



COMMISSION OF THE EUROPEAN COMMUNITIES

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2003/0329 (CNS)

Amended proposal for a

COUNCIL DIRECTIVE

amending Directive 77/388/EEC as regards the place of supply of services

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

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

When the European Commission first adopted its new VAT strategy, modernising the rules on the place of supply of services was identified as one of the future priorities.

This prompted a general and thorough review of the rules governing the place of supply of services as a whole. Consistent with the guidelines for future work identified by the Commission, this review was guided by the principle that VAT should be imposed at the place of consumption.

One of the main purposes of this review is further to simplify the VAT rules applicable to traders in accordance with the objectives set in the Lisbon Strategy.

- **General context**

To ensure that the rules on the place of supply of services - and hence the place of taxation - met the objective that tax should accrue to the country of consumption, the Commission proposed to amend the rules governing the place of supply of services to taxable persons, by generally making such services taxable in the Member State where the customer is established and simultaneously extending the scope of the reverse charge mechanism. Once implemented, these changes should ensure taxation at the place of consumption.

As largely similar considerations apply, it would be illogical to leave the rules on services to non-taxable persons unchanged. Under the current rules, in the absence of specific provisions they are taxed where the supplier of the service is established. If such services can be supplied at a distance and the customer bears the full VAT burden, there is, however, a clear risk of distortion of competition. In addition, differences in VAT rates have a more substantive impact in the case of supplies of services to non-taxable customers, where they can influence companies' decisions to relocate their activities.

To avoid further complicating trade, the proposed amendments to the rules determining the place of supply for services provided to non-taxable persons should to a large extent be in line with the rules proposed for taxing similar services to taxable persons. Moreover, any change should avoid increasing traders' administrative costs.

In order to simplify the obligations for traders who supply goods and services across borders, the Commission has already proposed a “one-stop” mechanism allowing traders to fulfil all their VAT obligations for EU-wide activities in the Member State in which they are established. This mechanism would allow traders to use a single VAT number for supplies provided throughout the EU and to make VAT declarations to a single electronic portal from which they would then be transmitted automatically to the different Member States where the traders have supplied goods or services. This one-stop mechanism will make it easier for suppliers to fulfil their obligations when they become liable to pay VAT in a Member State where they are not established or

otherwise identified for VAT purposes.

With the one-stop mechanism, the Member State which has identified the taxable person for VAT purposes will be given a complete overview of all the activities of the taxable person throughout the EU. This should maintain the general quality of the controls and ensure that VAT has, in every case, been paid in the EU. At a more detailed level, in-depth controls will be necessary to check that the VAT has been correctly paid in the right Member State and, where necessary, to secure adjustment.

Taxing services supplied to non-taxable persons at the place of consumption ensures that the influence of VAT rates on the place of supply will always be neutral. Regardless where the taxable person carrying out the transaction is established, be it inside or outside the EU, the service will be taxed and this will be done at the rate which applies in the Member State of consumption. As further harmonisation of VAT rates is unachievable for the time being, this would leave Member States free, under the current VAT regime, to set their rates of VAT without major risks of distortion of competition in these transactions.

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

Supplies between taxable persons were addressed in an earlier proposal submitted by the Commission (COM(2003) 822). Although the changes proposed applied to supplies to taxable persons only, this proposal nevertheless included a new set of rules to replace the existing rules on the place of supply of services. To bring about the second and final part of the reform of the rules on place of supply, covering services supplied by taxable persons to non-taxable customers, this proposal - which is yet to be adopted by the Council - would need to be amended.

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

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

Over the last few months, consultations were held with Member States in a Commission working group in order further to discuss problems with the place of supply rules for services and how best to resolve them. Additionally, during February and March of this year, a public consultation was undertaken on this matter. Over 70 written responses were received from industrial associations and businesses from various sectors and countries. The main sectors responding to the consultation were telecommunications and e-commerce, transport, consultants and law firms, restaurants and travel agents, car leasing companies, industry and some financial institutions.

Summary of responses and how they have been taken into account

Most replies related to the part of the proposal amending the rules on the place of supply of services provided at a distance, which would see these services taxed in the

Member State of the customer. According to the respondents, this would entail additional administrative burdens for the sectors concerned and lead to a series of practical problems which would need to be solved. While these comments are valid, the Commission still believes that the new rules are necessary in order to ensure taxation at the place of consumption and to eliminate distortion of competition caused by relocation of business to Member States applying low VAT rates.

Very many comments were also received on the idea of changing the place of supply for passenger transport services. Although some businesses supported this idea, there was also strong opposition, mainly from airlines fearing that the new rules could encourage Member State to abolish the current exemption. Most replies showed that the place of taxation was not viewed as a major problem. Instead, the real issues are exemptions applied by Member States and the inequity in VAT treatment of transport by air and road. Strong emphasis was also put on the practical problems that any taxation of these services would entail. Against this background, it was decided not to change this rule.

Travel agents and tour operators also expressed serious concern about the suggestion to amend the rules governing the place of supply of services provided by an intermediary since reverting to the general rule, as proposed, could encourage traders to relocate to other Member States or even to non-EU countries. They argued that, although sometimes difficult to apply, the current rules best ensure taxation at the place of consumption. This proposal takes account of these comments and maintains the current rules for this type of service.

