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Proposal for a

COUNCIL IMPLEMENTING DECISION

**authorising Spain and France to apply a special measure derogating from Article 5 of
Directive 2006/112/EC on the common system of value added tax**

EXPLANATORY MEMORANDUM

Pursuant to Article 395 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹ (hereafter ‘the VAT Directive’), the Council, acting unanimously on a proposal from the Commission, may authorise Member States to apply special measures for derogation from that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

By letters registered with the Commission respectively on 23 May 2019 and 17 June 2019, France and Spain requested an authorisation to derogate from Article 5 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States of the request made by Spain and France by letters dated 10 September 2019. By letters dated 11 September 2019, the Commission notified Spain and France that it had all the information it considered necessary for the appraisal of the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The European Union has developed a strong energy policy, based on the need for secure, competitive and sustainable energy. The European Union has therefore set ambitious objectives to be reached at Union Level, regarding energy efficiency, development of renewable energy sources and reduction of CO₂ emissions. In order to reach these objectives, it is necessary a more integrated energy market.

In this regard, the development of electricity interconnection capacity between Spain, Portugal and the rest of Europe is a priority. The importance of a further increase in interconnection capacity between Spain and France was emphasized in the Madrid Declaration signed on 4 March 2015 by the President of France, the Prime Ministers of Spain and Portugal and the President of the European Commission. In this document it was underlined the fundamental importance of attaining a fully-functioning and interconnected internal energy market. The document also stressed that building the necessary energy infrastructure is actually imperative for the Member States which have not yet attained a minimum level of integration in the internal energy market, such as Portugal and Spain. Following this declaration, the High Level Group for South-West Europe was established, with the aim of monitoring the development of interconnections in the region.

An important step in this direction was the construction of the Baixas-Santa Llogaia interconnection. The construction of a second interconnection through the Bay of Biscay is considered as the next step.

In this regard, the national electricity market regulators of Spain and France, respectively the ‘Comisión Nacional de los Mercados y la Competencia’ and the ‘Commission de Régulation de l’Énergie’, signed an agreement on 22 September 2017 to finance an electricity interconnection between both Member States through the Biscay Gulf. The construction of this interconnection was entrusted to the electricity transmission system operators in Spain and France, respectively ‘Red Eléctrica de España’ and ‘Réseau de transport d’Electricité’. The agreement provides for a division of the cost on equal shares, thus 50% of the costs will be borne by Spain and the other 50% of the costs will be borne by France.

¹ OJ L 347, 11.12.2006, p. 1.

The project involves the construction of two independent high voltage direct current (hereafter ‘HVDC’) links, each rated 1000 Megawatts (hereafter ‘MW’), between Cubnezais (France) and Gatica (Spain). The project will be composed of the following elements:

- Technical adaptations of the existing Gatica and Cubnezais substations;
- Connections from the existing Gatica and Cubnezais substations to the new Gatica and Cubnezais HVDC converter stations;
- Four new 1000 MW HVDC converter stations (2 bipoles in Gatica and 2 in Cubnezais);
- Two 1000 MW links (4 cables) of which 90 kilometres terrestrial and 280 kilometres submarine through the Biscay Gulf;
- The voltage of the HVDC links will be defined once the tender process is completed.

In accordance with the principle of territorial application laid down by the VAT Directive, with regard to supplies of goods and services it is necessary to establish where they are carried out. That is why for every supply of goods or services, intra-Community acquisition and import of goods related to the execution of the project, it would normally be necessary to establish if they are carried out in Spain or in France. Spain and France are of the opinion that the application of this rule would create tax complications to the taxable persons responsible for the construction of the electricity interconnection and for the Spanish and French tax authorities, as the project is actually managed as a whole irrespective of its cross-border nature.

In order to simplify the charging of VAT, Spain and France request an authorisation based on Article 395 of the VAT Directive to derogate from Article 5 of the VAT Directive and to provide that, for VAT purposes, all supplies of goods and services, intra-Community acquisitions and imports of goods destined for the execution of the foreseen investment (i.e. the construction of the electricity interconnection) are invoiced by the suppliers as taking place 50% in the territory of Spain and 50% in the territory of France.

After the construction of the electricity interconnection, the normal VAT rules will apply.

The Council authorised a similar special measure to Spain and France² for the construction of an underground electricity interconnection between Santa Llogaia in Spain and Baixas in France. Other derogations from the territoriality principle have been authorised by the Council on previous occasions, inter alia, between Germany and Poland³, Germany and Czechia⁴, as well as between Poland and Ukraine⁵.

² Council Implementing Decision 2012/85/EU of 10 February 2012 (OJ L 41, 15.2.2012, p. 16).

³ Council Decision 95/115/EC of 30 March 1995 (OJ L 80, 8.4.1995, p.47); Council Decision 96/402/EC of 25 June 1996 (OJ L 165, 4.7.1996, p. 35); Council Decision 95/435/EC of 23 October 1995 (OJ L 257, 27.10.1995, p. 34); Council Decision 2001/741/EC of 16 October 2001 (OJ L 278, 23.10.2001, p. 28) and Council Implementing Decision (EU) 2018/918 of 22 June 2018 (OJ L 163, 28.6.2018, p. 17).

