



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.6.2005  
COM(2005) 285 final

Proposal for a

**COUNCIL DECISION**

**authorising the Kingdom of the Netherlands to apply a measure derogating from  
Article 11 of the Sixth Council 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) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

Pursuant to Article 27(1) of 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, the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

By letter registered with the Secretariat-General of the Commission on 4 October 2004, the Kingdom of the Netherlands requested authorisation to introduce a special measure derogating from Article 11 of the Sixth Directive. In accordance with Article 27(2) of the Sixth Directive, the Commission informed the other Member States by letter of 1 December 2004 of the request made by the Kingdom of the Netherlands and by letter dated 2 December 2004, the Commission notified the Kingdom of the Netherlands that it had all the information it considered necessary for appraisal of the request.

- **General context**

As a general rule, Article 11(A)(1)(a) of the Sixth Directive stipulates that the taxable amount shall be everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser.

The Kingdom of the Netherlands has increasingly been confronted in several economic sectors with avoidance schemes as regards the supply of capital goods and as regards the supply of services in relation to capital goods. This can take the form of any agreement or transfer of rights whereby these goods are put at the disposal of the recipient. These avoidance schemes are based on transactions between related parties involving payment of a non market value consideration in cases where the recipient is not, or is only partly, entitled to deduct VAT.

For example, the supplier, a taxable person, who is entitled to deduct input VAT in full, is often established with the sole purpose of acquiring expensive capital goods for onward supply to the (connected) recipient via a lease or let. The lease may be fixed at a low level, reflecting the fact that the parties are connected, and later on, the capital goods are often sold to the recipient for a price which also bears little relationship to the asset's value. The recipient sometimes obtains the goods via a merger or via VAT grouping.

Similar avoidance schemes are used for services, which represent a substantial value and which are normally amortized for income or company tax purposes.

These avoidance schemes have led to a considerable revenue loss. The Kingdom of the Netherlands has therefore requested to be authorised to provide that in these cases the taxable amount for VAT will be based on the open market value and not on the consideration. The Commission accepts that this derogation will counter abuse in the

VAT system.

On 16 March 2005, the Commission has presented a proposal for a Directive modifying the Sixth Directive as regards certain measures to simplify the procedure for charging VAT and to assist in countering tax evasion and avoidance, and repealing certain Decisions granting derogations (the rationalisation of Article 27 derogations exercise). This proposal tackles, amongst other things, the issue of the valuation of supplies between connected persons.

Therefore, the present request should be granted until the abovementioned Directive rationalising the derogations from Article 27 comes into effect, but not later than the 31st December 2009.

- **Existing provisions in the area of the proposal**

Similar derogations in relation to Article 11 of the Sixth Directive have been granted to other Member States.

- **Consistency with other policies and objectives of the Union**

Not applicable.

## 2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Not relevant

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The Decision proposal aims at combatting VAT avoidance in the Netherlands and has therefore a potential positive economic impact.

Impact will in any case be limited because of the narrow scope of the derogation.

## 3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The proposal aims at authorising the Kingdom of the Netherlands to apply a measure derogating from Article 11 of the Sixth Council Directive 77/388/EEC concerning the taxable amount with regard to capital goods and related services.

- **Legal basis**

Article 27(1) of 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.

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

This Decision concerns an authorisation granted to a Member State upon its own request and does not constitute any obligation.

Given the limited scope of the derogation, the special measure is proportionate to the aim pursued.

- **Choice of instruments**

Proposed instruments: other.

Other means would not be adequate for the following reason(s).

According to Article 27 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes, only a Council Decision is possible.

#### **4) BUDGETARY IMPLICATION**

The derogation has no adverse impact on the Communities' own resources accruing from VAT.

#### **5) ADDITIONAL INFORMATION**

- **Review/revision/sunset clause**

The proposal includes a sunset clause.

Proposal for a

## COUNCIL DECISION

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**(Only the Dutch version is authentic)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to 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<sup>1</sup>, and in particular Article 27 thereof,

Having regard to the proposal from the Commission<sup>2</sup>,

Whereas:

- (1) By letter registered with the Secretariat-General of the Commission on 4 October 2004, the Kingdom of the Netherlands sought authorisation to introduce a special measure derogating from Article 11(A)(1)(a) of Directive 77/388/EEC.
- (2) In accordance with Article 27(2) of Directive 77/388/EEC, the Commission informed the other Member States by letter dated 1 December 2004 of the request made by the Kingdom of the Netherlands. By letter dated 2 December 2004, the Commission notified the Kingdom of the Netherlands that it had all the information it considered necessary for appraisal of the request.
- (3) The aim of the derogation is to prevent the avoidance of value added tax (VAT) through the undervaluation of supplies between connected persons, whereby the recipient is not, or is only partly, entitled to deduct VAT. It is designed to circumvent abuses in the supplies of capital goods or in the supply of services in relation to these capital goods, such as leasing or letting or any other arrangement whereby the goods are put at the disposal of the recipient. Because of the relationship between the parties, the consideration is often fixed at a non market value, resulting in significantly lower VAT revenues.

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<sup>1</sup> OJ L 145, 13.6.1977, p. 1. Directive last amended by Directive 2004/66/EC (OJ L 168, 1.5.2004, p. 35).

<sup>2</sup> OJ C [...], [...], p. [...].

- (4) The special measure should apply only in cases where the administration is able to conclude that the taxable amount, as determined in accordance with Article 11(A)(1)(a) of Directive 77/388/EEC, has been influenced by the relationship between the parties. That conclusion should, in each case, be based on manifest facts, not presumptions.
- (5) It is therefore appropriate and proportionate to permit the Kingdom of the Netherlands to treat the open market value of those supplies as the taxable amount.
- (6) The derogations pursuant to Article 27 of Directive 77/388/EEC which counter VAT avoidance linked to the taxable amount of supplies between related parties are included in a proposal for a Directive rationalising some of the derogations pursuant to that Article. It is therefore necessary to limit the application period of this derogation until this Directive comes into effect.
- (7) The derogation has no adverse impact on the Communities' own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

#### *Article 1*

By way of derogation from Article 11(A)(1)(a) of Directive 77/388/EEC, the Kingdom of the Netherlands is hereby authorised to take the open market value, as defined in Article 11(A)(1)(d) of Directive 77/388/EEC, as the taxable amount for the supply of capital items or any other supply of services whereby the capital item is put at the disposal of the recipient, where the following conditions are met:

- (1) the recipient is a non-taxable legal person or a taxable person carrying on partly or totally exempted activities, which give not rise to a right of deduction;
- (2) the supplier and the recipient are directly or indirectly connected persons according to national legislation;
- (3) a number of facts make it possible to conclude from the circumstances of the case that the relationship between these connected persons have influenced the taxable amount, as determined in accordance with Article 11(A)(1)(a) of Directive 77/388/EEC.

For the purposes of this Article, capital item shall mean capital goods as defined by the Kingdom of the Netherlands in accordance with Article 20(4) of Directive 77/388/EEC and, as far as they are not covered by this definition, services of substantial value which can be amortized.

#### *Article 2*

The authorisation granted under Article 1 shall expire on the date that the Directive rationalising the derogations pursuant to Article 27 of Directive 77/388/EEC which counter avoidance of value added tax linked to the taxable amount comes into effect, or on 31 December 2009 whichever is the earlier.

*Article 3*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

*For the Council  
The President*