Car rental and leasing companies were strongly in favour of having similar rules for the services they render whether the customer is a taxable person or a non-taxable person. They also accepted the difference in treatment between long-term leasing and short-term renting. Various criteria for taxing these services were put forward, e.g. place of effective use or enjoyment, place where car is registered, etc. This proposal for a directive takes these comments into account by providing that the place of supply for short-term hiring should be identical for B2B and B2C services, whereas all long-term leasing of means of transport, both to taxable and non-taxable persons, should be taxable at the place where the customer is established. This responds to the concerns expressed by the sector that, otherwise, companies might relocate to Member States which apply low VAT rates.

The restaurant and catering sector mainly supported the ideas put forward by the Commission to tax restaurant services where they are physically provided or, if provided on board means of transport, at the place of departure. The place of supply of these services will therefore be amended accordingly.

An open consultation was conducted over the internet from 3 February to 4 April 2005. The Commission received 71 responses. The results are available on http://europa.eu.int/comm/taxation_customs/common/consultations/tax/index_en.htm.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

In the field of indirect taxation, common rules concerning the place of supply of services are necessary to avoid cases of double taxation or non-taxation for the economic operators concerned. The best way to achieve this result while guaranteeing Member States maximum flexibility is a Commission initiative.

When preparing new Community legislation in the field of VAT which has a direct impact on business, as is the case with this proposal, the Commission considers it necessary to consult not only the tax administrations but also other interested parties. In order to prepare this new proposal, the Commission first discussed the broad principles with Member States in a Commission group in January 2005. This was followed by a public consultation over the internet. Extensive informal contacts were also fostered with the business community, by actively participating in meetings and forums on this issue and organising bilateral talks with the sectors concerned.

The results of this consultation process were taken into account to the largest extent possible and then resubmitted to the Member States. The result is this proposal for a Council Directive, which is a delicate balance between the needs for control and correct allocation of VAT resources for tax administrations and for simple, uniform and straightforward rules for traders.

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The purpose of this proposal is to amend certain provisions of the Sixth VAT Directive governing the place of supply of services to non-taxable customers. These changes are proposed in order to ensure taxation of services at the place of consumption and to avoid relocation of companies.

- **Legal basis**

Article 93 of the EC Treaty.

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons:

The supply of services can involve more than one Member State. Common rules governing the place of supply of services for VAT purposes are therefore essential.

It is clear that if Member States were to apply individual rules governing the place of supply of services in the field of VAT, this could lead to double taxation or non-taxation. This would significantly damage Member States' interests, as well as EU businesses.

Community action will better achieve the objectives of the proposal for the following reasons:

If the neutrality of the VAT system is to be ensured, the risk of double taxation or non-taxation must be eliminated. The best way to achieve that objective is a Commission proposal laying down the rules for determining the place of supply of services.

This way, in principle no cases of double taxation or non-taxation should arise.

An initiative at Community level, creating a single place of supply of a specific service, is the appropriate tool to deal with this issue.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

It is a proposal for a directive, which the Member States have to implement in their national legislation. This instrument is commonly used for Commission initiatives in the field of indirect taxation and leaves some room for manoeuvre to Member States.

The basic objective of this proposal is to ensure that supplies of services are taxed, to the largest extent possible, at the place of actual consumption. Furthermore, this proposal will not lead to any additional administrative burdens for tax administrations nor will it impose disproportionate administrative burdens on businesses, thus meeting the objectives set in the Lisbon Strategy.

- **Choice of instruments**

Proposed instrument: directive.

Other means would not be adequate for the following reason:

This proposal is an amendment to a previous Commission proposal for a Council Directive and therefore takes the form of a directive. This amended proposal is presented pursuant to Article 250(2) of the EC Treaty and takes into account the principles of subsidiarity and proportionality.

4) BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

5) ADDITIONAL INFORMATION

- **Simulation, pilot phase and transition period**

There was or will be a transition period for the proposal.

- **Correlation table**

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and this Directive.

- **Detailed explanation of the proposal**

BASIC PARAMETERS

It is an established principle that VAT is a consumption tax. Any changes to the rules governing the place of supply of services should therefore, to the greatest extent possible, follow the principle that taxation should be at the place where the actual consumption occurs. However, this should not lead to additional obligations which could be regarded as disproportionate, burdensome or impractical.

Unlike VAT on services to taxable persons, the VAT charged on services provided to non-taxable persons (final consumers) cannot be deducted by the customer. As non-deductible VAT forms part of the VAT revenues of Member States it is even more important to ensure that the principle of taxation at the place of consumption is observed whenever possible.

PROBLEMS ENCOUNTERED AND PROPOSED CHANGES TO COMMISSION PROPOSAL COM(2003) 822

According to the general rule, the place of supply of services is deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place, the place where the supplier has his permanent address or usually resides. Beyond this, a number of exceptions override this general rule and can change the place of taxation depending on the nature of the service supplied.

As regards services supplied to non-taxable persons, exceptions exist for services relating to immovable property, transport - both passenger and goods -, cultural, artistic, sporting, scientific and educational activities, work on tangible movable property and, in particular cases, for intangible services, including copyrights, patents, advertising, professional services (e.g. engineers, lawyers, etc.), the supply of staff, the hiring out of tangible movable property, telecommunications, radio and television broadcasting and electronically supplied services.

