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2023/0214 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision (EU) 2017/784 as regards the period of authorisation for, and the scope of, the special measure derogating from Articles 206 and 226 of Directive 2006/112/EC on the common system of value added tax taken by Italy

EXPLANATORY MEMORANDUM

Pursuant to Article 395(1) of 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 26 September 2022, the Italian Republic requested authorisation to continue to derogate from Articles 206 and 226 of the VAT Directive with regard to VAT payment and invoicing requirements for supplies of goods and services made to public authorities, to companies controlled by central and local public authorities and to a list of companies listed on the stock exchange.

By letter registered with the Commission on 8 May 2023, Italy modified its request, asking that the scope of the authorisation should be reduced from 1 July 2025 to supplies of goods and services made to public authorities and to companies controlled by central and local public authorities. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 11 May 2023 of the request made by the Italian Republic. By letter dated 12 May 2023, the Commission notified the Italian Republic that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Following the introduction of a system of statistical checks, Italy discovered considerable VAT fraud in relation to supplies of goods and services to public authorities. To put an end to these practices Italy requested in 2014 that, for supplies to public authorities, the VAT due would no longer be paid to the supplier, but to a separate and blocked bank account of the tax authorities. This mechanism is commonly referred to as a type of 'split payment', as the payment which is usually transferred in full by the customer to the supplier (consideration in exchange for the supply plus VAT) is split into: (i) on the one hand, the consideration, which is paid to the supplier of the goods or services; and, (ii) on the other hand, the VAT due, which is paid to a blocked bank account of the tax authorities.

The derogation was authorised by Council Implementing Decision (EU) 2015/1401² until 31 December 2017. It authorised Italy to derogate from Article 206 of the VAT Directive regarding VAT payment and from Article 226 of the VAT Directive regarding the invoicing rules.

The derogation was requested by Italy for a limited period, allowing it to organise and implement adequate control policy measures and to fully benefit from the data available via electronic invoicing. The implementation of an obligation of electronic invoicing for supplies to public authorities, allowing the possibility of real-time control of individual transactions and the exact amounts of VAT which public authorities are due to pay on their purchases, should allow Italy to audit the sector concerned on the basis of conventional control techniques without the need to derogate from the VAT Directive in order to apply the split payment measure.

According to information submitted by Italy, the introduction of electronic invoicing for supplies to public authorities provided tax authorities considerable information regarding the

¹ OJ L 347, 11.12.2006, p. 1.

² OJ L 217, 18.8.2015, p. 7–8.

flow of invoices allowing the control of transactions and corresponding VAT amounts. However, another element of the effective control system – the obligation to communicate data of all invoices issued and received to the tax authorities – was only introduced as from 1 January 2017. More time was required for the measure to be effective and to effectively induce taxpayers to improve their compliance with tax obligations. Consequently, Italy requested to prolong the derogation from Articles 206 and 226 of the VAT Directive on supplies to public authorities.

Additionally, Italy discovered tax evasion in the sector of supplies to companies controlled by public authorities and to a small group of 40 companies that are listed on the stock exchange. In order to fight this tax evasion and to ensure no further VAT losses for public revenues, Italy requested to broaden the scope of the derogation from Articles 206 and 226 of the VAT Directive to supplies of goods and services made to the above mentioned entities which were considered by Italy as reliable as public authorities. These entities are both companies controlled by central and local public authorities and a list of around 40 companies listed on the stock exchange adding up to a total of around 2 400 companies. Italy expected that extending the split payment measure to these companies would tackle tax evasion in the form of non-payment of VAT by the suppliers to the entities concerned and consequently would increase the VAT revenues.

The extension of the derogation with its widened scope was authorised by Council Implementing Decision (EU) 2017/784³ until 30 June 2020. This derogation was further extended by Council Implementing Decision (EU) 2020/1105⁴ until 30 June 2023.

