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2019/0146 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

**amending Implementing Decision 2013/805/EU authorising the Republic of Poland to
introduce measures derogating from point (a) of Article 26(1) and Article 168 of
Directive 2006/112/EC on the common system of value added tax**

EXPLANATORY MEMORANDUM

Pursuant to Article 395(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax¹ ('the VAT Directive'), 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 14 January 2019, Poland requested an extension of the derogation from Articles 26(1)(a) and 168 of the VAT Directive in order to continue (a) to limit to 50% the right of deduction of input VAT on expenditure relating to certain motor vehicles and (b) to exempt from VAT the use by taxable persons of motor vehicles covered by the derogation for private purposes or for any purpose other than business activities. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 15 April 2019 on the request made by Poland. By letter dated 16 April 2019, the Commission notified Poland 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

Article 168 of the VAT Directive provides that a taxable person is entitled to deduct VAT charged on purchases of goods or services used for the purposes of taxed transactions in the Member State where such transactions take place. Article 26(1)(a) of the same directive stipulates that the use for private purposes of goods forming part of the assets of a business shall be considered as a supply of services for consideration if the VAT on such goods was eligible for deduction.

In the case of passenger cars forming part of the assets of a business, the application of the above provisions encounters a number of practical difficulties, in particular because it is not easy to distinguish between private and business use of a motor vehicle. Moreover, in cases where records about the use of such cars are kept, they add an additional burden to both businesses and administrations in terms of maintaining and controlling them. Those difficulties may increase the risk of VAT abuse or fraud attempts.

Poland is currently authorised to derogate from Article 168 of the VAT Directive by limiting to 50% the right to deduct VAT on the purchase, intra-Community acquisition, importation, hire or leasing of motor vehicles as well as VAT charged on expenditure related to those vehicles, provided that they are not used exclusively for business purposes. The derogation does not cover motor vehicles with a total maximum weight exceeding 3.5 tonnes and those with more than nine seats, including the driver's seat. Similarly, it does not cover expenditures related entirely to the taxable person's business.

In addition, Poland is authorised to derogate from Article 26(1)(a) of the VAT Directive by exempting from VAT the private use by the taxable person or their staff of vehicles caught by the above derogation. Any use for purposes other than business is considered as private use.

¹ OJ L 347, 11.12.2006, p. 1.

The authorisation for the above derogating measures was first² granted by the Council by means of the Implementing Decision 2013/805/EU of 17 December 2013³ for the period 1 January 2014 until 31 December 2016. Consequently, Poland incorporated the authorised measures into the national VAT legislation with effect from 1 April 2014⁴.

In 2016, Poland requested an extension of the period in which the measures in question could be applied. The Council authorised such extension until 31 December 2019 by means of Implementing Decision (EU) 2016/1837 of 11 October 2016⁵.

The present request from Poland to prolong further the derogation until 31 December 2022 is based on the same grounds as those presented in the previous requests. The request is accompanied by a report including a review of the percentage limitation applied on the right of deduction, as required by Article 3(2) of Decision 2013/805/EU.

Poland maintains that the current rate of 50% is justifiable and should continue to be applied, as it has contributed to simplifying the VAT collection procedure and has prevented tax evasion. According to the data submitted by Poland, small enterprises with modest turnover (microenterprises) and a few employees dominate the Polish economy. Such enterprises are either sole traders or family firms. In 2014-2017, they accounted for almost 96% of the total number of enterprises in the country. Poland argues that it is difficult to delineate between private and business use of corporate vehicles owned by such microenterprises. The same is true with regard to large companies, which often make their vehicles available for the exclusive use of their employees as a non-cash fringe benefit. It is true that establishing a distinction between private and business use of corporate vehicles would entail onerous and disproportionate costs on keeping appropriate records as compared to the potential benefits, notably as regards sole traders and microenterprises. It could also give rise to legal disputes between the tax authorities and taxable persons resulting in additional costs.

It is stated that the percentage rate set at 50% reflects adequately the actual business use of such vehicles. Indeed, as submitted by Poland, applying a higher or a lower rate would lead to excessively high discrepancies between the set rate and the actual use of vehicles for business activities and private purposes. This rate is similar to the percentage used in other Member States.

It appears that taxable persons have expressed a mostly positive opinion on both the conditions for deduction and the set percentage rate. The measures adopted by Decision 2013/805/EU are considered as a satisfactory compromise between the adopted rules and expensive, time-consuming and largely ineffective record keeping with the view to confirming that a particular vehicle has indeed been used for business activities.

The derogating measures are not expected to affect significantly the overall amount of the tax revenue of Poland collected at the stage of the final consumption. Likewise, they are not expected to adversely affect the Union's own resources accruing from VAT.

² A similar authorisation was in place until 31 December 2013, based on Council Implementing Decision of 27 September 2010 (OJ L 256, 30.9.2010, p. 24).

³ OJ L 353, 28.12.2013, p. 51.

⁴ Poland states that this was done by means of the Act of 7 February 2014 amending the VAT Act of 11 March 2004 [*Journal of Laws (Dziennik Ustaw)* 2011, No 177, item 1054, as amended] and certain other acts [*Journal of Laws* 2014, item 312].

⁵ OJ L 280, 18.10.2016, p. 28.

In the light of the above, and given that the EU legal framework and the factual situation remain unchanged, the requested extension of the derogating measures until 31 December 2022 appears to be justified. Therefore, it is proposed that the request be granted. Should Poland wish to ask for a further extension beyond 2022, it shall submit an extension request by 1 April 2022, accompanied by a report including a review of the percentage restriction applied.

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

Similar derogations in relation to the right of deduction have been granted to other Member States.