The structure of these rules creates a number of problems which, in cases where services are supplied to non-taxable persons, are exacerbated when such supplies can be provided at a distance without any safeguard having been put into place.

1. General rule

Currently, the general rule is taxation at the place where the supplier is established. In most cases, this rule leads to taxation at the place of actual consumption. This is certainly the case where services are supplied locally. It is also a rule which is very easy to apply for the service provider, as all he needs to know is the VAT legislation and rates of his own Member State.

While taxation at the place of consumption would best be achieved by taxing services

at the place where they are actually used or enjoyed, experience shows that, in many cases, it is very difficult to determine where the service is used or enjoyed. Although, from a strict theoretical VAT point of view, this is possibly the most correct rule to apply in order to comply fully with the character of VAT as a consumption tax, it is not considered appropriate to use as a general rule, mainly because of the practical problems linked to determination of this place in cases where the service is used or enjoyed in different jurisdictions. This would also create an unnecessary administrative burden for the business.

The alternative would be to tax all supplies of services to non-taxable persons at the place where the customer is established. This solution would, however, also impose disproportionate administrative burdens on traders, as they would always have to determine the place of establishment of their client and, in the absence of a one-stop mechanism, would have to register in every Member State where they have non-taxable customers and to collect and remit tax to those Member States. It would also place additional administrative burdens on the tax administrations, whilst at the same time offering no particular advantage in terms of quality of control. This is certainly not in line with the conclusions reached at the Lisbon summit. Therefore, in the absence of a mechanism enabling tax to be collected in the Member States of consumption without creating undue administrative complications, it is unrealistic to tax all supplies to final customers at the place of consumption.

These burdens can be avoided if the current rule is maintained as the general rule. In most cases, it achieves the objective of taxation at the place of consumption and is very easy to apply by the supplier, who can simply apply his own national VAT rules and does not need to check the identity of the customer. This is substantiated by very many of the responses received to the public consultation. Taking this into account, the proposal is to maintain the place of establishment of the supplier as the general rule.

2. Specific rules

Although in most cases the main rule does lead to taxation at the place of actual consumption, there are, nevertheless, a number of areas where specific rules are needed. These are areas where continuation with the existing rules would cause practical difficulties for businesses if the proposed treatment of B2B services were adopted without a corresponding change for B2C; or where the existing rules could be held to be inadequate or impractical; or where the current rules fail to comply with the principle of taxation at the place of consumption in an area of major financial importance. In some other areas consideration of the burden, simplicity and observation of the principle of taxation at the place of consumption has tilted the balance towards maintaining the current specific rules. The following cases have been identified, where it is considered necessary to allow certain exceptions to the general rule for both administrative and policy reasons:

2.1. Immovable property (current Article 9(2)(a))

A first exception would need to be to maintain the current rule in respect of services relating to immovable property. This rule is reasonably straightforward to apply and generally results in taxation where the service is consumed. In addition, this sector is often subject to exemptions, which in turn affect rights of deduction.

As the Commission has already proposed, in the B2B proposal, to maintain this exception, covering supplies to both taxable and non-taxable persons, no further changes are necessary.

2.2. Passenger transport (current Article 9(2)(b))

Passenger transport services are currently, as an exception, taxed in proportion to the distances covered. To apply this rule on an internal market without fiscal frontiers is impractical and difficult. It implies that a coach company which transports tourists from Paris to Amsterdam needs to apply French, Belgian and Dutch VAT to each relevant part of the journey and to pay the corresponding amount of VAT to the tax authority of each of these Member States. In practice this rule is quite burdensome and very difficult to apply for the operators involved.

As it was very difficult to address the issue for taxable persons only, without taking into account services of this type to non-taxable persons, this problem was not tackled in the initial B2B proposal. Instead, it was left for a future proposal on B2C to deal with this question.

Consideration has been given to the possibility of taxing passenger transport services, irrespective of the means used, at the place of departure. This would be in line with previous undertakings and coincides with what was previously proposed, but should not bring changes to the level of rates and exemptions currently applied to passenger transport services in the different Member States. Even so, as illustrated by previous discussions, this rule would not necessarily resolve the matter. Instead, it would probably create other problems as it would provide scope for tax avoidance through the relocation of transport services.

From the responses to the consultation, it appears that a mere change to the rules on the place of supply will not be able to solve the problems encountered in this sector. Therefore, despite the difficulties with the current rules, many would still prefer to retain them until the Commission puts forward a proposal not only tackling the place of supply of passenger transport services but also eliminating the current distortions of competition between the different means of transport in terms of VAT rates and exemptions currently applied by Member States in this sector. The companies that currently have to charge VAT on their passenger transport services were not convinced that taxation at the place of departure would reduce the problems.

The existing rule, consisting of taxing passenger transport services on the basis of the distances covered, ensures that the tax accrues to the Member State of consumption. To replace that rule by taxation at the place of departure – the only viable alternative identified in studies undertaken for the Commission – would not see transport services taxed at the place of consumption to the same extent. Moreover, the burden of having to split up the price according to the distances covered in each Member State would be diminished with the one-stop mechanism.