The split payment mechanism is part of a package of measures introduced by Italy in order to counter tax fraud and evasion. This package of measures involves amongst others electronic invoicing and the electronic transmission of data on daily charges. Electronic invoicing was introduced as of 1 July 2018 in respect to certain sectors, and as of 1 January 2019 in a generalised form. This obligation was authorised by Council Implementing Decision (EU) 2018/593⁵. The electronic transmission of data on daily charges requires taxpayers engaged in the retail trade and similar activities (not involving invoicing obligations) to store data on daily charges electronically and transmit them electronically to the *Agenzia delle Entrate*. This latter obligation became applicable on 1 January 2020 and, for taxpayers with a turnover of over EUR 400 000, on 1 July 2019. This package of measures has replaced other control measures, allowing the Italian tax authorities to cross-check the different operations declared by the operators and to monitor their VAT payments. The latest legislative changes introduced an obligation to make the data on VAT transactions from electronic invoices, cross-border transactions and electronic charges immediately available to taxpayers in order to simplify their compliance; leading to VAT returns being pre-completed by the *Agenzia delle Entrate* and to the preparation of regular VAT assessments, which taxpayers can accept or supplement.

According to recital 7 of Decision 2017/784, once this system was fully implemented, there should be no need to further derogate from Directive 2006/112/EC in order to apply the split payment measure. However, as reflected in recital 8 of Decision 2020/1105, given that, at that time, these measures had been recently implemented, it would have been premature to fully assess their effectiveness. Further, in view of the time of difficulties Italy was experiencing due to the COVID-19 pandemic, taxable persons had more difficulties to implement the

³ OJ L 118, 6.5.2017, p. 17.

⁴ OJ L 242, 28.7.2020, p. 4.

⁵ Council Implementing Decision (EU) 2018/593 of 16 April 2018 authorising the Italian Republic to introduce a special measure derogating from Articles 218 and 232 of Directive 2006/112/EC on the common system of value added tax, OJ L 99, 19.4.2018, p. 14-15.

changes required in their invoicing systems, similarly to tax administrations to adapt their control and IT-systems. Therefore, the removal of the measure could have significant negative effects in the fight against tax evasion and the collection of VAT, as well as on the administrative costs for taxable persons. For that reason, the authorisation to continue applying the split payment mechanism was extended until 30 June 2023.

Nevertheless, Italy considers that the split payment mechanism and the mandatory electronic invoicing have presented synergies that have resulted in a significant reduction of VAT fraud and therefore should continue to coexist, given that the split payment is a tool to prevent fraud, while the electronic invoicing is a tool to detect fraud.

According to Italy, the effectiveness of the split payment mechanism lies in the fact that this instrument acts in a preventive manner with respect to cases of tax evasion, thus ensuring greater revenue than any measure involving ex-post control activity. Regardless of how timely and immediate the control activity may be, ex-post measures cannot always ensure the effective recovery of the tax evaded. While electronic invoicing (or reporting of invoice data in those cases where electronic invoicing is not mandatory) is an extremely effective measure, once the control has been carried out, it is possible that the tax evader does not have the necessary financial capacity to pay the debt. For this reason, Italy claims that the split payment mechanism is a very effective tool when the recipient has a degree of tax compliance higher than the supplier. Therefore, Italy considers that these measures are complementary, not mutually interchangeable.

Nevertheless, to honour its commitment to gradually phase out this measure, by letter registered with the Commission on 8 May 2023, Italy modified its request to exclude supplies of goods and services to companies listed in the FTSE MIB index of the *Borsa Italiana* from the scope of the special measure as of 1 July 2025. This timeframe will allow taxable persons affected by the restriction of the scope of the derogation to make the appropriate operational adjustments and the Italian authorities to monitor the effectiveness of the measure and adequately evaluate possible alternative measures.

