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Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising the Republic of Poland to apply a special measure derogating from Articles 218 and 232 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[1] (hereafter '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 5 August 2021, the Republic of Poland requested authorisation to derogate from Articles 218, 226 and 232 of the VAT Directive to be able to impose mandatory electronic invoicing.

Further, by letter registered with the Commission on 9 February 2022, Poland modified its request. Accordingly, Poland requests the authorisation to derogate only from Articles 218 and 232 of the VAT Directive and specifies that mandatory electronic invoicing would only apply to taxable persons established in the territory of Poland.

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 21 October 2021 of the request made by Poland. By letter dated 22 October 2021, the Commission notified Poland that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Poland submitted a request for derogation based on Article 395 of the VAT Directive to be authorised to implement an obligation to issue electronic invoices, processed through the National e-Invoicing System (KSeF), for all transactions that require the issuance of an invoice according to Polish VAT legislation. By letter dated 8 February 2022, the scope of the special measure was limited to taxable persons established in the territory of Poland.

In addition, taxable persons will have to transmit to the KSeF specific information on certain transactions that do not need to be documented with invoices issued in accordance with the Polish VAT rules, such as intra-Community acquisitions of goods and cross-border supplies of services. As these transactions do not require the issuance of an invoice according to Polish VAT legislation, the latter obligation does not entail a derogation from the VAT Directive.

Poland considers that the introduction of a generalised obligation to issue electronic invoices would bring significant benefits in terms of combating VAT fraud and evasion while simplifying tax collection. The implementation of the measure will accelerate the digitalisation of the public sector. It will also help increasing the automation of processes for taxable persons, thus simplifying compliance with tax obligations. For instance, the information obtained through e-invoicing will allow for the pre-filling of VAT returns and recapitulative statements, and accelerated VAT refunds.

Article 218 of the VAT Directive provides for an obligation for Member States to accept all documents or messages both in paper or electronic form as invoices. Poland would therefore like to obtain a derogation from the above-mentioned Article of the VAT Directive so that only documents in electronic form can be considered as invoices by the Polish tax administration.

[1] OJ L 347, 11.12.2006, p. 1.

Article 232 of the VAT Directive requires that the use of an electronic invoice shall be subject to acceptance by the recipient. Therefore, the introduction of an electronic invoicing obligation in Poland requires a derogation from this Article so that the issuer no longer has to obtain the consent of the recipient to send an invoice in a paperless format.

Poland submits that the mandatory electronic e-invoicing, coupled with the transmission of additional transaction data, will significantly improve the analytical capabilities of the tax administration. This will lead to a more effective prevention and identification of irregularities, which will help combat VAT fraud and evasion. In particular, it will enable the Polish tax administration to automatically verify the consistency between declared and paid VAT. It will also allow a smoother and more accurate verification of VAT refund claims submitted by taxpayers. Further, it will complement other measures introduced by Poland to combat VAT fraud and evasion and modernise the VAT system, such as the Single Audit File for VAT purposes, the split payment mechanism, the system for the electronic analysis of financial flows (STIR) or the online fiscal cash register system for monitoring the retail sector.

The electronic invoicing obligation will cover all transactions carried out by taxable persons established in the territory of Poland that currently require the issuance of an invoice in accordance with the Polish Act on VAT[2]. In addition, specific information on certain transactions that do not require the issuance of an invoice will be transmitted to the KSeF. This is the case of intra-Community acquisitions of goods and cross-border supplies of services, where the buyer or service recipient are the ones obliged to settle VAT in Poland. As these transactions do not require the issuance of an invoice according to Polish VAT legislation, the latter obligation does not entail a derogation from the VAT Directive. The transmission of this information will allow the preparation of pre-filled VAT declarations and recapitulative statements.

The obligation to issue electronic invoices using the KSeF will apply to all taxpayers, established in the territory of Poland, carrying out activities that require the issuance of an invoice in that territory under Polish VAT rules. This includes taxable persons benefitting from the exemption for small enterprises referred to in Article 282 of the VAT Directive. However, the implementation of the mandatory e-invoicing model will not affect neither foreign taxpayers who are not obliged to register for VAT in Poland in connection with their intra-Community transactions or cross-border supplies of services nor taxpayers registered for VAT in Poland but not established in its territory. Neither will it affect, in those cases, the right of customers to receive paper invoices.