Under these circumstances, the Commission proposes to leave the existing rule unchanged. To better reflect the current text, the initially proposed wording is slightly modified.

2.3. Intra-Community transport of goods (current Article 28b(C)(2))

The current rule is that the place of supply, in the case of intra-Community transport of goods services provided to persons not identified for VAT purposes, is the place of departure. This implies that a transport company carrying out a cross-border removal for a non-taxable person needs to charge VAT in the Member State where the transport starts. Such companies are therefore liable for VAT in all Member States from which they carry out removals.

Although this is recognised as quite burdensome for the traders involved, it would not be appropriate to return either to the general rule or to the distances covered. The concern is that taxation of such services at the place where the supplier is established could lead to relocation of the supplier either to a Member State with a more preferential VAT rate or even to a non-EU country. This concern was shared by a number of respondents to the public consultation. Against that background, the preference is for maintaining this exception, to which operators are now used.

The principal inconvenience of this rule is that it forces removal companies to fulfil all the VAT obligations in every Member State from where they start a removal. This problem could, however, largely be solved by applying the one-stop mechanism, which would allow these companies to centralise these obligations at one place.

2.4. Restaurant and catering services (current Article 9(1))

Restaurant services cover a cluster of features and activities, of which the provision of food is only one component and in which services largely predominate. Such services - which are tangible in nature and supplied for immediate consumption at a readily identifiable location - should, as an exception, be taxed where the service is physically carried out. While this is often the same as the place where the supplier is established, which is currently the determining factor when taxing such services, this is not always so, especially in the case of catering services. Where that is not the case, the rule that the place of supply is the place where the service is physically carried out better reflects the reality of where such services are, for all intents and purposes, consumed. It also ensures a level playing field between suppliers of such services.

In order to achieve this result, a new point (d) is added to Article 9f(1).

However, this rule should not apply to the supply of restaurant or catering services on board ships, aircraft or trains during a passenger transport service as it would be very difficult to determine where the service is physically carried out. Instead, such services should, in line with on-board supplies of goods, be taxed at the place of departure of the passenger transport service.

It is therefore proposed to add a new second paragraph to Article 9d(1) stipulating that the place of supply of restaurant or catering services to taxable customers on board ships, aircraft or trains during a passenger transport service will be the place of departure of that transport service. A similar provision will be inserted as a new second paragraph in Article 9f covering the supply of such services to non-taxable customers.

2.5. Hiring of means of transport (current Article 9(1))

Hiring of means of transport is deemed to have been supplied not at the place of use of the means of transport but, with a view to simplification and in conformity with the general rule, at the place where the supplier has established his business. Since means of transport can easily cross frontiers, this rule does not properly ensure that VAT accrues to the Member State of consumption. To address this issue, it is necessary to regulate it separately.

As the place of use of means of transport is difficult, if not impossible, to determine, it is necessary to put into place a practical rule for charging VAT. In the B2B proposal, this problem was tackled by moving the place of taxation, in the case of long-term leasing of means of transport, to the place where the customer is established under the general rule. For short-term hiring only, the place of supply under the B2B proposal would be the place where the supplier is established insofar as the means of transport is used in the same Member State. In practice this implies taxation at the place where the taxable customer takes possession of the means of transport, unless the supplier is established in another Member State.

It would not be desirable to have a different set of rules for the hiring of means of transport, depending whether the customer is a taxable person or not. It is clear from the responses to the public consultation that this would be a major cause for concern to the sectors involved. To be consistent, it would be logical to align the rules on B2C on the treatment proposed for B2B.

For short-term hiring, this would avoid the need for the rental company to verify whether the customer is a private individual or a taxable person. The company would simply charge the VAT in the Member State where the person takes possession of the means of transport in order to use it there for a short period. For long-term leasing the concerns raised by the sector for B2B services apply equally to B2C services. The current rule consisting of taxation at the place of establishment of the supplier leads to relocation of car rental companies to Member States which apply low VAT rates to car leasing or which, in the case of business customers, allow more favourable deduction rules. Therefore, it is necessary to put into place rules ensuring that the VAT is paid in the Member State of consumption. For practical reasons this is deemed to be where the customer is established. If the customer is a non-taxable person, the tax would need to be accounted for by the supplier. For the suppliers, the practical inconvenience is that this forces them to fulfil VAT obligations in every Member State where they have non-taxable customers. This problem could, however, largely be solved by applying the one-stop mechanism, which would allow these companies to centralise these obligations in one place.

It is therefore proposed to add a new paragraph 3 to Article 9f stipulating that the place of supply in the case of long-term leasing to non-taxable customers will be the place where the customer is established, has his permanent address or usually resides. For short-term hiring the place of supply would be the place where the means of transport is actually placed at the disposal of the non-taxable person. This paragraph also includes a definition of long-term leasing.

2.6. Exhibitions, fairs, cultural events, valuation of and work on tangible movable property (current Article 9(2)(c))

For cultural, artistic, sporting, entertainment or similar services, the current rule provides for taxation at the place where such services are physically provided. This applies equally to services relating to valuation and work on tangible movable property. It is widely accepted that, overall, this rule results in taxation where consumption occurs. Amendment of the current rule could cause additional problems (e.g. relocation of traders) and would certainly move away from the principle of taxation at the place of consumption. As for the administrative burdens for the suppliers involved, these could be minimised with the proposed one-stop mechanism.