Article 176 of the VAT Directive stipulates that the Council shall determine the expenditure on which the VAT is not deductible. Until then, it authorises Member States to maintain exclusions that were in place under national laws on 1 January 1979. On this basis, there is a number of ‘stand still’ provisions restricting the right to deduct VAT in relation to corporate motor vehicles.

Previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct have failed⁶. Until those rules are harmonised at EU level, derogations such the present one are considered as appropriate.

The proposed measures are therefore consistent with the provisions of the VAT Directive.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 395 of the VAT Directive is the only possible legal basis.

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

Considering the provision of the VAT Directive on which it is based, the proposal falls under the exclusive competence of the European Union. Hence, 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, i.e. to simplify tax collection and to prevent certain forms of tax evasion or avoidance. In particular, given the potential for businesses to under declare their liability and the burdensome check of mileage data for tax authorities, the 50% restriction would simplify the VAT collection procedure and would prevent tax evasion *inter alia* through incorrect record keeping.

- **Choice of the instrument**

The instrument proposed is a Council Implementing Decision.

⁶ COM (2004) 728 final – Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations (OJ C 24, 29.1.2005, p. 10) withdrawn on 21 May 2014 (OJ C 153, 21.05.2014, p.3).

Under Article 395 of the VAT Directive, a derogation from the common VAT rules is only possible upon authorisation by the Council, which is 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**

No stakeholder consultation has been conducted. The present proposal is based on a request made by Poland and concerns only this particular Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal aims to simplify the procedure for collecting VAT and to prevent VAT evasion. It has, therefore, a potential positive impact for both businesses and administrations. The derogating measures have been identified by Poland as the most appropriate solution and are comparable to other past and present derogations granted to other Member States.

- **Fundamental rights**

The proposal does not have any consequences for the protection of fundamental rights.

4. BUDGETARY IMPLICATIONS

The proposal will not have a negative impact on the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The proposal includes a sunset clause which is set at 31 December 2022.

In case Poland considers a further extension of the derogating measures beyond 2022, it should submit to the Commission an extension request accompanied by a report including a review of the percentage limit no later than 1 April 2022.

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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 tax⁷, and in particular the first subparagraph of Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Article 168 of Directive 2006/112/EC establishes a right for taxable persons to deduct value added tax (VAT) charged on supplies to them of goods and services that are used for the purposes of their taxed transactions. Article 26(1)(a) of that Directive treats the use of business assets for the private use of taxable persons or their staff or, more generally, for purposes other than those of their business as a supply of services for consideration.
- (2) By Council Implementing Decision 2013/805/EU⁸, Poland is authorised to limit the right under Article 168 of Directive 2006/112/EC to deduct VAT to 50% in the case of VAT on the purchase, intra-Community acquisition, importation, hire or leasing of certain motorised road vehicles, and of VAT on expenditure related to those vehicles, where the vehicle in question is not entirely used for business purposes. For vehicles to which that 50% limit applies, Poland is also authorised to relieve taxable persons from having to treat non-business use of those vehicles as a supply of services in accordance with Article 26(1)(a) of that Directive.
- (3) The expiry date of Implementing Decision 2013/805/EU was extended by Council Implementing Decision 2016/1837/EU⁹ to 31 December 2019.
- (4) By letter registered with the Commission on 14 January 2019, Poland requested authorisation to continue to apply the derogating measures authorised by Implementing Decision 2013/805/EU ('the derogating measures') for a further period until 31 December 2022.
- (5) By letter dated 15 April 2019, the Commission informed the other Member States pursuant to Article 395(2) of Directive 2006/112/EC of the request that had been made

⁷ OJ L 347, 11.12.2006, p. 1.

⁸ Council Implementing Decision 2013/805/EU of 17 December 2013 authorising the Republic of Poland to introduce measures derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 353, 28.12.2013, p. 51).

⁹ Council Implementing Decision (EU) 2016/1837 of 11 October 2016 authorising the Republic of Poland to continue to apply measures derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 280, 18.10.2016, p. 28).

by Poland. By letter dated 16 April 2019, the Commission notified Poland that it had all the information necessary to consider the request.

- (6) Alongside the request, Poland submitted a report to the Commission, in accordance with Article 3(2) of Implementing Decision 2013/805/EU, including a review of the percentage restriction applied on the right to deduct VAT. Based on the information currently available, Poland maintains that a rate of 50% is still justified. It also maintains that the derogation authorised by Implementing Decision 2013/805/EU from the requirement set out in Article 26(1)(a) of Directive 2006/112/EC is still necessary to avoid double taxation. Those derogating measures are justified by the need to simplify the procedure for collecting VAT and to prevent tax evasion resulting from incorrect record-keeping and false tax declarations.
- (7) Extension of the derogating measures should be limited to the time needed to evaluate the effectiveness of the derogating measures and the appropriateness of the percentage. Poland should therefore be authorised to continue to apply the derogating measures until 31 December 2022.
- (8) A deadline should be set for requesting authorisation for any further extension of the derogating measures beyond 2022. Poland should also be required to submit a report alongside any such extension request, including a review of the percentage restriction applied on the right to deduct VAT.
- (9) The derogating measures will only have a negligible effect on the overall amount of tax collected at the stage of final consumption and will not adversely affect the Union's own resources accruing from VAT.
- (10) Implementing Decision 2013/805/EU should be therefore amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 3 of Implementing Decision 2013/805/EU is replaced by the following:

'Article 3

This Decision shall expire on 31 December 2022.

Any request for authorisation to extend the derogating measures authorised by this Decision shall be submitted to the Commission by 1 April 2022. The request shall be accompanied by a report including a review of the percentage restriction applied on the right to deduct VAT on the basis of this Decision.'

Article 2

This Decision is addressed to the Republic of Poland.

Done at Brussels,

*For the Council
The President*