Taxable persons will be able to issue and make structured electronic invoices available using the KSeF. For this purpose, the Polish Ministry of Finance will offer several tools free of charge: the online app ‘e-Mikrofirma’, accessible via smartphone and a web form to any taxpayer logged on to e-Urząd (e-Office)[3]. Businesses will also be able to produce structured electronic invoices in their financial and accounting software and send them to the KSeF by means of an application program interface, after the relevant authorisation. For this purpose, it will only be necessary for the taxpayers or a person authorised by them to authenticate themselves using one of the publicly available means.

Electronic invoices will need to be validated by the KSeF. Once validated the electronic invoice will be deemed received and will automatically be available for the recipient to read

[2] Act of 11 March 2004 on Value Added Tax (Polish Journal of Laws of 2021 item 685, as amended).

[3] A centralized system which, according to Poland, makes it possible to settle taxes comprehensively online. e-Urząd is a project which will provide taxpayers with online tools that will make it easier to meet tax obligations, including paying taxes, through an online electronic payment service.

or download. In the event of malfunction of the KSeF system, a message about the unavailability of the system will appear on the website. An emergency procedure is envisaged for these cases, to ensure the smooth processing of invoices by taxpayers. For this purpose, businesses will be able to issue invoices in their own accounting software.

Poland submits that this measure will entail benefits to taxable persons, such as an invoice storage and archiving service provided by the administration, the elimination of the need to print invoices and manually enter them into accounting systems, the impossibility of losing invoices, the automation of accounting processes and the simplification of tax and reporting obligations.

In order to minimise the impact of the measure on taxable person and to enable them to smoothly adapt to the mandatory regime, Poland has implemented a voluntary e-invoicing model, where the acceptance of the use of electronic invoice by the recipient is still necessary, which came into force on 1 January 2022. Prior to that, from October 2021, an e-invoice pilot programme enabled tests of the system with entrepreneurs.

Given the broad scope of the derogation, it is important to ensure the necessary follow-up within the framework of this derogation. In particular the impact of the measure on combatting VAT fraud and evasion and on taxable persons. Should Poland wish to prolong the derogating measure, it is requested to provide a report on the functioning of the measure together with the prolongation request. This report should provide the assessment of the measure on its effectiveness in fighting VAT fraud and evasion and in simplifying tax collection. The report should also include an evaluation of the measure on taxable persons and in particular what concerns the increase of their administrative burdens and compliance costs.

It is proposed to authorise the derogation as from 1 April 2023 until 31 March 2026.

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

Article 218 of the VAT Directive puts paper and electronic invoices on equal footing by providing that Member States shall accept documents or messages on paper or in electronic form as invoices. Following Article 232 of the VAT Directive, the use of an electronic invoice shall be subject to acceptance by the recipient. The obligatory electronic invoicing as envisaged by Poland would indeed derogate from these two provisions.

The derogation can be authorised based on 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. Poland requested the derogating measure to fight tax fraud and evasion as well as to simplify the tax collection. Based on the elements provided by Poland, the derogation is consistent with the existing policy provisions.

Similar authorisations allowing Italy and France to derogate from Articles 218 and 232 of the VAT Directive in order to implement mandatory electronic invoicing, were granted by Council Implementing Decision (EU) 2018/593[4] and Council Implementing Decision (EU) 2022/133[5].

Finally, the Commission adopted in 2020 the "*Communication from the Commission to the European Parliament and the Council: an Action Plan for fair and simple taxation supporting the recovery strategy*"[6]. One of the actions envisaged in this action plan is the adoption by the Commission of a legislative proposal aimed at modernising VAT reporting obligations. As

4 OJ L 99, 19.4.2018, p. 14.

5 OJ L 20, 31.1.2022, p. 272.

6 https://ec.europa.eu/taxation_customs/system/files/2020-07/2020_tax_package_tax_action_plan_en.pdf

indicated in the Action Plan, this proposal should, amongst others, help streamline the reporting mechanisms that can be applied for domestic transactions. The need to further expand e-invoicing will also be examined in this context. Therefore, the derogation asked by Poland is aligned with the objectives pursued by the Commission as laid down in the Action Plan.

