

Opinion of the European Economic and Social Committee on the ‘Proposal for a Council Directive amending Directive 2006/112/EC as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud’

COM(2009) 511 final — 2009/0139 (CNS)
(2010/C 339/09)

Rapporteur-General: **Mr IOZIA**

On 6 October 2009 the Council decided to consult the European Economic and Social Committee, under Article 93 of the Treaty establishing the European Community, on the

Proposal for a Council Directive amending Directive 2006/112/EC as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud

COM(2009) 511 final - 2009/0139 (CNS).

On 3 November 2009, the Committee Bureau instructed the Section for Economic and Monetary Union and Economic and Social Cohesion to prepare the Committee's work on the subject.

Given the urgent nature of the work, the European Economic and Social Committee appointed Mr Iozia as rapporteur-general at its 459th plenary session, held on 20 and 21 January 2010 (meeting of 21 January), and adopted the following opinion by 91 votes to two with four abstentions.

1. Conclusions

1.1 The EESC is in favour of the proposal for a directive introducing a reverse charge mechanism for certain goods and services. Nevertheless, it deeply regrets the need once again to seek ‘conventional’ solutions to the problem of tax fraud and moving on from the ‘transitional’ system that will continue unimpeded to facilitate intra-Community fraud.

1.2 The EESC understands and supports the Commission's efforts, despite the political problems that it must face. However, it continues to insist that steps should be taken towards a new VAT system that limits opportunities for fraud and reduces the administrative burden for taxable persons.

1.3 The EESC agrees with the proposals set out in the European Parliament resolution of 2 September 2008 on a coordinated strategy to improve the fight against fiscal fraud, in particular taxation in the country of origin at a single rate of 15 % for intra-Community transactions. This option would be in line with the provisions of Article 402 of Directive 2006/112/EC.

1.4 The proposal for a directive introduces further divergences within the VAT system. The EESC is concerned about choices that postpone VAT harmonisation.

1.4.1 The choice of legal instrument seems appropriate although it would be advisable to adopt regulations.

1.5 Member States will have to strengthen fiscal administration. Reimbursement requests will increase since it will no longer be possible to offset input VAT against output VAT. A rigorous control system will be essential in order to protect Member States from the negative impact that the reverse charge mechanism could have.

1.6 The EESC considers as essential the decision to include the trading of emission certificates in the directive.

1.7 The EESC does not agree to the limit of only two of the four products set out in the directive. Each Member State should decide whether its administration is in a position to manage the introduction of the reverse charge mechanism adequately for all product categories. This limit seems to contradict Article 395 of Directive 2006/112/EC.

1.8 The EESC will continue to support the Commission's initiatives to strengthen the harmonisation of the VAT tax system, preferably by adopting those ‘more far-reaching’ structural reforms that would drastically reduce opportunities for tax fraud.

2. Introduction

2.1 The fight against tax fraud, especially intra-Community fraud, has not made much progress in recent years. Overall fraud-related fiscal losses amount to 200 to 250 billion euros, equivalent to 2 % of the EU's GDP.

2.2 VAT fraud amounts to about 40 billion euros, i.e. 10 % of tax revenues.

2.3 The gradual growth in trade has led to a rise in so-called 'carousel' fraud. The relevant legislation provides for the free movement of goods within the EU but for VAT on commercial transactions with EU countries to be paid in the country of destination.

2.4 Introducing a fictitious third trader into trade within the EU creates an unlawful triangulation that simulates two successive transfers of the same goods. The buyer is entitled to reimbursement for VAT that has never been paid by the intermediary, who has purchased the goods exempt of VAT from a supplier in another Member State. In this way, the intermediary leaves no trace.

2.5 Under the reverse charge mechanism, no VAT is charged by domestic suppliers to taxable customers who, in turn, become liable for the payment of VAT. In theory, this procedure should eliminate opportunities for 'carousel' fraud.

