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**COVER NOTE**

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMUNICATION FROM THE COMMISSION TO THE COUNCIL in accordance with Article 395 of Council Directive 2006/112/EC

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Delegations will find attached document COM(2016) 355 final.

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Brussels, 1.6.2016  
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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL**

**in accordance with Article 395 of Council Directive [2006/112/EC](#)**

# COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

in accordance with Article 395 of Council Directive 2006/112/EC

## 1. BACKGROUND

Pursuant to Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the 'VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. As this procedure provides for derogations from the general principles of VAT, such derogations should be proportionate and limited in scope.

By letter, registered at the Commission on 23 December 2015, the Republic of Austria has requested to be authorised to introduce a measure derogating from the special margin scheme for travel agents. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 20 April 2016 of the request made by the Republic of Austria. By letter dated 21 April 2016, the Commission notified the Republic of Austria that it had all the information it considered necessary for appraisal of the request.

## 2. THE REQUEST

Articles 306 to 310 of the VAT Directive provide for a special 'margin' scheme for travel agents whereby only the difference (or margin), between the price (without VAT) paid by the customer and the actual costs of the travel agent, is taxed. This scheme is applicable insofar the travel agent acts in his own name and not solely as intermediary.

Regarding this margin, Article 308 stipulates that "*The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.*"

In this context, the Court of Justice of the European Union (CJEU) has ruled that this article does not provide for any possibility of making an overall determination of the taxable amount of the travel agent's profit margins and that, consequently, the taxable amount must be calculated by referring to each single service provided by the travel agent<sup>1</sup>.

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<sup>1</sup> [Case C-189/11](#), *European Commission v Kingdom of Spain*, par. 101 -103

With its request, Austria wants to derogate from Article 308 of the VAT Directive, as interpreted by the CJEU, by allowing travel agents to calculate a single profit margin during a year for all the supplies of travel services covered by the special VAT scheme (i.e. when the travel agent is not acting as intermediary).

### 3. THE COMMISSION'S VIEW

When the Commission receives requests in accordance with Article 395 of the VAT Directive, these are examined to ensure that the basic conditions for their granting are fulfilled i.e. whether the proposed specific measure simplifies procedures for taxable persons and/or the tax administration or whether the proposal prevents certain types of tax evasion or avoidance. In this context, the Commission has always taken a limited, cautious approach to ensure that derogations do not undermine the operation of the general VAT system, are limited in scope, necessary and proportionate.

Furthermore, the CJEU has ruled that measures, taken in application of Article 395 of the VAT Directive in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance, have to be necessary and appropriate for realising the specific objective which they pursue and have as little effect as possible on the objectives and principles of the VAT Directive<sup>2</sup>.

It therefore follows from this CJEU ruling that derogations under Article 395 of the VAT Directive should only be granted when a particular situation in a Member State requires a specific measure. In the present case, however, it is not justified why such a derogation, requested as a simplification measure, would specifically be needed in Austria. On the contrary, the special scheme for travel agents is implemented everywhere in the EU and the margin is to be calculated in all Member States in the same way; i.e. on each single supply. Considering a specific derogation to alter a situation which is equally applicable in all Member States would therefore circumvent the normal procedure, which is the unanimous adoption by the Council after consultation of the European Parliament of an amendment to the VAT Directive upon proposal of the Commission.

In addition, the Commission considers that such a derogating measure would give a specific advantage to travel agents established in Austria in comparison to travel agents established in other Member States. Because the place of taxation being the place of establishment, such an advantage could create issues from a competition point of view in the internal market, especially at a time when customers buy more and more of these services on-line. Travel agents established in (or relocating to) Austria would have, as put forward in the derogation request, the possibility to calculate an overall profit margin for a calendar year. Therefore, they would have the possibility, contrary to travel agents in other Member States, to consolidate negative margins resulting from certain specific supplies with positive margins of other supplies; resulting in a lower VAT liability and subsequent payment of tax to the administration.

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<sup>2</sup> See for example case [C-489/09](#), *Vandoorne NV*, par. 27

The Commission had already proposed a new travel agent scheme for VAT purposes in 2002. However, the Council could not agree on the (amended) proposal<sup>3</sup> which was finally withdrawn by the Commission in 2014<sup>4</sup>. Notwithstanding this, the Commission continues exploring the possibilities for, where necessary, improving this scheme taking into account the effects of the above-mentioned CJEU ruling on travel agents and in the light of the principle of taxation in the Member State of destination that the European Union has agreed upon as the main principle for future VAT legislation<sup>5</sup> and later on developed by the Commission in the VAT Action Plan<sup>6</sup>. To this end, the Commission will shortly launch a study to evaluate the whole, currently origin-based, travel scheme (including the method for the calculation of the margin) with the aim, among others, to minimise administrative burdens.

#### 4. CONCLUSION

On the basis of the above-mentioned elements, the Commission objects to the request made by the Republic of Austria.

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<sup>3</sup> Proposal for a Council Directive amending Directive 77/388/EEC as regards the special scheme for travel agents ([COM\(2002\)64final](#)) and Amended proposal for a Council Directive amending Directive 77/388/EEC as regards the special scheme for travel agents (presented by the Commission pursuant to Article 250(2) of the EC Treaty) ([COM2003\(78\)final](#))

<sup>4</sup> Withdrawal of obsolete Commission proposals -list of proposals withdrawn (OJ C 153 of 21.5.2014, p. 3)

<sup>5</sup> See *Communication on the future of VAT* (COM(2011)851, 6.12.2011). This was welcomed by the Council in its ECOFIN conclusions of May 2012 [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/130257.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/130257.pdf) and by the European Parliament in its resolution of 13 October 2011 on the future of VAT <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0436>

<sup>6</sup> COM(2016)148 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1461242313847&uri=CELEX:52016DC0148>