II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 2 November 2004

authorising Austria to apply a measure derogating from Article 21 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes

(2004/758/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard 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 VAT: uniform basis of assessment [1] and in particular Article 27(1) 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 3 March 2004, the Austrian Government sought authorisation to introduce three measures derogating from Article 21(1)(a) of Directive 77/388/EEC.

(2) The purpose of the derogation requested by Austria is to make the recipient liable for the VAT due in three specific cases: Firstly on the supply of goods provided as security by one VAT taxable person to another person in execution of that security, secondly on the supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee and thirdly on the supply of immovable property by a judgment debtor in a compulsory sale procedure to another person. The requested measures are to be considered as measures to prevent certain types of tax evasion or avoidance in the above sectors.

(3) Where goods are supplied as collateral by one VAT taxable person to the recipient of security in execution of the security, this usually reflects a situation where the guarantor supplying the goods has a limited capacity to settle his debts, including his tax debts. When the collateral taker who received the goods exercises his rights and sells the collateral to a third party, this sale also generates a supply from the guarantor to the collateral taker. In such scenarios VAT losses occurred in many cases because the collateral taker could not be refused his right to deduct and the supplying guarantor could not be held responsible because he was insolvent or had disappeared. The dimension of the problems encountered by the Austrian administration requires legal measures. A similar derogation has already been granted to Germany by Decision 2002/439/EC [2].

(4) In cases where a buyer of goods has a limited capacity to settle his debts for a purchase, the supplier of the goods will reserve the ownership and may cede the right to exercise this reservation as well as the purchase price claim to a third party, usually a bank, as a security for a loan granted by the bank to the buyer. If the buyer of the goods discontinues settling his debts for the loan, the bank will exercise its right of ownership; this involves a supply of the goods from the original buyer to the bank. In such a case the bank would usually not pay the original buyer the turnover tax due on the supply to it, but use it to settle the original buyer's debt for the loan, with the consequence of VAT losses for the fiscal authorities because the original buyers are usually insolvent or have disappeared before the tax administration can identify them and recover VAT. Therefore this scenario is similar to the execution of a security described above.

[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).

[2] OJ L 151, 11.6.2002, p. 12.

(5) VAT losses also occurred in cases of taxable supplies of immovable property sold by the judgment debtor in a compulsory sale procedure to another person. This is particularly relevant for such cases where the supplier had opted for tax liability although at the time of supply he was not in a financial position to pay the tax authorities the tax which he has invoiced to the purchaser. The buyer could usually exercise his right to deduct and the supplier did not pay VAT to the fiscal authorities. The dimension of the problem encountered by the Austrian administration requires legal measures. Immovable property is a high value good; thus also the taxable amount and the losses in terms of VAT — even on one single transaction — are particularly high. The value of the immovable property usually contains hidden VAT and the maintaining of the option is necessary to keep the VAT system neutral. Against this background, it appears that the envisaged liability of the recipient for VAT is the most appropriate solution in the specific circumstances and for the particularly high risk involved. The requested derogation avoids the loss of VAT because there is no VAT paid from the fiscal authorities to one of the economic operators involved. The solution also avoids a double tax responsibility of supplier and recipient, which would involve a higher economic risk for the recipient and burdensome recovery procedures for the fiscal authorities which could only address the recipient, when recovery from the supplier proved to be impossible. It avoids the fiscal responsibility of a third person like the notary, which would result in higher charges for supplier and recipient. Similar derogations have already been granted to Germany by Decisions 2002/439/EC and 2004/290/EC [1].

(6) The derogation in question does not affect the amount of VAT due at the final consumption stage and has no adverse impact on the Communities' own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 21(1)(a) of Directive 77/388/EEC, as amended by Article 28(g) thereof, the Republic of Austria is hereby authorised to designate the recipient of the supplies of goods referred to in Article 2 of this Decision as the person liable to pay VAT.

Article 2

In the following instances the recipient of the supply may be designated as the person liable to pay VAT:

1. the supply of goods provided as security by one VAT taxable person to another person in execution of that security;

2. the supply of goods following the cession of the reservation of ownership to an assignee and the exercising of this right by the assignee;

3. the supply of immovable property sold by the judgment debtor in a compulsory sale procedure to another person.

Article 3

This Decision shall expire on 31 December 2008.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 2 November 2004.

For the Council
The President
B. R. BOT

[1] OJ L 94, 31.3.2004, p. 59.