

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

REQUEST SUBMITTED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC
OF GERMANY UNDER ARTICLE 27(1) AND (2) OF THE SIXTH VAT
DIRECTIVE 77/388/EEC FOR AUTHORIZATION TO INTRODUCE A SPECIAL
MEASURE DEROGATING FROM THAT DIRECTIVE IN RESPECT OF THE
MARGIN ON TRAVEL AGENTS' SERVICES RELATED TO TRAVEL OUTSIDE
THE COMMUNITY

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(Communication from the Commission to the Council)

1. INTRODUCTION

- (a) Member States are required by the Sixth VAT Directive (77/388/EEC)¹ to apply the common system of value added tax. Under the terms of Article 27(1) of that Directive, the Council may authorize any Member State to introduce special measures for derogation from the provisions of the Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.
- (b) In a letter dated 22 March 1994, received by the Secretariat-General of the Commission on 18 April 1994, the office of the Permanent Representative of the Federal Republic of Germany notified the Commission of a measure to exempt from value added tax certain services provided by travel agents which relate to journeys by air to destinations outside the Community and to cruises.
- (c) By letter from the Secretary-General of the Commission dated 10 May 1994, the other Member States were informed, in accordance with Article 27(3) of the Sixth VAT Directive, of the measure envisaged by the Federal Republic of Germany. Under the terms of paragraph 4 of that Article, the Commission or any Member State may request that the matter be raised by the Council.

2. DESCRIPTION OF THE PROPOSED MEASURE

Article 26(3) of the Sixth VAT Directive provides that where transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may

¹ OJ N° L 145, 13.6.1977, p. 1. Directive as last amended by Directive 94/5/EC (OJ N° L 60, 3.3.94, p. 16).

be exempted. The German authorities maintain that the apportionment made necessary by this provision is difficult to apply in practice, and in the case of cruises, these difficulties are disproportionate in relation to the amount of tax due.

The Government of the Federal Republic of Germany is, therefore, proposing to exempt from value added tax the margins of travel agents in respect of passenger transport by air for which the place of destination is outside the Community and in respect of cruises which involve the transport of passengers both within and outside the territory of the Community.

For the purposes of applying these arrangements, return journeys are regarded as a single supply of passenger transport services, the destination being that of the outward flight.

The exemption of the travel agent's services in respect of cruises would apply, for example, to cruises which begin and end at a Community port, but whose route falls outside the Community territory. The justification given by the German authorities for this measure is that, on average, only a small proportion of the total route is within the territory of the Community, and the cost involved in establishing the actual portion of the route travelled within the territory of the Community is generally disproportionate to the amount of tax revenue generated.

The travel agent who applies the simplification will have to do so in respect of all the services it provides. However, the travel agent may, at any time, apportion its services according to the proportions of the journey performed within and outside the Community, as provided for in Article 26(3).

3. OPINION OF THE COMMISSION

It is the opinion of the Commission that the measure proposed by Germany does not constitute a special measure, but constitutes rather a fundamental derogation to Article 26 of the Sixth Directive in particular, and more generally to one of the fundamental principles of the Directive concerning the taxable base.

Article 26(3) of the Sixth Directive provides that an apportionment is necessary between the part of the travel agent's services which relate to transactions performed by other taxable persons within the Community and the part relating to transactions performed outside the Community.

In case N° C-74/91 before the European Court of Justice between the Commission of the European Communities and the Federal Republic of Germany, the Commission contested the provisions of German law due to the fact that they provided for the exemption of the travel agent's services which related to transactions performed wholly or partially within the territory of the Community, contrary to Article 26 of the Sixth Directive which only provided for the exemption of all or part of such services which relate to transactions performed outside the Community.

In its judgement the Court, which found in favour of the Commission, recognised that even if there were real technical difficulties in apportioning between the parts of the travel agent's services which related to transactions performed within the Community and the parts performed outside the Community, these had not prevented this provision from being transposed into the national law of several Member States. Moreover, concerning the organization of cruises, the Court reasoned that even if the Federal Republic of Germany wished to invoke, for reasons of simplification, the difficulties of apportionment between the Community and extra-Community portions, it was sufficient to recall that these difficulties were not insurmountable.

Article 26, which provides for special arrangements for travel agents, is nevertheless, based on the principle that all goods and services consumed within the Community should be subject to tax. The organisational service provided by travel agents to their customers are services whose place of consumption is the place where the travel agent is established, and from where such organisational services will have been provided.

Article 26(3) diverges from this principle by exempting the travel agent's margin in the case of transactions performed outside the Community. This derogation was introduced in order to put travel agents within and outside the Community on an equal footing in respect of travel outside the Community.

The application of Article 26 is clearly intended to maintain a consistency of treatment between travel agents established in different Member States. In spite of having the appearance of maintaining a balance between the number of cases where the taxable margin is decreased with the cases where it is increased, in reality the measures envisaged by the German authorities would result in an unjustified overall advantage in favour of travel agents established in Germany. It is a matter of fact that the Community portion of flights to third country destinations generally exceeds the extra-Community portion of flights between two Member States. It would be undesirable to allow a derogation based on Article 27 which would give one Member State a competitive advantage over the others.

Concerning cruises, the German authorities request that the travel agent's margin in respect of all cruises be exempt from value added tax, on the grounds that, even for cruises which call at Community ports, the travel within the Community territory constitutes on average less than 1% of the total route travelled. This claim does not appear to be credible taking into account the fact that a succession of Community ports of call can easily necessitate a prolonged sailing within the territorial waters of one or several Member States. Moreover, what are globally referred to as "cruises" can often include several types of service apart from transport, such as meals, entertainment and sight-seeing, the value of which can be considerable.

Furthermore, the Commission notes that exempting the whole of the travel agent's margin that relates to transactions performed partially within the

Community would create a fiscal treatment more favourable to third-country holiday destinations than to Community destinations. Such a fiscal incentive is not considered desirable by the Commission.

Turning specifically to the provisions of Article 27 of the Sixth Directive, the Commission notes that the exemption would have an adverse effect on the Communities' VAT own resources. Article 27(1) stipulates that any derogation from the provisions of the Directive may not, except to a negligible extent, affect the amount of tax due at the final consumption stage. As, by the very nature of their business, travel agents generally deal with final consumers, and taking into account that the value of transactions performed in the Community can be considerable, as explained above, an exemption such as requested by Germany would affect the amount of tax due at the final consumption stage to more than a negligible extent.

Finally, Article 27(1) provides for derogations from the Sixth Directive "in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance". However, the present German request is not so much a question of simplifying the procedure for charging the tax, but the exclusion from taxation of the travel agent's services which relate to certain transactions performed within the Community. One can only speak of simplification of procedures for charging tax if tax is charged; in other words, the procedure for charging tax which is not due cannot be simplified.

4. CONCLUSION

As the measure in question gives rise to fundamental objections, the Commission requests that the matter be raised by the Council in accordance with Article 27(4) of the Sixth Directive.

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