COUNCIL DECISION

of 21 October 2004

authorising Italy to apply a measure derogating from Article 2(1) of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes

(2004/737/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1], and in particular Article 30 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) In a request submitted to the Commission and registered by the Commission's Secretariat-General on 24 March 2004, the Italian Government sought authorisation to conclude an agreement with Switzerland which includes provisions derogating from Article 2(1) of Directive 77/388/EEC.

(2) The reasons for this request are twofold. Firstly the introduction of VAT on tolls for the Gran San Bernardo tunnel as of 1 January 2003 has led to competitive distortions in multi-journey season ticket sales. Secondly the breakdown of proceeds for VAT purposes in proportion to the physical demarcation between the countries causes high administrative costs because the proceeds are calculated and distributed in accordance with economic criteria reflecting the breakdown of tunnel management and maintenance costs. These costs do not only concern the tunnel itself but include a highway linking the tunnel on Italian territory to the Italian road net.

(3) As of 1 January 2003, the Italian tunnel operator levies and collects VAT on tolls for the Gran San Bernardo tunnel. However, Switzerland does not apply VAT or any similar tax on the toll; under the 1958 Convention concluded between Italy and Switzerland before the introduction of a common VAT system, Switzerland cannot be obliged to apply and collect Italian VAT on tolls for the Gran San Bernardo tunnel. Therefore the introduction of VAT only on tolls collected by the Italian operator led to a difference in user costs and distorted competition in season-ticket sales. Users can pay for their multi-journey season tickets at either end of the tunnel and purchase them where they are cheaper, which is in Switzerland.

(4) The tunnel crosses an international border and is run by an Italian-Swiss joint venture and two operating companies, based in their respective countries. The Italian operator, in line with the territoriality principle, should levy VAT only in respect of the part of the tunnel on Italian soil. However, under a legally binding agreement between the operators concluded in 1963 and applied until today, the proceeds of the toll are not shared out in proportion to the physical demarcation between the countries but must be shared in line with economic criteria reflecting the breakdown of tunnel management and maintenance costs. The tunnel management and maintenance costs also include the use of a section of motorway which gives access to the tunnel. This means that the exact amount of the proceeds divided and distributed in accordance with these criteria can only be established *a posteriori*. For VAT purposes this established amount must then be broken down in accordance with the territoriality principle, extrapolating management and maintenance costs for the use of a section of motorway which gives access to the tunnel. This ex-post calculation and the collection of VAT is burdensome and generates high administrative costs. It cannot be rendered consistent with a consumption tax system requiring that VAT is levied and collected immediately.

(5) Against this background, the only viable option is in fact not to impose VAT on tolls for the Gran San Bernardo tunnel. The derogation represents a major simplification for the Italian-Swiss joint venture and its two operating companies.

(6) However, the requested derogation will have an impact on the Communities' own resources accruing from VAT and therefore require compensatory measures,

[1] OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2004/66/EC (OJ L 168, 1.5.2004, p. 35).

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 2(1) of Directive 77/388/EEC, the Italian Republic is hereby authorised to conclude an agreement with Switzerland in view of not imposing VAT on tolls for the Gran San Bernardo tunnel. The authorisation is granted under the condition that the Italian Republic estimates every year the amount of losses in VAT at the stage of final consumption and adds an equivalent compensation to the VAT base which is used for establishing its contributions to the Community's own resources.

Article 2

This Decision is addressed to the Italian Republic.

Done at Luxembourg, 21 October 2004.

For the Council

The President

G. ZALM