It should be noted that one of the effects of split payment is the fact that suppliers being taxable persons are not able to offset the VAT paid on their input with the VAT received on their supplies. They may constantly be in a credit position and may need to ask for an effective refund of this VAT from the tax administration. On the other hand, under certain conditions Italy authorises these suppliers to offset the VAT they did not receive from their customers with other taxes due in Italy, thus limiting the cash flow problem that otherwise may arise for businesses liable for paying their taxes in Italy. According to the data provided by Italy, the average time for processing VAT refunds in 2021, in general, was 68 days while in requests referred to taxable persons under the split payment, the average was of 63 days.

In the light of the above, it is proposed to accept the request made by Italy to prolong the authorisation of the derogation but to do so only until 30 June 2026 (as opposed to 31 December 2026, as requested by Italy). That period should be sufficient to assess the effectiveness of the measures implemented to reduce tax evasion in the sectors concerned. Further, by then businesses and tax administration will be in a better position to undertake the necessary adaptations in their systems.

Given the broad scope of the derogation, it is important to ensure the necessary follow-up within the framework of this derogation and, in particular, to assess the impact of the measure on the level of VAT fraud and on the situation of VAT refunds for the taxable persons covered by the derogation. Italy is, therefore, requested to provide a report on the VAT refund procedure with regard to the situation of suppliers (taxable persons) covered by the derogation fifteen months after its entry into force. This report should, in particular, provide statistics as

regards the average time needed to effectively refund the VAT to these taxable persons and outline particular problems that might have occurred in this context. This report should also indicate the different measures implemented to combat the tax evasion for the supplies covered by the derogation, their date of entry into force, as well as an evaluation of their effectiveness.

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

The derogation is consistent with the existing policy provisions in the policy area.

The Commission adopted on 8 December 2022 a Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age⁶. One of the main objectives of the proposal is to fight VAT fraud by implementing digital reporting requirements based on e-invoicing. This reform, once adopted, will allow Member States to implement mandatory e-invoicing, as Italy is currently doing, but eliminating the need to request further derogations from the VAT Directive in order to implement such systems. As mentioned above, the reporting of data to the tax administration through electronic invoicing is part of the package of measures adopted by Italy, together with the split payment mechanism, to fight against VAT fraud.

By Council Implementing Decision (EU) 2019/310⁷ Poland was granted a similar derogation to apply the split payment mechanism. This derogation was initially granted until 28 February 2022 and later extended until 28 February 2025⁸. The Polish split payment system comprises a voluntary and a mandatory split payment mechanism. This mandatory split payment system affects supplies of goods and services paid by electronic bank transfers, carried out between taxable persons in areas particularly exposed to VAT fraud and in which fraud has been detected for years. In the Polish mandatory split payment system, the bank acts as a splitting agent, transferring the amount paid by the customer to the relevant accounts of the supplier, i.e. the taxable amount to the regular account of the trader and the VAT amount to the trader's blocked VAT account. Funds on the blocked VAT account are owned by the taxable person, however, his possibility to dispose of the funds is limited in principle to the payment of VAT due to the tax authority or to the payment of VAT resulting from invoices received from suppliers.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis is Article 395 of the VAT Directive which provides that the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

⁶ COM/2022/701 final.

⁷ Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax, OJ L 51, 22.2.2019, p. 19.

⁸ Council Implementing Decision (EU) 2022/559 of 5 April 2022 amending Implementing Decision (EU) 2019/310 as regards the authorisation granted to Poland to continue to apply the special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax, OJ L 108, 7.4.2022, p. 51.

- **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 that the derogation is limited in time and restricted to supplies of goods and services to the public sector, to companies that are state-controlled and to companies listed on the stock exchange (the latter only until 1 July 2025), the scope is targeted to specific sectors that pose considerable problems of tax evasion. Therefore, the special measure is proportionate to the aim pursued, i.e. to combat tax evasion.

- **Choice of the instrument**

The instrument proposed is a Council Implementing Decision.

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 Italy and concerns only this particular Member State.

- **Impact assessment**

An impact assessment was not carried out as the proposal is not expected to lead to significant economic, environmental or social impacts.

