

29.11.13

**Resolution
of the Bundesrat****Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards a standard VAT return****COM(2013) 721 final; Council document 15337/13**

At its 917th meeting on 29 November 2013 under the terms of sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

1. The Bundesrat is of the opinion that the Commission's proposal is not in line with the allocation of powers under primary law.

The Commission cannot invoke Article 113 TFEU for this proposal for a Directive. Pursuant to the principle of conferral in Article 5(2) TEU, a Community body may act only within the limits of the competences conferred upon it by the Treaty. However, under Article 113 TFEU the Council has competence only to issue "directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market."

The allocation of powers under primary law extends only to provisions regarding substantive VAT law, and aims to create a harmonised basis of assessment in the internal market and, thus, a neutral tax burden for all companies within the Union. Article 113 TFEU therefore applies only to provisions regarding substantive VAT law, but not to provisions of a procedural nature. The latter fall within the competences of the Member States. Whether the provisions are necessary for the functioning of the internal market or the avoidance of distortion of competition does not play a decisive role, since the EU is basically not competent from the outset.

The Commission's reference to the fact that the Council had previously adopted legislation concerning the obligation to declare VAT (impact assessment, page 20 et seq. SWD (2013) 427 final) has no bearing. The fact that the EU's regulatory powers in this area were not questioned until now, does not mean that they apply.

^{*}) First Resolution of the Bundesrat of 29 November 2013, Bundesrat document 735/13 (Resolution)

Rather, the previous rules did not restrict the Member States' tax administrations to the extent that the Member States felt it necessary to question the regulatory powers. The European treaties do not justify granting the Commission such a competence on the basis of previous Directives and Regulations whose adoption was not opposed. It is moreover incompatible with the second sentence of Article 5(2) TEU.

2. Notwithstanding the lack of competence, the EU is no better placed to achieve the desired objectives through its initiative of the proposal for a Directive than the Member States themselves. The Bundesrat believes that the proposal for a Directive will not achieve the objective of closing the VAT loopholes. Instead, it will further aggravate the problem in Germany.

Admittedly, a standard VAT return not including the Commission's objectives, or considered in its own right in relation to improving the functioning of the internal market, would be achieved more easily by the EU through an amendment of the Directive on the common system of value added tax than by the Member States. However, the Commission's proposal for a Directive gives the Member States options in respect of Article 251 of the Directive on the common system of value added tax that do not justify the term "standard VAT return". The discrepancies in the Member States are still considerable, because any of a total of twenty-one options may be used.

It is indeed impossible at the moment to manage twenty-eight different national VAT laws with their specific legal aspects by means of a standard VAT return that does not provide options. However, the proposed standard VAT return does not provide enough options either for managing all the Member States' VAT laws that apply in accordance with the terms of the Directive on the common system of value added tax.

The claim that the standard VAT return would reduce distortion of competition (caused by avoidance or evasion of VAT) is not really convincing with regard to Germany. The Bundesrat believes that the forms and the verification routines used in Germany are superior to the proposed standard VAT return for which, moreover, the corresponding routines have not yet been developed. With regard to combating fraud, Member States like Germany do not therefore rely on the standard VAT return.

Member States like Germany that already have a functioning IT procedure for submitting returns electronically and the corresponding verification routines find it difficult to understand the Commission's claim that the standard VAT return would allow Member States to monitor the returns better. This applies in particular in view of the tight deadline for implementing the proposed amendments to the Directive on the common system of value added tax (1 January 2017), which

makes it impossible to achieve the technical integration into Member States' existing IT structures that in some cases have been developed over decades, as well as the implementation of new verification routines on the basis of the proposal for a Directive.

The drafting and use of tax return forms are elements of the implementation of the Directive on the common system of value added tax which, pursuant to Article 291 TFEU, should take place at national level.

Notwithstanding the detailed explanations in the proposal for a Directive, the proposal considers that Article 255a (new) of the Directive on the common system of value added tax not only regulates technical aspects, but also establishes common "procedures by which corrections can be made to the standard VAT return" by the Commission through comitology (see Regulation (EU) No 182/2011). The rules on correcting tax returns and their legal implications (also including criminal implications), however, concern questions of procedural law that the executive body should not be allowed to establish using its implementing powers. Thus, in this respect the proposal for a Directive infringes Article 291 TFEU.

3. The proposal for a Directive also infringes the principle of proportionality by disproportionately affecting Germany's autonomy.

From the outset, the proposal for a Directive does not appear to be suited to achieving the Commission's own objectives. It would not lead to real standardisation since only a few standard entries are mandatory while a much larger number of optional entries are still possible, which means that the forms would still differ. The objective of standardisation would therefore not be achieved, while at the same time national procedures would be affected and thus rendered less effective without any gains on another level.

In the first instance, this affects the legislator in the individual Member States who, following the introduction of the standard VAT return, is no longer free to decide whether to use any exceptions under substantive law provided for in the Directive on the common system of value added tax and, if so, which ones, should the introduction of new methods of determining the facts make it necessary to include questions in the VAT return that do not appear in the proposed standard VAT return.

The administration in Germany will also be disproportionately restricted if the official form is replaced by a statutory one. This affects the principle of the separation of powers that gives the administration the right to draw up its forms as it sees fit in the context of the legal provisions governing the procedure, since this is one of the administration's central competences along with assessing the usefulness of these forms.

The proposal for a Directive also makes the current instruments for combating fraud useless, but it does not provide an adequate alternative. In view of this, the Commission's objective of reducing distortion of competition by combating fraud cannot be achieved. Furthermore, this holds the danger of greater tax shortfalls for the Member States, thus jeopardising their national budgets. This negative effect on national budgets will moreover be increased by the fact that companies with an annual turnover not exceeding two million euros will be allowed to submit their VAT returns on a quarterly basis.

4. The Bundesrat calls on the German Federal Government pursuant to the first sentence of Section 5(2) EUZBLG to take due account of its above-mentioned objections, and thus to reject the Commission's proposal in the Council. The proposal affects, in particular, the administrative procedures of the Länder and their electronic data processing. The Bundesrat asks the Federal Government to keep it up to date on all developments concerning the discussions on the proposal for a Directive.

The Bundesrat also points out that until new verification routines based on the proposal for a Directive are implemented, considerable additional effort would be necessary to investigate VAT-related matters requiring verification. This could also affect the authority granted to the Länder to appoint and dismiss staff, which is protected in the Constitution.

Since it is not apparent either how the tax administrations of the Länder could cope with the additional effort, it cannot be ruled out that this will lead to lower tax revenues which will significantly affect national budgets.

5. The Bundesrat welcomes proposals that strengthen the internal market, reduce bureaucracy and simplify administration. In this regard, irrespective of the Council's decision, the Commission's proposal for a Directive suits the purpose of providing an impetus to the Member States' tax administrations, and of encouraging convergence between the Member States in this area.

However, the Bundesrat notes that it is precisely with regard to the administration of VAT that these objectives in particular must be considered in relation to the fight against fraud, and that this must be done in the Member States in view of the actual implementation of the Directive on the common system of value added tax, and also of the work already carried out by the national tax administrations.

6. The Bundesrat is transmitting this opinion directly to the Commission.