While the current rule should be left unchanged, it must be ensured that only services requiring some human presence are covered by this rule. Otherwise, suppliers of services which can be supplied without any human presence, notably training or teaching provided at a distance, could relocate to Member States which apply more favourable VAT rates to such services, especially when they are supplied to customers with no right to deduct the input VAT. These services should, therefore, be taxed at the place where the customer is located, in the same way as other services which can be supplied remotely.

To achieve this result, point (c) of Article 9f(1) is to be amended to exclude from it teaching supplied without the physical presence of the service provider.

2.7. Services which can be supplied at a distance (current Article 9(1))

Electronically supplied services, telecommunication services and radio and television broadcasting services as well as distance teaching can be and are supplied to non-taxable persons at a distance. Financial services are also increasingly supplied in this way. When supplied to taxable persons, these services are taxed in the Member State of the customer, a rule retained in the new B2B proposal. When supplied to non-taxable persons, these services are taxed at the place where the supplier is established.

Given the ease with which these services can be supplied, there is a very real risk that the supplier's decision on where to locate his business could be influenced by VAT rate issues, all the more so when supplying to customers bearing the full VAT burden. There is empirical evidence that, with the adoption of new rules for electronic services, suppliers of electronic services established outside the EU have been setting up a fixed establishment in Member States with the most attractive VAT rates from where they supply all their customers throughout the EU. Equally, EU companies are changing their place of establishment in order to benefit from this competitive advantage.

The general principle of taxation at the place of consumption is then no longer observed, nor is the principle of trade on a level playing field. This is a cause of concern to several Member States, as highlighted on several occasions and most recently during the Council discussions on the B2B proposal.

For these types of services provided to non-taxable persons, the place of taxation should be changed from the place where the supplier is established to the place where the customer who receives the service is located. At this stage this exception should not, however, cover financial services, most of which are currently exempt. Instead, treatment of these services should be dealt with in the global proposal on the taxation of financial services.

With this rule, the supplier would have to charge VAT in the Member States where his customers are established or domiciled, using the VAT rate applicable in each specific Member State. This is probably the reason why most reactions received during the public consultation from companies involved in this type of activities are very negative. It will indeed lead to additional administrative burdens for these traders, but much of the inconvenience that this might cause could be addressed by those traders opting for the one-stop mechanism, leaving only one place where all the obligations must be fulfilled and providing an electronic means to do so. Therefore, the Commission strongly believes that this proposal can only achieve the full scale of its simplification when accompanied by the one-stop mechanism. Without this simplification the amended rules would impose disproportionate administrative burdens on business and run strongly counter to the Lisbon Strategy.

This rule would apply to all suppliers, irrespective whether they are established inside or outside the EU. In this way, suppliers established in a non-EU country would receive the same treatment as suppliers established in the EU and they would also have to comply with the same rules, including the obligation to pay the VAT due to each Member State where they are liable for VAT. Currently a temporary special rule makes the provision of electronically supplied services by suppliers established outside the EU to non-taxable customers in the EU taxable at the place where the customer is established. This rule together with the special scheme laid down in Article 26c of the Directive was observed well by providers of electronically supplied services established outside the EU. While in the first instance tax collection is primarily a matter for the Member States, in the context of examining the operation of Directive 2002/38/EC, Member States have provided the Commission with information showing that on 30 June 2004 there were 617 live registrations for non-established taxable persons availing themselves of the simplified scheme. In the year to 30 June 2004, these non-established taxable persons paid VAT totalling €90 315 000.

The Commission also held a seminar in June 2004 in the context of the Fiscalis Programme at which practical implementation of the Directive was discussed. Member States expressed satisfaction with its utility and application. Therefore, the rules proposed would make the temporary rule in Article 9(2)(f) permanent. The part that relates to Article 26c of the Directive is currently being dealt with under the proposed general one-stop mechanism.

To achieve this result, the proposal is first of all to delete Article 9g which will become redundant with the introduction of the new Article 9g. Secondly it is proposed to replace the first paragraph of Article 9g by a text covering services which can be supplied at a distance to non-taxable persons. This new paragraph 1 would make supply of the following services taxable at the place where the non-taxable customer is established: electronically supplied services, telecommunication services, broadcasting services and teaching services provided without the physical presence of the service provider. The Commission considers it preferable to concentrate on those services, where there is clearly a real risk of distortion of competition or relocation of trade, rather than introducing a general description of all services which can be supplied at a distance.

Finally, in order to allow traders to continue to use the current rules determining the place of taxation of services supplied electronically to non-taxable customers, the

Commission proposes that these rules enter into force on 1 July 2006 at the latest.

