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OPINION OF THE LEGAL SERVICE*

Subject:	Proposal for a Council Directive amending Council Directive 2006/112/EC on the common system of value added tax as regards a quick reaction mechanism against VAT fraud [1] - Proposal for a new Article 395a - competences and procedure

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I. Introduction

1. The abovementioned proposal for a Council Directive amending Council Directive 2006/112/EC (hereafter "the Directive" or "the VAT Directive")[2] provides for the establishment of a "quick reaction mechanism" (hereafter also "QRM") whereby the Commission, assisted by an examination Committee, would be granted implementing powers to authorise individual Member States to adopt pre-defined measures derogating from the Directive with respect to sudden and massive forms of tax fraud which could lead to considerable and irreparable financial losses (see the proposed new Article 395a).

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1 Docs. 13072/12 and 7723/13.

2 OJ L 347, 11.12.2006, p. 1.

2. Under Article 395 of the VAT Directive the Council may authorise Member States to introduce special measures derogating from the Directive in order to prevent certain forms of tax evasion or avoidance. The proposed new Article 395a for a QRM conferring limited implementing powers on the Commission should enable a more rapid response to VAT fraud than can arguably be done under Article 395.

3. In the course of proceedings in the Working Party on Tax Questions - Indirect Taxation (VAT), the Legal Service was questioned on the legality of the proposed new Article 395a and was asked for guidance with respect to the rules governing the implementation of EU acts, and in particular on the possible scope for Council implementing powers in the framework of a faster procedure than that provided for in Article 395 of the Directive. The present opinion reflects and further elaborates on the oral interventions by the Council Legal Service representative in the Working Party.

II. The conferral of implementing powers on the Commission or on the Council

4. It is to be recalled that it is for the Member States to implement EU law[3], under the supervision of the Commission, the national courts and the Court of Justice[4]. Where uniform conditions for implementation are needed, the Treaty on the Functioning of the European Union provides for the conferral of implementing powers by the legislator on the Commission, as a general rule, and on the Council in duly justified specific cases, as follows :

"*Article 291*

[...]

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 11 and 13 of the Treaty on European Union, on the Council.

[...]."

[3] This principle has been explicitly laid down in Article 291 TFUE; see also Council Legal Service opinions of 19 October 1998 (doc. 11987/98), of 2 February 2006 (doc. 5923/06), of 30 July 2009 - with respect to taxation - (doc 12506/09), in particular point 3 and footnote 2, and of 11 April 2011 (doc. 8970/11), point 25.

[4] See *i.a.* Legal Service opinions referred to in footnote 3, and in particular points 7 to 8 of the Legal Service opinion of 2 February 2006.

5. The Single European Act (1986) introduced into the Treaty a rule under which the powers for implementation of legislative acts are generally conferred on the Commission, but can be reserved for the Council to exercise in specific cases[5]. The Lisbon Treaty specifies that the implementation of legally binding Union acts is primarily a task of the Member States but that implementing powers may, under certain conditions, be conferred on the Commission or, in duly justified specific cases, on the Council [6].

6. Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 (hereafter "the Comitology Regulation" or "the Regulation") lays down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[7]. Under the Comitology Regulation it is for the legislator to decide whether the Commission, in the exercise of the implementing powers conferred on it, shall be assisted by a committee of representatives of Member States. It is to be noted in this respect that, as concerns the implementation of basic acts concerning taxation, if the legislator decides that the Commission is to be assisted by a committee, the Comitology Regulation provides that the examination procedure shall apply. Under that procedure, the Committee delivers its opinion by qualified majority. It is furthermore to be noted that Article 8 of the Comitology Regulation provides for an urgency procedure[8].

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[5] New third indent inserted in Article 145 of the EEC-Treaty by Article 10 of the European Single Act. See Legal Service opinion of 4 June 2008 (doc. 10297/08), point 14 and in particular footnote 7.

[6] Article 291 TFEU.

[7] OJ L 55, 28.2.2011, p. 13. In its Judgments of 2 October 1997, Case C-259/95, *EP v. Council* ,and of 21 January 2003, Case C-378/00, *Commission v. EP and Council*, the ECJ ruled that the Union legislator must adhere to the rules and principles laid down in Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (predecessor to the present Comitology Regulation) when adopting a basic act conferring implementing powers on the Commission. The Comitology Regulation, like Decision 1999/468/EC which preceded it, is « supra-legislative » in nature as the legislator is subject to the Regulation when exercising its powers. Only those mechanisms for control laid down in advance in the Regulation in accordance with Article 291(3) TFUE may be used by the legislator.

[8] See also point 17 of this opinion.

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