2.6 The inconsistency of a system based on applying the principle of destination, which in order to function properly would require a consolidated and efficient information-exchange system between Member States, opens the door to tax fraud that is difficult to combat. The Community has finally opted for the principle of origin, which provides for a form of rebalancing payments between Member States by redistributing VAT. Article 402 of Directive 2006/112/EC of 28 November 2006 provides for taxation on intra-Community trade to take place in the Member State of origin.

2.7 Redistribution is necessary to neutralise the effect on tax revenues of exports and tax deductions on imports, already taxed in the country of origin.

2.8 Adopting a definitive system that would drastically reduce intra-Community tax fraud requires an integrated system of administrative cooperation which, despite the Commission's efforts, has so far failed to materialise ⁽¹⁾. Similarly, there are difficulties in the essential task of setting up the clearing house, called for by the Commission since 1987, because the verification and gathering of data still varies considerably between Member States.

2.9 The Commission's proposal for a Council Directive aimed at providing a temporary option allowing for national rules to apply the reverse charge mechanism to supplies of certain goods and services ⁽²⁾ comes in the midst of this highly unpromising scenario.

3. The Commission proposal

3.1 The initiative under consideration is based on the proposals of the Anti Tax Fraud Strategy (ATFS) expert group. The Commission had presented a Communication ⁽³⁾ setting out innovative proposals to fight fraud, which included a generalised reverse charge mechanism. Ecofin did not approve these proposals.

3.2 In order to counter the growing phenomenon of Missing Trader Intra-Community (MTIC) fraud, better known as 'carousel' fraud because of the repeated transfer of the same goods between operators in different Member States, some Member States asked the Commission to apply the derogation set out in Article 395 of the VAT Directive, which allows for the temporary application of the reverse charge mechanism to certain goods and services.

3.2.1 The Commission decided that it would be more appropriate to adopt an instrument amending the VAT Directive by inserting an Article 199a, and extending the derogation to the end of 2014.

3.3 The list of goods for which a reverse charge mechanism may be introduced includes extremely commonplace electronic devices such as mobile phones and integrated circuit devices. This is already the case in the United Kingdom, which has been granted a Council derogation.

3.3.1 Perfume and precious metals that are not antiques or collectors' items complete the four categories of goods mentioned in the Directive. The services mentioned include emission certificates.

4. General comments

4.1 Although, on the one hand, the Communication from the Commission to the Council and the European Parliament ⁽⁴⁾ highlighted the positive contribution that the reverse charge mechanism could theoretically make to fighting fraud, it also underlined all the possible risks of new types of fraud and the need to tighten controls, but most of all, administrative cooperation.

⁽²⁾ COM(2009) 511 final.

⁽³⁾ COM(2008) 109 final, 22.2.2008 and SEC(2008) 249, 22.2.2008.

⁽⁴⁾ Ibidem.

⁽¹⁾ COM(2009) 427 final - 2009/0118 (CNS). ECO 265 (work in progress), rapporteur: Mr Burani.

4.2 The Commission stressed its concern that 'introducing a generalised reverse charge mechanism on an optional basis would significantly affect the coherence and harmonisation of the EU VAT system and the scope for its future development'.

4.3 The EESC shares the Commission's concerns and believes that any measures liable to compromise progress towards future VAT harmonisation should be avoided.

4.4 As early as 2008, the European Parliament, when urging the Council to take more incisive action to fight tax fraud ⁽⁵⁾, drew attention to the risk that introducing a generalised reverse charge mechanism could create new opportunities for fraud, especially at the retail level and the misuse of VAT identification numbers. In this resolution, the European Parliament suggested a better solution, i.e. moving on from the transitional system and taxing intra-Community supplies at the rate of 15 %.

4.5 The EESC, in all its more or less recent opinions, has stressed the need to move on from the transitional system ⁽⁶⁾. It agrees with the European Parliament's proposal to introduce uniform taxation on the intra-Community supply of goods. Moreover, the transitional system is fragmented into a high number of special systems (for agriculture, small enterprises, travel agencies, publishing firms, and others) comprising exemptions, rebates or derogations.

4.6 As usual, Ecofin was unable to reach an agreement. The EESC once again regrets that decision deadlock on tax issues has blocked yet another attempt to launch a harmonisation process.