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, subsidiarity principle does not apply.

- **Proportionality**

The proposal complies with the proportionality principle for the following reasons.

The Decision concerns an authorisation granted to a Member State upon its own request and does not constitute any obligation.

The mandatory electronic invoicing will entail a number of changes for taxable persons. To help them cope with the situation, Poland has put in place a voluntary electronic invoicing model from 1 January 2022, preceded by an e-invoice pilot programme enabling the testing of the system with entrepreneurs. Further, Poland will provide free tools to comply with the electronic invoicing obligation and the Ministry of Finance and the National Revenue Administration (NRA) will carry out an extensive information campaign to familiarise taxpayers with the new VAT invoicing rules.

Taxable persons benefitting from the exemption for small enterprises referred to in Article 282 of the VAT Directive are included under the scope of the measure. Poland considers that this inclusion is justified in order to prevent VAT evasion or avoidance. The Polish authorities have identified irregularities in the application of the VAT exemption for small businesses by not reporting all transactions carried out and by the artificial splitting up of business activities in order to remain below the threshold.

In addition, analyses conducted by the NRA show that most of the missing trader fraud[7] and fraud committed through fake invoices are generated by businesses that belong to the group of micro, small and medium-sized enterprises. Making electronic invoicing mandatory for such businesses will enable more effective monitoring and identification of such irregularities.

Poland submits that the preparatory work carried out through the voluntary electronic invoicing model and the tools that will be put at their disposal to comply with the obligation, coupled with the advantages and benefits derived from the implementation of electronic invoicing, will largely absorb the investments that small enterprises will have to incur to adapt their systems. These investments will not be significant in any case, according to the estimates of the Polish authorities.

[7] Missing trader fraud is a type of VAT fraud where traders sell goods or provide services, collect the VAT from their customers and subsequently disappear without remitting the VAT they collected from their customers to the tax authorities.

The derogation is also limited in time and a report on the functioning and the effectiveness of the measure is to be prepared in case Poland wishes to prolong the derogating measure.

Therefore, the special measure is proportionate to the aim pursued, i.e. to combat tax evasion and simplify tax collection.

- **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 an individual Member State.

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

- **Impact assessment**

The mandatory electronic invoicing will impact both the tax administration and taxable persons.

Poland expects that mandatory electronic invoicing will help tighten up and modernise the Polish VAT system to make it more resistant to fraud and other irregularities. It will automate and provide faster access to a wider range of data, improving the analytical activities of the tax administration. Poland estimates that it will contribute to an increase in budget revenues of approximately PLN 1,8 billion per year. These additional revenues will be obtained from the reduction of missing trader-type VAT fraud as well as from the reduction of unjustified VAT refunds. Poland submits that these are conservative estimates which do not take into account the potential revenues arising from the contribution of the KSeF to the detection of other irregularities related to VAT, such as under-reporting of retail sales and the increase in the collection of income taxes.

The implementation of generalised mandatory electronic invoicing will generate costs for the state budget related to the creation and maintenance of the system, as well as the infrastructure needed to store invoices and the gradual increase in analytical capacity due to the successively growing database. Poland estimates that the expenses related to the introduction and maintenance of the KSeF in the years 2021-2026 will total approximately PLN 161,2 million.

Taxable persons will incur costs as a result of the introduction of mandatory electronic invoicing, mainly related to the need to adapt their accounting systems. However, the cost of issuing an invoice using the KSeF will be very low, much lower than in paper format. To mitigate these costs, the Polish Ministry of Finance will provide free tools in order to issue and process structured electronic invoices.

Therefore, Poland does not expect the costs for taxable persons to be significant, especially when compared to the benefits they will obtain from the introduction of the electronic invoicing model. Poland submits that taxable persons will obtain significant benefits as a result of the implementation of mandatory electronic invoicing, such as an invoice storage and archiving service provided by the administration, the disappearance of the need to print invoices and manually enter them into accounting systems, the reduction of mistakes due to the automation of the accounting process or the increase in the speed of data exchange between business partners. Other benefits will be the simplification of tax and reporting obligations, like pre-filled declarations and recapitulative statements, the reduction in the number of verifications and inspections carried out by the tax administration and faster VAT refunds.

