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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.12.2009
COM(2009)668 final

Proposal for a

COUNCIL DECISION

**authorising the Republic of Lithuania to extend the application of a measure derogating
from Article 193 of Council Directive 2006/112/EC on the common system of value
added tax**

(Only the Lithuanian version is authentic)

EXPLANATORY MEMORANDUM

CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

Pursuant to Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹ (hereafter 'the VAT Directive'), 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 9 September 2009, the Republic of Lithuania (hereafter 'Lithuania') requested authorisation to continue to apply a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 27 October 2009 of the request made by Lithuania. By letter dated 29 October 2009, the Commission notified Lithuania that it had all the information it considered necessary for appraisal of the request.

General context

The Lithuanian government would like to extend the current application of a reverse charge mechanism in relation to supplies of timber and supplies by taxable persons under judicial insolvency or restructuring procedures.

As regards the supplies of timber, Lithuania has been confronted with a considerable number of traders that fail to comply with their obligations. Businesses in this sector are frequently small resellers and intermediaries, which often disappear without paying to the tax authorities the tax they charged on their supplies but leaving their customers in receipt of a valid invoice for VAT deduction.

Taxable persons under an insolvency procedure or a restructuring procedure subject to judicial oversight are often not in a position or willing to pay the VAT they have received from their customers to the tax authorities. However, the purchaser can, as a compliant trader, still deduct the VAT incurred.

Under the reverse charge mechanism, the customer becomes liable for the payment of the VAT on domestic transactions. This derogates from the general rule, as stipulated in Article 193 of the VAT Directive, that the taxable person supplying goods or services is normally liable to pay VAT.

This derogating measure (derogating from the then applicable Sixth Directive² which has, without substantial modification to the content, been replaced by the VAT

¹ OJ L 347, 11.12.2006, p. 1.

² 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 (OJ L 145, 13.6.1977)

Directive) had initially been granted by Council Decision 2006/388/EC of 15 May 2006³.

Initially, this derogating measure was also applicable in relation to certain supplies of waste and certain supplies of construction work. As indicated in Article 3 of that Decision, the authorisation would cease to have effect on the date (if that date was before 31 December 2009) of the entry into force of a Directive rationalising the derogations pursuant to Article 27 of the Sixth Directive (currently Article 395 of the VAT Directive) which would include a special scheme for the application of VAT to these areas. This materialised via the so-called Rationalisation Directive⁴ which replaced the Decision as legal basis for the application of the reverse charge mechanism in these two sectors which, as a result, are not longer subject of the extension request and of this Decision.

The Commission understands that the situation, on which the initial derogation was based, continues to exist and that the previous derogation has enabled Lithuania to reduce the risk of VAT evasion and to simplify the procedure for charging the tax in the timber market and as regards certain supplies under insolvency or restructuring procedure. The derogation should therefore be granted for another limited period.

Existing provisions in the area of the proposal

Similar derogations in relation to Article 193 of the VAT Directive have been granted to other Member States.

Consistency with the other policies and objectives of the Union

Not applicable.

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 simplifying the procedure for charging the tax and at combating possible VAT evasion or avoidance and has therefore a potential positive economic impact.

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

³ OJ L 150, 3.6.2006, p. 13.

⁴ Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ L 221, 12.8.2006, p. 9).

LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

Authorisation for Lithuania to continue to apply a measure derogating from Article 193 of the VAT Directive as regards the use of a reverse charge mechanism in case of supplies of timber and in case of supplies of goods and services by businesses under an insolvency or restructuring procedure subject to judicial oversight.

Legal basis

Article 395 of the VAT Directive.

Subsidiarity principle

In accordance with Article 395 of the VAT Directive, a Member State wishing to introduce measures derogating from the said Directive must obtain an authorisation from the Council, which will take the form of a Council Decision. Therefore, the proposal complies with the subsidiarity principle.

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

Under Article 395 of the VAT Directive, derogation from the common VAT rules is only possible with the authorisation of the Council acting unanimously on a proposal from the Commission. Moreover, a Council Decision is the most suitable instrument since it can be addressed to individual Member States.

BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

ADDITIONAL INFORMATION

Review/revision/sunset clause

The proposal includes a sunset clause.

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(Only the Lithuanian version is authentic)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union and to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax⁵, and in particular Article 395(1) thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) By letter registered with the Secretariat-General of the Commission on 9 September 2009, Lithuania requested authorisation to continue to apply a measure derogating from the provisions of Directive 2006/112/EC governing the person liable for the payment of the value added tax (VAT) to tax authorities.
- (2) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States of the request made by Lithuania in a letter dated 27 October 2009. By a letter dated 29 October 2009, the Commission notified Lithuania that it had all the information that it considered necessary to consider the request.
- (3) The purpose of the measure is to continue to make the recipient liable for the VAT due on the supply of goods and services in the case of insolvency procedures or restructuring procedures subject to judicial oversight and of timber transactions.
- (4) Taxable persons under insolvency procedures or restructuring procedures subject to judicial oversight are often prevented by financial difficulties from paying to the tax authorities VAT invoiced on their supplies of goods and services. The recipient, insofar a taxable person with a right of deduction, can nonetheless deduct the VAT even though it has not been paid by the supplier to the tax authorities.
- (5) Because of the nature of the market and the business involved, Lithuania has encountered problems in the timber market which is dominated by small companies, often resellers and intermediaries which the tax authorities have found difficult to

⁵ OJ L 347, 11.12.2006, p. 1.

control. The most common form of evasion involves the invoicing of supplies followed by the disappearance of the business without paying tax leaving the customer in receipt of a valid invoice for tax deduction.

- (6) By designating the recipient, insofar as he is a taxable person, as the person liable for the VAT in the abovementioned cases, the derogation removes the difficulties of collection of the VAT without affecting the amount of tax due. This has the effect of simplifying the work of the tax authorities for collecting the tax and of preventing certain types of tax evasion or avoidance. In this respect, the measure derogates from Article 193 of Directive 2006/112/EC which stipulates that the taxable person supplying goods or services is normally liable for the payment of the tax.
- (7) The measure has previously been authorised by Council Decision 2006/388/EC⁶ under the then applicable Sixth Council Directive 77/388/EC on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment⁷.
- (8) The Commission understands that the legal and factual situation which justified the current application of the derogating measure in question has not changed and continues to exist. Lithuania should therefore be authorised to apply the measure during a further limited period.
- (9) The derogation will not adversely affect the Community's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, Lithuania is authorised to continue to designate the taxable person, to whom the following supplies of goods and services are made, as the person liable for payment of VAT.

- (1) supplies of goods and services by a taxable person while under an insolvency procedure or a restructuring procedure subject to judicial oversight;
- (2) supplies of timber.

Article 2

This Decision shall expire on 31 December 2012.

Article 3

This Decision is addressed to the Republic of Lithuania.

⁶ OJ L 150, 3.6.2006, p. 13.

⁷ OJ L 145, 13.6.1977, p. 1.

Done at Brussels,

For the Council
The President