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2019/0136 (NLE)

Proposal for a

**COUNCIL IMPLEMENTING DECISION**

**authorising Portugal to introduce a special measure derogating from Article 193 of  
Directive 2006/112/EC on the common system of value added tax**

## **EXPLANATORY MEMORANDUM**

Pursuant to Article 395(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'<sup>1</sup>), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from the provisions of that Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Commission on 2 July 2018, Portugal requested the authorisation to introduce a measure derogating from Article 193 of the VAT Directive, which determines the person liable for the payment of VAT. By letter registered with the Commission on 27 November 2018, Portugal sent more detailed information on the measure it wants to introduce. On 18 December 2018, the Commission sent a letter to ask Portugal for a bilateral meeting to clarify the request. The meeting took place on 27 February 2019. Portugal confirmed its derogation request and sent additional information by letter registered with the Commission on 19 March 2019.

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 27 March 2019 of the request made by Portugal. By letter dated 28 March 2019, the Commission notified Portugal that it had all the information necessary to consider the request.

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

As a general rule, Article 193 of the VAT Directive stipulates that the taxable person supplying goods or services is liable to pay VAT.

Pursuant to Article 395 of the VAT Directive, Member States may apply measures derogating from the provisions of the VAT Directive to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance if they have been authorised by the Council.

Portugal requested to apply the reverse charge mechanism to supplies of cork, wood, pine cones and pine nut kernels in their shell if the person to whom these goods are supplied is a taxable person who has his registered office, permanent establishment or residence in Portugal and carries out transactions for which he is entitled to fully or partly deduct input VAT.

According to Portugal, its forestry sector is one of the sectors of economic activity where fraud and tax evasion are extremely high. This is due to the fact that this sector is dominated by a large number of small producers and numerous harvesters who are selling raw materials onwards to processing companies without declaring and paying VAT for these sales. The processing companies, however, are medium-sized or large taxable persons and are easily identifiable. The nature of the market and of businesses involved has generated VAT fraud, which the Portuguese tax authorities have found difficult to tackle despite enhanced controls and the measures already taken. In order to combat this abuse, Portugal would like to introduce the reverse charge mechanism for supplies of cork, wood, pine cones and pine nut kernels in their shell, which would shift the liability to pay VAT to the small number of easily identifiable processing companies. This would, according to Portugal, eliminate this kind of VAT fraud and prevent the resulting losses of VAT revenue.

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<sup>1</sup> OJ L 347, 11.12.2006, p. 1.

Derogations are in general granted for a limited period of time as to allow an assessment whether the special measure is appropriate and effective and in order to grant Member States time to introduce other conventional measures to tackle the respective problem until the expiry of the derogating measure, thus making an extension of the derogation redundant. A derogation allowing making use of the reverse charge mechanism is only granted exceptionally for specific fraudulent areas and constitutes a means of last resort.

Taking into consideration the fraudulent situation in the above-mentioned sector, it is therefore proposed to introduce a derogating measure, allowing Portugal to apply this derogating measure until 31 December 2022. Until the expiry of this derogation, Portugal should implement other conventional measures to fight and prevent VAT fraud in the sector of cork, wood, pine cones and pine nut kernels in their shell. As a consequence, there should be no further need to derogate from Article 193 of Directive 2006/112/EC with regard to these supplies.

- **Consistency with existing policy provisions in the policy area**

Similar derogations in relation to Article 193 of the VAT Directive have been granted to other Member States.

The proposed measure is, therefore, consistent with the existing provisions of the VAT Directive.

## **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 a Member State upon its own request and does not constitute any obligation.

Given the 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 Council Directive 2006/112/EC, a derogation from the common VAT provisions 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 an individual Member State.

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

- **Stakeholder consultations**

This proposal is based on a request made by Portugal and concerns only this Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for a Council Implementing Decision aims at preventing certain forms of tax evasion or avoidance in the sector of supplies of cork, wood, pine cones and pine nut kernels in their shell. The reverse charge mechanism should help Portugal to further combat VAT fraud in this sector. Consequently, the derogating measure will have a potential positive impact.

Because of the narrow scope of the derogation and the limited application in time, its impact will in any case be limited.

### **4. BUDGETARY IMPLICATIONS**

The proposal has no implication on the EU budget.

### **5. OTHER ELEMENTS**

The proposal is limited in time.

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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 tax<sup>1</sup>, and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letter registered with the Commission on 2 July 2018, Portugal requested the authorisation to introduce a special measure derogating from Article 193 of Directive 2006/112/EC for supplies of cork, wood, pine cones and pine nut kernels in their shell if the person to whom those goods are supplied is a taxable person who has his registered office, permanent establishment or residence in Portugal and carries out transactions for which he is entitled to fully or partly deduct input value added tax (VAT). By letters registered with the Commission on 27 November 2018 and 19 March 2019 more information has been submitted by Portugal to the Commission.
- (2) In accordance with the second subparagraph of Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States, by letters dated 27 March 2019 of the request made by Portugal. By letter dated 28 March 2019, the Commission notified Portugal that it had all the information necessary to consider the request.
- (3) According to Portugal, the forestry sector in Portugal is one of the sectors of economic activity where fraud and tax evasion is extremely high. This is due to the fact that this sector is dominated by a large number of small producers and numerous harvesters who are selling raw materials onwards to processing companies without declaring and paying VAT for these sales. The nature of the market and of businesses involved has generated VAT fraud, which the Portuguese tax authorities have found difficult to tackle despite enhanced controls and the measures already taken. In order to combat abuse, Portugal would like to introduce the reverse charge mechanism for supplies of cork, wood, pine cones and pine nut kernels in their shell, which would shift the liability to pay VAT to the small number of easily identifiable processing companies. This would, according to Portugal, eliminate this kind of VAT fraud and prevent the resulting losses of VAT revenue.
- (4) Portugal should therefore be authorised to introduce a derogating measure for a limited period of time until 31 December 2022.

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<sup>1</sup> OJ L 347, 11.12.2006, p. 1.

- (5) Derogations are in general granted for a limited period of time to allow an assessment whether the derogating measure is appropriate and effective. Derogations give Member States time to introduce other conventional measures to tackle the respective problem until the expiry of the derogating measure, thus making an extension of the derogation redundant. A derogation allowing making use of the reverse charge mechanism is only granted exceptionally for specific fraudulent areas and constitutes a means of last resort. Portugal should therefore implement other conventional measures to fight and prevent VAT fraud in the sector of cork, wood, pine cones and pine nut kernels until the expiry of this derogation and consequently should no longer need to derogate from Article 193 of Directive 2006/112/EC with regard to those supplies.
- (6) The derogating measure will have no adverse impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

*Article 1*

By way of derogation from Article 193 of Directive 2006/112/EC, Portugal is authorised to designate the taxable person to whom supplies of cork, wood, pine cones or pine nut kernels in their shell are made as the person liable to pay VAT if this is a taxable person who has his registered office, permanent establishment or residence in Portugal and carries out transactions for which he is entitled to fully or partly deduct input VAT.

*Article 2*

This Decision shall apply from 1 January 2020 and shall expire on 31 December 2022.

*Article 3*

This Decision is addressed to the Portuguese Republic.

Done at Brussels,

*For the Council  
The President*