The proposal for a Council Implementing Decision aims at prolonging the application of the derogation from Articles 206 and 226 of the VAT Directive for supplies to public authorities, to companies controlled by central and by local authorities and to a list of around 40 companies listed on the stock exchange. By imposing that the VAT due is paid to a separate bank account of the tax administration, the proposal for a Council Implementing Decision aims in the first place at combating tax evasion in the form of non-payment of VAT by suppliers to the listed entities. The measure currently applied by Italy appeared to be an effective tool for this aim.

According to the data provided by Italy, the implementation of the measure entails an increase in payments of about EUR 4.6 billion per year. This amount was determined by the *Agenzia delle Entrate*, by considering that for the suppliers of the *Pubblica Amministrazione* (PA), for the same transactions, the sum of the lower output VAT actually paid following the introduction of split payment mechanism, net of the increase in compensations and refunds, is lower than the payments made by the PA relating to the same transactions. Further analysis made by Italy conclude that this effect has remained stable during all years that the measure has been implemented with its full scope. Italy fears that the elimination of the measure could

result in a loss of revenue of the same magnitude at a time when Italy has to still cope with a significant VAT gap.

Another effect that should be taken into account is that suppliers under this system do not receive the VAT from their clients. Therefore, they will more often have to ask for an effective refund of the VAT, in case they cannot offset this VAT with other taxes due in Italy. To avoid a negative impact on these taxable persons, even more so if the suppliers are not established in Italy, it is essential that the refund procedure is functioning properly and timely. According to Italy, the average processing times for refunds largely comply with the three-month deadline established by the national legislation⁹. Further, these processing times are shortened for companies subject to the split payment mechanism thanks to the priority treatment of these requests. Moreover, the introduction of electronic invoicing has facilitated the overall processing of requests, contributing to the general reduction of the time required to process refund requests. According to the data provided by Italy, the average time for processing refunds in 2021 was 68 days while in requests under the split payment the average was of 63 days.

- **Fundamental rights**

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

4. BUDGETARY IMPLICATIONS

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

⁹ Article 38-bis of Presidential Decree No 633 of 26 October 1972.

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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 Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By Council Implementing Decision (EU) 2015/1401², Italy was authorised until 31 December 2017 to require that value added tax (VAT) due on supplies to public authorities was to be paid by those authorities to a separate and blocked bank account of the tax authorities ('the special measure'). The special measure constituted a derogation from Articles 206 and 226 of Directive 2006/112/EC in relation to VAT payment and invoicing rules.
- (2) By Council Implementing Decision (EU) 2017/784³, Italy was authorised to apply the special measure until 30 June 2020, and its scope was broadened to include supplies to certain companies controlled by public authorities and to companies listed on the stock exchange that are included in the Financial Times Stock Exchange Milano Indice di Borsa ('FTSE MIB') index. That authorisation was subsequently extended until 30 June 2023 by Council Implementing Decision (EU) 2020/1105⁴.
- (3) By letter registered with the Commission on 26 September 2022, Italy requested that that authorisation be prolonged until 31 December 2026. By letter registered with the Commission on 8 May 2023, Italy requested that the scope of the special measure be restricted, from 1 July 2025, to supplies of goods and services to public authorities and to certain companies controlled by public authorities.
- (4) By letter dated 11 May 2023, the Commission informed the other Member States of the request made by Italy. By letter dated 12 May 2023, the Commission notified Italy that it had all the information necessary to consider the request.
- (5) The special measure is part of a package of measures introduced by Italy in order to counter tax fraud and evasion. That package of measures, including an electronic

¹ OJ L 347, 11.12.2006, p. 1.

² OJ L 217, 18.8.2015, p. 7–8.

³ OJ L 118, 6.5.2017, p. 17.

