purchase them where they are cheaper, which is in Switzerland.

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

3 OJ C , , p. .

(4) The tunnel crosses an international border and is run by an Italo-Swiss joint venture and two operating companies, based in their respective countries. The Italian operator, in line with the territoriality principle, should levy VAT only in respect of the part of the tunnel on Italian soil. However, under a legally binding agreement between the operators concluded in 1963 and applied until today, the proceeds of the toll are not shared out in proportion to the physical demarcation between the countries but must be shared in line with economic criteria reflecting the breakdown of tunnel management and maintenance costs. The tunnel management and maintenance costs also include the use of a section of motorway which gives access to the tunnel. This means that the exact amount of the proceeds divided and distributed in accordance with these criteria can only be established a posteriori. For VAT purposes this established amount must then be broken down in accordance with the territoriality principle, extrapolating management and maintenance costs for the use of a section of motorway which gives access to the tunnel. This ex post calculation and the collection of VAT is burdensome and generates high administrative costs. It cannot be rendered consistent with a consumption tax system requiring that VAT is levied and collected immediately.

(5) Against this background, the only viable option is in fact to exempt tolls for the Gran San Bernardo tunnel from VAT. The derogation represents a major simplification for the Italo-Swiss joint venture and its two operating companies.

(6) However, the requested derogation will have an impact on the European Communities' own resources from valued added tax and therefore require compensatory measures.

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 2(1) of Directive 77/388/EECthe Italian Republic is hereby authorised, to conclude an agreement with Switzerland in view of exempting tolls for the Gran San Bernardo tunnel from VAT. The authorisation is granted under the condition that the Italian Republic estimates every year the amount of losses in VAT at the stage of final consumption and adds an equivalent compensation to the VAT base which is used for establishing its contributions to the Community's own resources.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels,

For the Council
The President