EUROPEAN
COMMISSION

Brussels, 10.11.2015
COM(2015) 557 final

2015/0257 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

on authorising Hungary to apply a measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

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 letters registered with the Commission on 23 December 2014 and 8 May 2015, Hungary requested authorisation to apply a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 2 July 2015 of the request made by Hungary. By letter dated 7 July 2015, the Commission notified Hungary that it had all the information it considered necessary for appraisal of the request.

Hungary has informed the Commission that they are confronted with fraud schemes in the sector of supply of staff, in particular as regards temporary employment agencies and organisations providing similar services, such as school cooperatives whose members perform work for third parties. Around 1000 companies are registered as temporary employment agencies in Hungary.

A number of undertakings in the sector are member of Hungarian national associations (e.g. Hungarian National Association of Temporary Employment Agencies, National Associations of School Cooperatives) of which the membership, according to Hungary, provides a certain guarantee that they operate lawfully. However, a considerable number of undertakings are not member of a National Association and it is in particular in this category that, according to Hungary, 40% to 50% would engage in fraudulent activities.

This fraud has different forms, such as fictitious supply of services or fake invoices, but the main form of evasion involves the invoicing of supplies followed by the disappearance of the supplier without paying the tax to the tax authorities but leaving the customer in receipt of a valid invoice for VAT deduction. The VAT fraud in this sector in 2014 was calculated by Hungary at around €22.500.000.

One of the characteristics of supplying this type of services is that large investments or specialised knowledge is not really required. It is therefore relatively easy to establish such a business which then disappears after a short period. Because of limited investments, the VAT received from clients often largely exceeds the deductible VAT on these investments or, more general, on the input. The non-deducted VAT on the input constitutes therefore only a small cost element when these undertakings, with little or no assets, disappear. The overall amount of unpaid VAT becomes difficult or impossible to recover.

Notwithstanding certain control measures that have been introduced (e.g. increased supervision and controls on registration of new companies), Hungary has declared not to be in a position to successfully combat the fraud in this sector. Therefore, they ask to be authorised, in derogation of the general rule of Article 193 of the VAT Directive, to apply to this sector

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

the reverse charge mechanism under which not the supplier but the taxable client accounts for the VAT due on the supply in his VAT return. Such a customer, provided he has a full right of deduction, would simultaneously declare and deduct the VAT corresponding to the supply; thus leading to no effective payment of VAT to the Treasury. This prevents that fraudulent suppliers disappear with the VAT. Moreover, the service users are, as the Commission understands on the basis of information provided by Hungary, generally more compliant than these suppliers. The proposed measure will therefore also have the effect that VAT obligations are shifted from smaller, less reliable businesses to larger taxable persons that are more compliant. At the same time, no risk of fraud could be identified as regards the shifting of fraud to other Member States not applying this measure. In the same way, there is no foreseeable shift of fraud to the retail level as the type of service is normally not destined for final consumption.

It is to be noted that the VAT Directive already foresees in an optional application of the reverse charge mechanism in relation to the supply of staff (Article 199(1)(b) of the VAT Directive). This possibility is limited to, essentially, the immovable property sector (Article 199(1)(a) of the VAT Directive) but the background of the option in the directive is comparable to the one of the present request. The proposed derogating measure should therefore only be applicable to situations not already covered by the VAT Directive.

Finally, the Commission has been informed that Hungary has already have started applying the requested derogation without having awaited the adoption of the Council decision based on this proposal.

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 proposal complies with the proportionality principle for the following reasons.

The Decision concerns an authorisation granted to a Member states 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 combat tax evasion. It goes not beyond what is required to combat fraud in a specific sector.

• Choice of the instrument

Under Article 395 of the VAT Directive, derogation from the common VAT rules is only possible with the authorisation of the Council acting unanimously on a proposal from the Commission. Moreover, a Council Decision is the most suitable instrument since it can be addressed to individual Member States.

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

- **Stakeholder consultations**

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

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The Decision aims at combating VAT fraud in relation to supplies of staff by imposing that the VAT due is accounted for by the taxable recipient of the service.

It will therefore have a potential positive impact on VAT receipts insofar that fraudulent suppliers can no longer disappear with the amount of VAT they receive from their clients under the normal rules.

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 2017.

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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[2], and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) By letters registered with the Commission on 23 December 2014 and 8 May 2015, Hungary requested authorisation to introduce a special measure derogating from Article 193 of Directive 2006/112/EC as regards the person liable for payment of value added tax (VAT).

(2) The Commission informed the other Member States by letter dated 2 July 2015 of the request made by Hungary. By letter dated 7 July 2015, the Commission notified Hungary that it had all the information it considered necessary to consider the request.

(3) Article 193 of Directive 2006/112/EC provides that the taxable person supplying goods or services is, as a general rule, liable for the payment of the VAT to the tax authorities. The purpose of the derogation requested by Hungary is to make the recipient liable for the payment of VAT in relation to supply of staff.

(4) According to Hungary, a number of traders in the sector of temporary employment agencies engage in fraudulent activities by supplying services without paying the VAT over to the tax authorities. Since this type of activity does not necessarily require important input or investment, the VAT these agencies receive often exceeds largely the deductible VAT they have paid to their suppliers. A number of these agencies, often with little or no assets, disappear subsequently after a short period of even only a few months, making the recovery of unpaid VAT difficult or impossible.

(5) By designating the person to whom these services are supplied as the person liable for the payment of VAT in such cases, the derogation would eliminate the opportunity to engage in that form of tax evasion. For a number of situations of supply of staff, enumerated in Article 199(1)(a) of Directive 2006/112/EC, it is already possible to indicate the recipient as the person liable for the payment of VAT. The derogating measure is therefore applicable to situations of supply of staff not already covered by Directive 2006/112/EC.

(6) The derogation will not have an adverse effect on the Union's own resources accruing from VAT,

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

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, Hungary is authorised to provide that the person liable for payment of VAT is the taxable person to whom supplies of staff, engaged in other activities than covered by Article 199(1)(a) of Directive 2006/112/EC, are made.

Article 2

This Decision shall expire on 31 December 2017.

Article 3

This Decision is addressed to Hungary.

Done at Brussels,

For the Council
The President