



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.11.2006  
COM(2006) 739 final

2006/0245 (CNS)

Proposal for a

**COUNCIL DIRECTIVE**

**amending Council Directive 2002/38/EC as regards the period of application of the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1) CONTEXT OF THE PROPOSAL

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

Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, the so called e-commerce VAT Directive, contains a number of provisions which were due to expire on 30 June 2006 unless extended.

When enacted, it was intended that the provisions covering the place of supply of these services and certain facilitation measures for non-EU businesses should be reviewed by the Council before the end of the first three years of operation and, on the basis of a proposal from the Commission, revised or extended as needed. On 15 May 2006, the Commission adopted the required report to the Council as well as a proposal temporarily extending the validity of Council Directive 2002/38/EC until 31 December 2008<sup>1</sup>. The report sets out in some detail the reasons why these measures should continue in operation, outlining in particular the successful manner in which they achieved their original objective. Given the recent provenance of this report, it is not necessary to repeat these arguments in detail here.

In June 2006 however, the Council decided on an extension which runs only to the end of the current year.

In the view of the Commission, an extension of the original measures was needed in order to ensure the proper functioning of the internal market and to ensure the continued elimination of distortion. Allowing the 2002 measures to expire would have led to consequences which nobody would have welcomed. In the longer run, the adoption by the Council of proposals from the Commission on the place of supply of services (COM (2005) 334) and on the simplification of VAT obligations (COM (2004) 728) will encompass the long term fulfilment of the aims of Directive 2002/38/EC. The slow rate of legislative progress by Member States in the Council however meant that these changes would not have been in place in time before the 2002 measures expire. Indeed it is highly improbable that that they will be in place by the end of 2006. Accordingly, it is the view of the Commission that an extension to the end of 2008, as originally proposed, is still required. This will allow sufficient time for the adoption of the two proposals mentioned above and for Member States to ensure that the infrastructural changes necessary are in place.

The objective of this proposal remains the same as the earlier extension proposal. The 2002 Directive rectified an obvious shortcoming in one of the basic provisions of VAT law which conflicted with the neutrality central to VAT, leaving European business at a competitive disadvantage.

The detailed justification for extending 2002 measures in their present form is already set out in detail in the proposal and report of May 2006 remains valid and it is not

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<sup>1</sup> COM (2006) 210 final of 15 May 2006.

considered necessary to repeat them in detail here.

This proposal will also ensure the continued functioning provisions of Council Regulation (EC) No 1798/2003 relating to e-service operations.

- **General context**

Council Directive 2002/38/EC achieved its objectives in redressing a competitive disadvantage faced by EU businesses and nobody would wish to revert to the position which existed prior to its adoption, confirming the case for extending the provisions

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

This is a simple extension of the existing provisions in Directive 2002/38/EC so that they remain in force until the end of 2008. In time they will be given permanent effect by the adoption of the two proposals already mentioned, COM (2004) 728 and COM (2005) 334. Largely because of their much broader scope, legislative progress has been slower than expected. Nevertheless, they are likely to be adopted in the near future but not in time to cover the expiry of the provisions in the 2002 Directive at the end of the current year.

It should be recalled that, taken together, these two proposed measures will ensure the correct long term functioning of the application of VAT to e-services in line with the goals set out in Article 5 of Directive 2002/38/EC.

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

The provisions whose extension is being proposed are fully in line with established EU VAT policy as set out in the 6th VAT Directive. The original 2002 Directive was occasioned by a lacuna in the coverage of the 6th Directive caused by technological change and the need to assure consistent application of the tax.

## 2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

### *Consultation methods, main sectors targeted and general profile of respondents*

Participants in two seminars in the Fiscalis Programme held during the last three years to monitor the operation of the 2002 Directive included representatives of all Member States and representatives of a majority of the operators involved.

### *Summary of responses and how they have been taken into account*

Because of the sensitive nature of the relationship between taxpayers and tax administrations, it is not appropriate to identify individual contributions to this dialogue. All significant issues raised were however addressed in the report from the Commission to the Council and it is not considered necessary to repeat them here.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The only other option open to the Commission would be to allow the 2002 provisions to lapse.

The reasons why this is not a realistic option are set out in the report from the Commission to the Council.

### **3) LEGAL ELEMENTS OF THE PROPOSAL**

- **Summary of the proposed action**

The proposal will extend the period of application foreseen in Article 1 of Council Directive 2002/38/EC thereby ensuring that the measures adopted for the correct taxation of certain electronically supplied services and radio and television broadcasting services remain in place.

- **Legal basis**

Article 93 of the Treaty and Council Directive 2002/38/EC

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

The Proposal is a simple extension of the period of application of an existing measure in the 6th VAT Directive. There is no other reasonable alternative.

The measures adopted in 2002 have worked satisfactorily for both Member States and the businesses concerned. There is no alternative option which would better achieve the objectives of the original measure.

- **Choice of instruments**

Proposed instruments: Directive.

Other means would not be adequate for the following reason(s).

This Proposal extend the period of application of a provision already enacted in a Directive. There is no alternative means to achieve this objective.

#### **4) BUDGETARY IMPLICATION**

The proposal has no quantifiable implication for the Community budget.

#### **5) ADDITIONAL INFORMATION**

- **Review/revision/sunset clause**

Given that these measures will in time be subsumed in other legislation which is currently under discussion in the Council, there is no need for a revision clause.

The proposal includes a sunset clause.

- **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.

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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 Commission<sup>2</sup>,

Having regard to the opinion of the European Parliament<sup>3</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>4</sup>,

Whereas:

- (1) The provisions of Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable for radio and television broadcasting services and certain electronically supplied services were extended until 31 December 2006 by Council Directive 2006/58/EC of 27 June 2006 amending Council Directive 2002/38/EC as regards the period of application of the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services<sup>5</sup>
- (2) It has not yet been possible to adopt provisions on the place of supply of services and on a more general electronic mechanism. Considering that the legal situation and the facts which justified the extension until 31 December 2006 have not changed and to avoid a temporary gap in the value added tax arrangements for radio and television broadcasting services and certain electronically supplied services, those arrangements should continue to apply until 31 December 2008,
- (3) Directive 2002/38/EC should therefore be amended accordingly,

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<sup>2</sup> OJ C , , p. .

<sup>3</sup> OJ C , , p. .

<sup>4</sup> OJ C , , p. .

<sup>5</sup> OJ L 174, 28.6.2006, p5

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Article 4 of Directive 2002/38/EC is replaced by the following:

'Article 1 shall apply until 31 December 2008.'

*Article 2*

*Transposition*

1. Member States shall adopt and publish, by 31 December 2006 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 1 January 2007.

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*  
[...]