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2020/0323 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

**authorising the Netherlands to introduce a special measure derogating from Articles 168
and 168a 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"¹), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures derogating from the provisions of this Directive, in order to simplify the procedure for charging VAT or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Commission on 30 July 2020, the Netherlands requested an authorisation to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC, in order to exclude from the right of deduction the VAT borne on goods and services which are used for more than 90 % by the taxable person for his private use or for that of his employees, or in general, for non-business purposes or non-economic activities.

In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letters dated 10 September 2020 of the request made by the Netherlands. The Commission notified the Netherlands by letter dated 11 September 2020 that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Article 168 of Directive 2006/112/EC provides that a taxable person is entitled to deduct the VAT charged on purchases made and services received for the purpose of his taxed transactions. Article 168a(1) of Directive 2006/112/EC provides that the VAT on expenditure related to immovable property forming part of the business assets of a taxable person and used both for business and non-business purposes shall be deductible only up to the proportion of the property's use for purposes of the taxable person's business. Pursuant to Article 168a(2) of Directive 2006/112/EC Member States may also apply this rule in relation to expenditure related to other goods forming part of the business assets as they specify.

The measure pursued by the Netherlands deviates from those principles and entirely excludes from the right of deduction the VAT borne on goods and services that are used by a taxable person for more than 90% for private or non-business purposes, including non-economic activities.

The rate of 90 % is based on the implementation of this rate in the Netherlands for corporate and income tax purposes. More than 90 % non-business use means that investments are almost entirely used by the trader for his own private use or for private purposes of his employees, or, in general, for non-business purposes or non-economic activities and these investments are, therefore, not regarded as business investments.

In its request, the Netherlands argue that based on the fact that everyone who regularly supplies goods or services for a remuneration is a taxable person, the Dutch tax authorities, in the current (digital) economy are faced with numerous private persons or part-time or micro-businesses with a very small turnover. They are allowed to deduct the VAT on their inputs/costs. For example, there are the owners of solar panels, participants in sharing economy who rent out their cars or houses, independent people without staff, etc. The thin line between their professional and private activities generates in practice quite a lot of discussions on the level of their right to deduct input VAT, a right that is quite often very limited for these persons.

¹ OJ 347, 11.12.2006, p.1.

The Netherlands informed the Commission that managing the right to deduct input tax for these taxable persons, with continuous VAT declarations and corrections leads to disproportionate burdens, both for the taxable persons concerned and for the tax administrations.

This leads, in addition, to an unwarranted cash flow advantage against the taxable persons that use these goods and services 100% for business purposes. Taxable persons that use these goods and services only marginally for business purposes are still allowed to a 100% right of deduction. In addition, the VAT legislation has a high level of complexity for micro-businesses that cannot afford legal support, entailing a big risk for mistakes, evasion and thus complicating compliance. The latter is substantiated by an example of owners of solar panels who become taxable persons for the energy they produce and supply to the electricity grid, whereby they deduct all the VAT on the panels purchased and even add costs such as the purchase price of building land and houses to install the solar panels. Since the use of the garages and houses is primarily for private use, this leads to complicated discussions on the right to deduct input VAT and how to correctly apply this.

As a consequence, the special measure in question provides a facilitation for both tax administrations and businesses as there is no need for any monitoring of the subsequent use of the goods and services to which the exclusion from deduction applied at the time of their acquisition, particularly with respect to a possible taxation of private use pursuant to Articles 16 or 26 of Directive 2006/112/EC. Authorising the derogating measure is therefore appropriate.

The measure is expected to have little impact on the overall tax revenue. The initial deduction is currently corrected for non-business use by the correction on the basis of Articles 16 and 26 of Directive 2006/112/EC. The measure is expected to have no impact on the Union's own resources accruing from VAT.

However, any derogating measures should be limited in time in order to assess whether the conditions and the impacts, on which the derogation is based, would still be valid. Therefore, it is proposed to authorise the derogation until the end of 2023 and to request the Netherlands to present, in case a further extension would be envisaged beyond 2023, together with the extension request, a report by 31 March 2023 at the latest, including a review of the applied apportionment between business and non-business use on which the exclusion from deduction is based.