⁴ Council Decision 97/188/EC of 17 March 1997 (OJ L 80, 21.3.1997, 21 of March 1997 p.18); Council Decision 97/511/EC of 24 July 1997 (OJ L 214, 6.8.1997, p. 39) and Council Decision 2001/742/EC of 16 October 2001 (OJ L 278, 23.10.2001, p. 30).

⁵ Council Implementing Decision (EU) 2017/1769 of 25 September 2017 (OJ L 250, 28.9.2017, p. 73).

The split between France and Spain of the VAT charged on the construction work will represent a simplification, which will make it easier for the businesses concerned and tax authorities to apply the tax rules than would be the case if the normal tax rules were applied.

Given the narrow scope of the derogating measure, any possible negative impact of the measure on the VAT collected at the stage of final consumption and thus on the Union's own resources accruing from VAT, would be negligible.

In light of the above, it is proposed to grant the requested derogating measure.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 395 of the VAT Directive.

- **Subsidiarity (for non-exclusive competence)**

Considering the provision of the VAT Directive on which the proposal is based, the subsidiarity principle does not apply.

- **Proportionality**

The Decision concerns an authorisation granted to Member States upon their own request and does not constitute any obligation.

Given the very limited scope of the derogation, the special measure is proportionate to the aim pursued.

- **Choice of the instrument**

Proposed instrument: Council Implementing Decision.

Under Article 395 of the VAT Directive, derogation from the common VAT rules is only possible upon authorisation of the Council acting unanimously on a proposal from the Commission. A Council Implementing Decision is the most suitable instrument since it can be addressed to individual Member States.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

This proposal is based on requests made by Spain and France and concerns only these Member States.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for a Council Implementing Decision allows Spain and France to treat all supplies of goods and services, intra-Community acquisitions and imports of goods destined for the construction of the electricity interconnection between Gatica and Cubnezais as carried out in a 50% proportion in Spain and a 50% proportion in France for VAT purposes. The

measure is expected to simplify the tax obligations of the suppliers involved in the project and the tax collection by tax authorities. Given the limited scope of this derogation, the impact will in any case be limited.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the Union's own resources accruing from VAT.

5. OTHER ELEMENTS

The proposal will expire on completion of the construction of the electricity interconnection between Gatica in Spain and Cubnezais in France.

Proposal for a

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹, and in particular the first subparagraph of Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letters registered with the Commission on 23 May 2019 and 17 June 2019, France and Spain requested authorisation to introduce a special measure derogating from Article 5 of Directive 2006/112/EC in relation to the construction of an electricity interconnection between Gatica in Spain and Cubnezais in France ('the special measure').
- (2) By letters dated 10 September 2019, the Commission transmitted the request made by Spain and France to the other Member States in accordance with Article 395(2) of Directive 2006/112/EC. By letters dated 11 September 2019, the Commission notified Spain and France that it had all the information necessary to consider the request.
- (3) The national electricity market regulator of Spain, the Comisión Nacional de los Mercados y la Competencia, and the national electricity market regulator of France, the Commission de Régulation de l'Énergie, signed an agreement on 22 September 2017 to finance an electricity interconnection between Spain and France across the Bay of Biscay. Construction of the interconnection was entrusted to the electricity transmission system operators in Spain and France, Red Eléctrica de España and Réseau de transport d'Électricité. The agreement provides for the costs of the project to be borne in equal shares, in other words 50% by Spain and 50% by France.
- (4) Through the special measure, the electricity interconnection is to be treated as being situated 50 % in Spain and 50 % in France for the purposes of supplies of goods and services, intra-Community acquisition of goods and importation of goods intended for its construction.
- (5) In the absence of the special measure, it would be necessary, according to the principle of territoriality, to ascertain for each supply whether the place of taxation was within Spain or France.
- (6) Based on the information provided by Spain and France, the special measure will simplify the procedure for collecting VAT, and the overall amount of the tax revenue of Spain and France collected at the stage of final consumption will only be affected to

¹ OJ L 347, 11.12.2006, p. 1.

a negligible extent. It is therefore appropriate to authorise Spain and France to apply the special measure derogating from Article 5 of Directive 2006/112/EC by which the electricity interconnection between Gatica in Spain and Cubnezais in France is to be considered, for the purposes of supplies of goods and services, intra-Community acquisitions and imports of goods intended for its construction, as being situated 50% on the territory of Spain and 50% on the territory of France.

(7) The derogation has no impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 5 of Directive 2006/112/EC, Spain and France are authorised to consider the electricity interconnection between Gatica in Spain and Cubnezais in France as being situated 50 % on the territory of Spain and 50 % on the territory of France for the purposes of supplies of goods and services, intra-Community acquisitions of goods and importations of goods intended for its construction.

Article 2

This Decision is addressed to the Kingdom of Spain and the French Republic.

Done at Brussels,

*For the Council
The President*