4. BUDGETARY IMPLICATIONS

The measure will have no adverse impact on the Union's own resources accruing from VAT.

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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 valued added tax[1], 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 5 August 2021, Poland requested authorisation to introduce a special measure derogating from Articles 218, 226 and 232 of Directive 2006/112/EC to introduce mandatory electronic invoicing for all transactions carried out by taxable persons that require the issuance of an invoice. The authorisation was requested for a period from 1 April 2023 to 31 March 2026.

(2) The Commission transmitted the request made by Poland to the other Member States by letters dated 21 October 2021. By letter dated 22 October 2021, the Commission notified Poland that it had all the information necessary to consider the request.

(3) By letter dated 8 February 2022, Poland has informed the Commission that derogation from Article 226 of Directive 2006/112/EC is not needed and that the scope of the requested measure would be limited to taxable persons established in the territory of Poland.

(4) Poland submits a generalized requirement for mandatory electronic invoicing would provide benefits in combatting value added tax (VAT) fraud and evasion. That requirement, coupled with the transmission of additional transaction data, will significantly improve the analytical capabilities of the Polish tax administration, enabling it to automatically verify the consistency between VAT declared and paid and allowing a more accurate verification of VAT refund claims submitted by taxpayers. Further, it will complement other measures aimed at combatting VAT fraud and evasion and modernising the VAT system, such as the Single Audit File for VAT purposes, the split payment mechanism[2], the system for the electronic analysis of financial flows or the online fiscal cash register system for monitoring the retail sector.

(5) Poland considers that mandatory electronic invoicing would enable a number of facilitations for taxable persons to simplify compliance with their obligations, such as the pre-filling of VAT returns and recapitulative statements or accelerated VAT refunds. Electronic invoicing would provide advantages to taxable persons, such as an

[1] OJ L 347, 11.12.2006, p. 1.

[2] Introduced in Poland following the authorisation granted by Council Implementing Decision (EU) 2019/310 (OJ L 51, 22.2.2019, p. 19).

invoice storage and archiving service provided by the administration or the automation of accounting processes. According to Poland, the costs taxable persons would have to incur to adapt their systems to electronic invoicing are not expected to be significant, especially when compared to the benefits they would obtain from the introduction of the electronic invoicing model. To help with that adaptation, Poland has put in place voluntary electronic invoicing, before the entry into force of the mandatory one. Along with that, free-of-charge tools to comply with the mandatory electronic invoicing requirement would be provided and an extensive information campaign would be carried out with an aim to familiarise taxpayers with the new VAT rules on mandatory electronic invoicing.

(6) Given the broad scope and the novelty of the special measure, it is important to evaluate its impact on combatting VAT fraud and evasion and on taxable persons. Therefore, where Poland considers that an extension of the special measure is necessary, it should submit to the Commission, together with the request for extension, a report including the assessment of the special measure concerning its effectiveness in fighting VAT fraud and evasion and in simplifying VAT collection.

(7) This special measure should not affect the right of the customer to receive paper invoices in case of intra-Community transactions.

(8) The special measure is proportionate to the objectives pursued. In addition, the special measure does not give rise to the risk that fraud would shift to other sectors or to other Member States.

(9) The special measure will not negatively affect the overall amount of tax revenue collected at the stage of final consumption and 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 218 of Directive 2006/112/EC, Poland is authorised to accept invoices which have been issued by taxable persons established in the territory of Poland in the form of documents or messages only if those documents or messages are transferred in electronic format.

Article 2

By way of derogation from Article 232 of Directive 2006/112/EC, Poland is authorised to provide that the use of electronic invoices issued in the territory of Poland shall not be subject to an acceptance by the recipient.

Article 3

Poland shall notify the national measures implementing the derogations referred to in Articles 1 and 2 to the Commission.

Article 4

This Decision shall apply from 1 April 2023 until 31 March 2026.

Where Poland considers that the extension of the derogations referred to in Articles 1 and 2 is necessary, Poland shall submit a request for extension to the Commission, together with a report assessing the extent to which the national measures referred to in Article 3 have been effective in combatting VAT fraud and evasion and in simplifying VAT collection. That report shall also evaluate the impact of those measures on taxable persons and in particular whether those measures increase their administrative burdens and costs.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels,

For the Council
The President