2.8. Services provided by intermediaries (current Article 28c(E)(3))

When intermediaries supply services to final consumers who are not identified for VAT purposes, these services are taxed at the place where the principal transaction to which they relate (supply of goods or services or intra-Community acquisition) is taxed. As this rule is not always easy to apply, thought was given to taxing services provided by intermediaries at the place where the intermediary is established. Any such change, however, gives rise to some concern as services supplied by intermediaries established outside the Community would escape taxation despite being linked to EU activities. The ensuing distortion of competition could be further compounded by the relocation of suppliers, even within the EU, to Member States which apply lower VAT rates. This risk is especially high for this type of services as they need little equipment, office space etc. These concerns are certainly shared by a large proportion of the sectors which responded to the public consultation, especially by the transport sector, tour operators and travel agents.

Based on these arguments and on the fact that the disadvantages of additional compliance and tax-induced distortion clearly outweigh the benefits of any change from a system which, although not ideal, traders have managed to make work over the years, the Commission proposes to maintain the current place of supply of services by intermediaries to non-taxable customers. Nevertheless, rather than maintaining these rules in their current form, they should, for clarity, be brought together in a single provision. To this end, Article 9i, which now becomes Article 9h, is to be amended in order clearly to define that the place of supply of such services will be the place where the principal transaction is carried out. The exceptions provided for in the original text of Article 9i are deleted so that all services provided by intermediaries to non-taxable customers are now covered.

2.9. Suppliers and recipients established in a non-EU country (current Article 9(2)(e) and (f))

When services falling under the current Article 9(2)(e) are supplied to customers not established within the Community, the place of supply is currently situated outside the Community. This situation should be maintained.

When e-commerce, telecommunication and broadcasting services are provided by a supplier established outside the EU, under current rules the supplier may become liable for payment of VAT in the Member State where the non-taxable customer is established or in the Member State where the service is effectively used or enjoyed. These provisions were included in order to ensure fair competition between suppliers, whether established inside or outside the EU, when supplying such services to non-taxable customers in the EU. Those rules will be maintained and incorporated in the revised Article 9h, which becomes Article 9g.

Taking into account that these provisions are now covered by Articles 9g and 9h, the proposal is to amend Article 9j, which will now become Article 9i, by deleting the reference to points (h), (j), (k) and (l).

2.10. Anti-avoidance provision (current Article 9(3))

Current rules enable Member States to override any of the rules applying to the place of supply if there is a need to avoid double taxation or non-taxation or to address distortion of competition. The scope of this rule is limited as it only covers supplies governed by Article 9(2)(e). However, the B2B proposal already envisaged extending this rule to all the provisions on place of supply, including both taxable and non-taxable persons. No further changes are, therefore, necessary.

2.11. Exchange of information using the VAT Information Exchange System (VIES)

In its original proposal, the Commission proposed introducing the obligation for taxable persons to include services in their recapitulative statements, thereby allowing the information to be exchanged between Member States using the VIES exchange of information with effect from 1 January 2008. This was because at the time of the proposal, the Commission was about to undertake a feasibility study to improve the VIES. This study has now been completed, and has shown that it is technically feasible to include the exchange of information on services within the current VIES. Accordingly, the date of commencement of the reporting obligation for taxable persons will be the same as the date of entry into force of the proposed modifications, namely 1 July 2006 and the specific date of 1 January 2008 is deleted

2.12. Technical changes to the proposal

Finally, a number of technical changes are necessary in order to clarify the wording of the provisions as well as the cross-references to Articles amended by this proposal.

In Article 1(2), the paragraphs of Article 9d are numbered and a new paragraph 2 is inserted. Furthermore, a cross-reference to paragraph 1 is added to the definition of long-term leasing now featuring in paragraph 3.

In Article 9e(1), the words “and the services of intermediaries” are deleted as these are now covered by the new Article 9h.

Article 9g is deleted and the former Articles 9(h), 9(i), 9(j) and 9(k) are renumbered accordingly.

In Article 9g, as the first paragraph is replaced by a new paragraph 1, the reference in paragraph 2 is adapted accordingly and now reads “For the purposes of point (b) of paragraph 1”.

In Article 1(3) of the initial proposal which modifies Article 12(3)(a), the cross reference to Article 9j(k) is now replaced by a reference to the new Article 9g(1)(a).

In point (b) of Article 1(4), Article 21, in the version set out in Article 28g, to which a new paragraph 5 is added, is modified so as to clearly indicate the number of this new paragraph.

Similarly, a reference to point (b) is added to the text of the first subparagraph of Article 22(6)(b), in the version set out in Article 28h, modified by Article 1(5) of the B2B proposal.

The sixth subparagraph which was initially added to Article 22(6)(b), in the version set

out in Article 28g, by point (c) of Article 1(5) is taken out.

Amended proposal for a

COUNCIL DIRECTIVE

amending Directive 77/388/EEC as regards the place of supply of services

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the European Economic and Social Committee³,

Whereas:

- (1) The realisation of the internal market, globalisation, deregulation and technology change have all combined to create enormous changes in the volume and pattern of trade in services. It is increasingly possible for a number of services to be supplied at a distance. In response, piecemeal steps have been taken to address this over the years and many defined services are in fact at present taxed on the basis of the destination principle.
- (2) The proper functioning of the internal market requires the amendment of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment⁴ as regards the place of supply of services, following the Commission's strategy of modernisation and simplification of the operation of the **common** VAT system⁵.
- (3) For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place. If the general rule for the place of supply of services ~~rules~~ were to be altered in this way, ~~it would still be necessary to utilise~~

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2003/92/EC (OJ L 260, 11.10.2003, p. 8).