4.7 The EESC backs the Commission proposal despite underlining certain inconsistencies regarding its declared objectives: an optional system that imposes additional administrative burdens on operators in the sectors concerned, who are in practice forced to use parallel duplicate accounting with considerable responsibilities for taxable persons, who have to work out the right tax procedure for themselves.

⁽⁵⁾ European Parliament resolution of 2 September 2008 on a coordinated strategy to improve the fight against fiscal fraud (2008/2033(INI)) OJ C 295 E, 4.12.2009, p. 13.

⁽⁶⁾ EESC Opinion on VAT/derogations - OJ C 32, 5.2.2004, p. 120.
EESC Opinion on the fight against fiscal fraud - OJ C 161, 13.7.2007, p. 8.
EESC Opinion on VAT rates other than standard VAT rates - OJ C 211, 19.8.2008, p. 67.
EESC Opinion on Tax evasion linked to import - OJ C 277, 17.11.2009, p. 112.
EESC Opinion on combating tax evasion - OJ C 100, 30.4.2009, p. 22.
EESC Opinion CESE on the rationalisation of exemptions and anti-fraud measures concerning the Sixth VAT directive - OJ C 65, 17.3.2006, p. 103.

4.8 The European Court of Justice has already ruled on the reverse charge mechanism ⁽⁷⁾. The judgment examines the case of a tax authority's request for payment made as a result of an error in interpreting the reverse charge mechanism. In order to avoid pointless and costly litigation, in the light of experience gained, it will be necessary to examine national laws, which despite applying the general principles, show inconsistencies, e.g. between time-limits for reimbursement requests and for tax payments.

4.9 The authorities of Member States that adopt the system will have to process more reimbursement requests for excess VAT credit from taxable persons, who will no longer be able to recover input VAT.

4.10 The tax payment burden will shift towards increasingly smaller-scale economic actors, who might be less reliable than current VAT taxable persons, i.e. medium-sized and large businesses that contribute the bulk of tax revenue. The system increases the risk of revenue loss by eliminating payment fragmentation.

4.11 An overall analysis reveals that a rigorous control system would be indispensable to protect Member States from the potential negative impacts of a reverse charge mechanism. Stepping up control measures will have to be carried out in parallel with increased administrative cooperation and the use of standardised telematics systems for dialogue between authorities.

5. Specific comments

5.1 The EESC disagrees with the Commission's decision not to carry out an impact assessment because it considered its preceding consultation - 'Possible introduction of an optional reverse charge mechanism for VAT - Impact on businesses' of 13 August 2007 - to be exhaustive. However, this consultation, which was not published on the Commission's website, does not take account of the impact that the proposed directive could have on operators and authorities.

5.2 The argument that since the mechanism is not mandatory, the Member States concerned should be responsible for carrying out impact assessments is entirely open to question. The EESC has repeatedly recommended that the utmost attention be devoted to a rigorous and in-depth analysis of the consequences of European legislation.

5.3 The legal basis for the proposal seems appropriate and proportionate. However, the EESC believes that the decision to opt for a directive presents the obvious risk of widening differences between tax systems. It would have been better to adopt a regulation.

⁽⁷⁾ Joined Cases C-95/07 and C-96/07, 8 May 2008.

5.4 The EESC strongly backs the inclusion of the Emission Trading System (ETS), which constitutes (2008) 73 % of the international market value of certificates. Since the trading of certificates between taxable persons is regarded as a service, it should be taxed in the country where the purchasing company is based. The EESC only regrets that a reverse charge mechanism is not mandatory for these transactions.

5.5 The EESC believes inadequate justification has been given for the restriction to only two of the four categories of products indicated. It would have been more appropriate to allow Member States to decide this issue. Article 395 of Directive 2006/112/EC has already granted this possibility to one Member State, with the Council's authorisation. Article 199a, as currently drafted, may be inconsistent with the abovementioned article.

Brussels, 20 January 2010

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of the European Economic and Social Committee*
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