⁴ OJ L 242, 28.7.2020, p. 4.

invoicing obligation as authorised by Council Implementing Decision (EU) 2018/593⁵, has replaced other control measures and allows the Italian tax authorities to cross-check the different operations declared by the operators and to monitor their VAT payments.

- (6) Italy considers that, in the context of the package of measures implemented, mandatory electronic invoicing reduces the time needed by the tax administration to become aware of the existence of a potential case of tax fraud or evasion. However, Italy also considers that, in the absence of the split payment mechanism introduced by the special measure, recovery from the tax fraudsters or evaders once the cross-check has been carried out could be impossible if they are insolvent. Thus, the split payment mechanism, as an *ex ante* measure, has proved to be highly effective and complementary to mandatory electronic invoicing, which is an *ex post* measure.
- (7) Italy repeatedly committed itself to not seeking the renewal of the special measure allowing the application of the split payment mechanism once the package of measures Italy intended to apply was fully implemented. However, Italy considers that, given the effectiveness of the special measure and its synergies with other applied measures, in particular the electronic invoicing obligation, the special measure should be extended to avoid a setback in the efforts made to reduce the Italian VAT gap. Nevertheless, in order to honour its commitment to gradually phase out the special measure Italy modified its request to exclude from the scope of the special measure, from 1 July 2025, supplies of goods and services to companies listed on the stock exchange that are included in the Financial Times Stock Exchange Milano Indice di Borsa ('FTSE MIB') index. That timeframe will allow taxable persons affected by the restriction of the scope of the special measure to make the appropriate operational adjustments and the Italian tax authorities to monitor the effectiveness of the special measure and adequately evaluate possible alternative measures.
- (8) One of the effects of the special measure is that suppliers, being taxable persons, are not able to offset the VAT paid on their input with the VAT received on their supplies. Such suppliers may constantly be in a credit position and may need to ask for an effective refund of this VAT paid on their input from the tax administration. According to the information provided by Italy, taxable persons carrying out transactions subject to the split payment scheme are entitled to receive the payment of the relevant VAT credits as a priority, within the limit of the credit deriving from such transactions. That practice implies that refund requests related to the split payment mechanism are processed with priority both during preliminary investigation and during the payment of sums due from non-priority refunds.
- (9) The requested derogation should be limited in time to allow an assessment as to whether the special measure is appropriate and effective. The authorisation should therefore be prolonged until 30 June 2026, which would leave sufficient time to assess the effectiveness of the measures implemented by Italy with the aim of reducing tax evasion in the sectors concerned.
- (10) To guarantee the necessary follow-up within the framework of the requested derogation and in particular to assess the impact on VAT refunds to taxable persons covered by that derogation, Italy should be required to submit a report to the Commission by September 2024 on the overall situation of, and in particular the

⁵ Council Implementing Decision (EU) 2018/593 of 16 April 2018 authorising the Italian Republic to introduce a special measure derogating from Articles 218 and 232 of Directive 2006/112/EC on the common system of value added tax, OJ L 99, 19.4.2018, p. 14-15.

average time needed for, VAT refunds to taxable persons, and on the effectiveness of the special measure and any other measures implemented by Italy with the aim of reducing tax evasion in the sectors concerned. That report should include a list of the different measures implemented, together with their date of entry into force.

- (11) The special measure is proportionate to the objectives pursued since it is limited in time and restricted to sectors which pose considerable problems as regards tax evasion. In addition, the special measure does not create a risk that tax evasion would shift to other sectors or other Member States.
- (12) 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.
- (13) Implementing Decision (EU) 2017/784 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Council Implementing Decision (EU) 2017/784 is amended as follows:

- (1) in Article 1, the third indent is deleted;
- (2) in Article 3, second subparagraph, the date '30 September 2021' is replaced by the date '30 September 2024';
- (3) in Article 5, the date '30 June 2023' is replaced by the date '30 June 2026'.

Article 2

This Decision shall take effect on the day of its notification.

However, Article 1, point (1), shall apply from 1 July 2025.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels,

*For the Council
The President*