⁵ COM(2000) 348 final.

certain exceptions to this general rule **would still be necessary** for both administrative and policy reasons.

- (4) For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the customer is established, rather than where the supplier is established.
- (5) Where services are supplied to non-taxable persons, the general rule should continue to be that the place of supply of services is the place where the supplier has established his business.
- (6) In certain circumstances, the general rules as regards the place of supply of services for both taxable and non-taxable persons are not applicable and specified exclusions apply. These exclusions should be largely based on existing criteria and reflect the principle of taxation at the place of consumption, while not imposing disproportionate administrative burdens upon certain traders.
- (7) Where a taxable person receives services from a person not established in the same Member State the reverse charge mechanism should be obligatory, meaning that the taxable person should self-assess the appropriate amount of VAT on the acquired service.
- (8) Services rendered between different establishments of a taxable person are normally outside the scope of Directive 77/388/EEC. In the interests of greater legal certainty, that position should be confirmed in legislation.
- (9) Directive 77/388/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is amended as follows:

- (1) In Article 6 the following paragraph 6 is inserted:

6. Where a single legal entity has more than one fixed establishment, services rendered between the establishments shall not be treated as supplies.”

- (2) Article 9 is replaced by the following:

“Article 9

General rule

1. The place of supply of services to taxable persons shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied.

If the place where a taxable person has established his business or where he has a fixed establishment cannot be determined, the place of supply of services shall be the place where that taxable person has his permanent address or usually resides.

2. The place of supply of services to non-taxable persons shall be the place where the supplier has established his business or has a fixed establishment from which the service is supplied.
3. For the purposes of paragraphs 1 and 2, where a person is a taxable person who also performs activities or transactions that are not considered to be taxable supplies of goods or services, he shall be deemed to be a taxable person in respect of all services supplied to him except where the services are for his own private use or that of his staff.

Article 9a

Immovable property

The place of supply of services related to immovable property, including the services of estate agents and experts, the provision of hotel or similar accommodation, the granting of rights to use immovable property and services to prepare and co-ordinate construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located.

Article 9b

Passenger transport

The place of supply of passenger transport services shall be the place where the transport **takes place**, proportionate to the distances covered.

Article 9c

Cultural, artistic, sporting, entertainment and similar activities

The place of supply of services relating to cultural, artistic, sporting, entertainment, or similar activities, including the activities of the organisers of such activities, and where appropriate, the supply of services ancillary to such activities, shall be the place where those services are physically carried out.

Article 9d

Specific services to taxable persons

- 1.** The place of supply of services to taxable persons, other than the long-term hiring or leasing of or working on movable tangible property, shall be the place where the supplier has established his business or has a fixed establishment from which the

service is supplied, or the place where he has a permanent address or usually resides, when the following conditions are met:

- (a) the services are rendered in the Member State in which the supplier is established, has a fixed establishment, or has a permanent address or usually resides;
- (b) the services require the physical presence of the service provider, or the material presence of the means of providing the service, at the same time as the physical presence of the customer;
- (c) the services are provided directly to an individual for immediate consumption.

2. Where restaurant and catering services are supplied to taxable persons on board ships, aircraft or trains during a passenger transport service, the place of supply shall be the place of departure of the transport service.

- 3.** For the purposes of **paragraph 1**, ‘long-term hiring or leasing’ shall **mean** an arrangement governed by an agreement providing for continuous possession or use of the movable tangible property throughout a period of more than thirty days.

Article 9e

Transport of goods for non-taxable persons

- 1. The place of supply of transport services of goods, including intra-Community transport ~~and the services of intermediaries~~, to non-taxable persons shall be the place of departure.
- 2. Member States need not apply the tax to that part of the intra-Community transport of goods corresponding to journeys made over waters which do not form part of the territory of the Community.
- 3. ‘Intra-Community transport of goods’ shall mean transport of goods where the place of departure and the place of arrival are situated within the territories of two different Member States.
- 4. The transport of goods where the place of departure and the place of arrival are situated within the territory of the same Member State shall be treated as intra-Community transport of goods where such transport is directly linked to the transport of goods where the place of departure and the place of arrival are situated within the territories of two different Member States.
- 5. ~~The~~ **‘Place of departure’** shall mean the place where the transport of goods actually starts, irrespective of distances covered to the place where the goods are located and ~~the~~ **‘place of arrival’** shall mean the place where the transport of goods actually ends.

Article 9f

Specific services to non-taxable persons

- 1.** The place of supply of the following services ~~supplied~~ to non-taxable persons shall be the place where **these** services are physically carried out:
- (a) ancillary transport activities such as loading, unloading, handling and similar activities in the name and on behalf of other persons;
 - (b) valuations of and work on movable tangible property;
 - (c) services relating to scientific and educational activities, **except for the teaching services referred to in point (d) of Article 9g(1)**, including the activities of the organisers of such activities and, where appropriate, ~~the supply of ancillary services;~~
 - (d) restaurant and catering services.**

- 2.** **Where restaurant and catering services are supplied to non-taxable persons on board ships, aircraft or trains during a passenger transport service, the place of supply shall be the place of departure of the transport service.**

- 3.** **The place of supply of the long-term hiring or leasing of means of transport to non-taxable persons shall be the place where the customer is established, has his permanent address or usually resides.**

The place of supply of the hiring, other than the long-term hiring or leasing, of means of transport shall be the place where the means of transport is actually put at the disposal of the non-taxable person.