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

Similar derogations in relation to the restriction of right of deduction have been granted to other Member States Austria², Germany³.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct VAT⁴, such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

² Council Implementing Decision (EU) 2018/1487 of 2 October 2018 amending Implementing Decision 2009/1013/EU authorising the Republic of Austria to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 251, 5.10.2018, p. 33–34.

³ Council Implementing Decision (EU) 2018/2060 of 20 December 2018 amending Decision 2009/791/EC authorising Germany to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 282, 12.11.2018, p. 8–12.

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 proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore 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. simplification and to prevent certain forms of tax evasion or avoidance. The derogating measure would avoid that VAT on investments, which are only marginally used for business purposes is first entirely deducted as if used entirely for business purposes and subsequently corrected to reflect the real marginal business use, thus entailing continuous administrative and reporting requirements. With this measure, the private use no longer needs to be revised and adjusted annually, nor does the tax administration need to monitor the changes in private/business use proportion during the revision period.

- **Choice of the instrument**

Proposed instrument: Council Implementing Decision.

Under Article 395 of Council Directive 2006/112/EC, 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

- **Stakeholder consultations**

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

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal is designed to counter certain forms of tax evasion or avoidance and to simplify the procedure for charging VAT and has, therefore, a potential positive impact for both

⁴ 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)

businesses and administrations. The solution has been identified by the Netherlands as a suitable measure and is comparable to other past and present derogations.

4. BUDGETARY IMPLICATIONS

The proposal will have no negative implication for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause; an automatic time limit which is set at 31 December 2023.

In case the Netherlands would consider another extension of the derogating measure beyond 2023, a report including a review of the percentage limit should be submitted to the Commission together with the extension request no later than 31 March 2023.

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising the Netherlands to introduce a special measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax

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), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Articles 168 and 168a of Directive 2006/112/EC which govern taxable persons' right to deduct value added tax (VAT) charged on goods and services supplied to them for the purposes of their taxed transactions.
- (2) By letter registered with the Commission on 30 July 2020, the Netherlands requested authorisation to introduce a special measure derogating from Articles 168 and 168a of Directive 2006/112/EC in order to exclude entirely from the right to deduct VAT on goods and services used by the taxable person for more than 90 % for his private use or for the private purposes of his employees, or, in general, for non-business purposes or non economic activities.
- (3) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission informed the other Member States, by letter dated 10 September 2020, of the request made by the Netherlands. By letter dated 11 September 2020, the Commission notified the Netherlands that it had all the information necessary to consider the request.
- (4) The objective of the special measure is to simplify the procedure for charging and collecting VAT and to prevent certain forms of tax evasion or avoidance. The amount of tax due at the level of final consumption is only affected to a negligible extent.
- (5) According to the information provided by the Netherlands, the legal and factual situation which justifies application of the special measure exists. The Netherlands should, therefore, be authorised to introduce the special measure, but limited in time until 31 December 2023 in order to allow for a review of the necessity and effectiveness of the special measure and the apportionment rate between business and non-business use it is based upon.
- (6) In the event that the Netherlands considers that an extension of the authorisation beyond 2023 is necessary, it should submit a request to the Commission by 31 March

¹ OJ 347, 11.12.2006, p. 1.

2023, accompanied by a report on the application of the derogating measure, which includes a review of the apportionment rate applied.

- (7) The derogation 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 value added tax,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Articles 168 and 168a of Directive 2006/112/EC, the Netherlands is authorised to exclude value added tax (VAT) borne on goods and services from the right to deduct VAT when the goods and services in question are used for more than 90% for the private purposes of a taxable person, or for the private purposes of his employees or, in general for non-business purposes or non-economic activities.

Article 2

This Decision shall apply from 1 January 2021 until 31 December 2023.

Any request for authorisation to extend the derogating measure authorised by this Decision shall be submitted to the Commission by 31 March 2023.

Such request shall be accompanied by a report on the application of the derogating measure which includes a review of the apportionment rate applied on the right to deduct VAT on the basis of this Decision.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

*For the Council
The President*