‘Long-term hiring or leasing of means of transport’ shall mean an arrangement governed by an agreement providing for continuous possession or use of the means of transport throughout a period of more than thirty days.

Article 9g

Electronically supplied services to non-taxable persons

~~Until 30 June 2006, the place of supply to non-taxable persons of electronically supplied services, including in particular the services referred to in Annex I and services supplied by a taxable person who has established his business outside the Community or has a fixed establishment there from which the service is supplied, shall be the place where the non-taxable person is established, has his permanent address or usually resides.~~

Article 9g

Services which can be supplied at a distance to non-taxable persons

1. The place of supply of the following services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides:

(a) electronically supplied services, in particular those referred to in Annex L;

(b) telecommunications services, including the provision of access to global information networks;

(c) radio and television broadcasting services;

(d) teaching supplied without the physical presence of the service provider.

2. For the purposes of **point (b) of paragraph 1**, ‘telecommunications services’ shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception.

Article 9h

Services supplied by an intermediary to non-taxable persons

The place of supply of services rendered to non-taxable persons by **an intermediary** acting in the name and on behalf of other persons shall, ~~where such services form part of transactions other than those referred to in Article 9e and Article 9j,~~ be the place where **the principal transaction is carried out according to the provisions of Articles 9a to 9g and 9i.**

Article 9i

Services to non-taxable persons outside the Community

The place of supply of the following services ~~supplied~~ to a non-taxable person who is established or who has his permanent address or usual residence outside the Community shall be the place where that person is established, has his permanent address or usually resides:

(a) transfers and assignments of copyrights, patents, licences, trade marks and similar rights;

(b) advertising services;

(c) the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;

- (d) obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right referred to in this Article;
- (e) banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes;
- (f) the supply of staff;
- (g) the hiring out of movable tangible property, with the exception of all means of transport and of all other vehicles;
- ~~(h) telecommunications services, including the provision of access to global information networks;~~
- (h)** the provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other directly linked services;
- ~~(j) radio and television broadcasting services;~~
- ~~(k) electronically supplied services, in particular, those referred to in Annex L;~~
- ~~(l) the services of agents who act in the name and on behalf of other persons, when they procure for their principal the services referred to in this Article.~~

Article 9j

Avoidance of double taxation

In order to avoid double taxation, non-taxation or distortion of competition, Member States may, with regard to the supply of **the** services referred to in **Articles 9 to 9j**, treat:

- (a) the place of supply of services, if situated within their territory, as being situated outside the Community, where the effective use **or** enjoyment of the services actually takes place outside the Community;
- (b) the place of supply of services, if situated outside the Community, as being situated within their territory, where the effective use **or** enjoyment of the services actually takes place within their territory.”

(3) In Article 12(3)(a), the fourth subparagraph is replaced by the following:

“The third subparagraph shall not apply to the services referred to in **Article 9g(1)(a)**.”

(4) Article 21, in the version set out in Article 28g, is amended as follows:

(a) in paragraph 1, point (b) is replaced by the following:

“(b) taxable persons to whom services covered by Article 9(1) are supplied if the services are carried out by a taxable person not established within the territory of the country;”

(b) the following paragraph 5 is added:

“**5.** In cases where the taxable transaction is made by an establishment of a taxable person which is not situated in the territory of the country, where that person has at the same time an establishment in the same Member State as the customer, the taxable person shall be deemed, for the purposes of paragraphs 1 and 2, not to be established within the territory of the country.”

(5) Article 22(6)(b), in the version set out in Article 28h of Directive 77/388/EEC, is amended as follows:

(a) The first subparagraph is replaced by the following:

“**(b)** Every taxable person identified for value added tax purposes shall also submit a recapitulative statement of the acquirers identified for value added tax purposes to whom he has supplied goods under the conditions provided for in Article 28c(A)(a) and (d), and of consignees identified for value added tax purposes in the transactions referred to in the fifth subparagraph and of the taxable customers to whom he has supplied services under the conditions provided for in Article 9(1).”

(b) The third subparagraph is replaced by the following:

“The recapitulative statement shall set out:

- the number by which the taxable person is identified for purposes of value added tax in the territory of the country and under which he effected supplies of goods in accordance with the conditions laid down in Article 28c(A)(a) and under which he effected supplies of services in the conditions laid down in Article 9(1),
- the number by which each person acquiring goods or services is identified for purposes of value added tax in another Member State and under which the goods or services were supplied to him,
- for each person acquiring goods or services, the total value of the supplies of goods or services effected by the taxable person. Those amounts shall be declared for the calendar quarter during which the tax became chargeable.”

~~(c) The following sixth subparagraph is added:~~

~~“As regards services, the provisions of the first and third subparagraphs shall apply from 1 January 2008.”~~

(6) Articles 28b(C), (D), (E) and (F) are deleted.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by **1 July 2006** at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President