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2012/0355 (NLE)

Proposal for a

COUNCIL DECISION

on authorising the Kingdom of the Netherlands 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

Grounds for and objectives of the proposal

Pursuant to Article 395(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (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 that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

By letter registered with the Commission on 12 July 2012 and on 4 October 2012, the Kingdom of the Netherlands (hereafter 'the Netherlands') 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 17 October 2012 of the request made by the Netherlands. By letter dated 19 October 2012, the Commission notified the Netherlands that it had all the information it considered necessary for appraisal of the request.

General context

As a general rule, the person liable for the payment of value added tax to the tax authorities under Article 193 of the VAT Directive, is the taxable person supplying the goods. The purpose of the derogation requested by the Netherlands is to place that liability on the taxable person to whom the supplies are made, but only under certain conditions and exclusively in the case of particular products, notably mobile telephones and integrated circuit devices, game consoles and personal computers for mobile use.

According to the Netherlands, a number of businesses within these trade sectors engage in tax evasion by not paying VAT to the tax authorities after selling the products. However, their customers, insofar as they are taxable persons with a right of deduction, being in receipt of a valid invoice, remain entitled to a tax deduction. In the most aggressive forms of this tax evasion, the same goods are, via a 'carousel scheme', supplied several times without payment of the VAT to the tax authorities. By designating in those cases the person to whom the goods are supplied as the person liable for the VAT, the derogation would remove the opportunity to engage in that form of tax evasion.

The derogation request, as regards the part on mobile telephones and integrated circuit devices, is very similar to that which was granted to Austria, Germany, Italy and the UK via Council Implementing Decision 2010/710/EU of 22 November 2010. On the basis of inspections of the Dutch Fiscal Information and Investigation Service (Fiscale Inlichtingen- en Opsporingsdienst (FIOD)), the Netherlands also noted a shift of fraud towards game consoles, laptops and tablet PC's and they requested that these products be added to the derogation authorisation. A sufficiently high threshold of EUR 10 000 should exclude a shifting of fraud towards the retail sector.

At the same time, however, the Netherlands recognises that individual derogations, with an ever increasing scope, cannot form a satisfactory long-term reply to EU-wide fraud phenomena. Therefore, the Netherlands have accepted that the derogation would only be

applicable for a short period and would end at the same time as the above-mentioned derogation, namely on 31 December 2013, so as to enable an alternative and more harmonised VAT fraud policy in the future.

In this context, reference should be made to the Commission's proposal (COM(2009) 511) to amend the VAT Directive to allow all interested Member States to apply a targeted reverse charge in relation to certain fraud-sensitive goods and services without the need to apply for a derogation. This proposal was partially adopted through Council Directive 2010/23/EU of 16 March 2010, which is however limited to allowing a reverse charge to greenhouse gas emission allowances. Via a Council minute statement, the Council committed itself to continue discussions on the other parts of the proposal.

It is the view of the Commission that the only measure which can be efficient at EU level in this field is the adoption of that proposal rather than a piecemeal approach based on individual derogations and whose impact on other Member States may not be negligible. The Commission therefore calls on the Council to quickly resume these negotiations.

In combination with the Quick Reaction Mechanism proposal (COM(2012) 428), missing trader fraud in VAT would then be tackled both in the short and longer term.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

Not applicable.

Impact assessment

The Decision proposal aims at combating VAT evasion and will therefore have a potential positive impact on VAT receipts.

Nevertheless, the measures will have an impact on the business insofar as the arrangements will be different from those applying to normal supplies of goods. This will introduce a complexity in accounting for businesses which do not deal exclusively with the goods which are the subject of the derogation. The control mechanisms envisaged will also impose additional obligations on the business sector concerned. It is therefore clear that this derogation fails the simplification test provided by Article 395, and only falls within the scope of preventing evasion.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

Authorisation for the Netherlands to apply a measure derogating from Article 193 of the VAT Directive as regards the use of a reverse charge mechanism for domestic supplies of certain goods.

4. BUDGETARY IMPLICATION

The proposal has no negative impact on the EU budget.

5. OPTIONAL ELEMENTS

The proposal includes a sunset clause.

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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[1], 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 12 July 2012 and on 4 October 2012, the Netherlands requested authorisation to introduce a special measure for derogating from Article 193 of Directive 2006/112/EC as regards the person liable for payment of value added tax (VAT).

(2) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 17 October 2012 of the request made by the Netherlands. By letter dated 19 October 2012, the Commission notified the Netherlands 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 the 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 the Netherlands is to make, under certain circumstances, the recipient of supplies of certain goods liable for the payment of VAT in relation to particular products, notably mobile phones, integrated circuit devices, game consoles and personal computers for mobile use.

(4) According to the Netherlands, a number of traders in these sectors engage in fraudulent activities by selling these products without paying the VAT over to the tax authorities. Their customers, however, are entitled to a tax deduction as they are in possession of a valid invoice. In its most aggressive form, the goods are, via a 'carousel' scheme, supplied several times without payment of VAT. In this context, the Dutch investigation service has noted a shift of fraud from mobile phones and integrated circuit devices towards game consoles and personal computers for mobile use. By designating the person to whom the goods are supplied as the person liable for

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

the payment of VAT in such cases, the derogation would eliminate the opportunity to engage in that form of tax evasion.

(5) In order to ensure the effective operation of the derogation and preventing tax evasion from being shifted towards the retail stage or to other products, the Netherlands will introduce appropriate control and reporting obligations. In addition, a minimum threshold should reduce the risk of the fraud shifting to the retail trade.

(6) The authorisation shall be valid for only a very short period as questions remain on, in particular, the possible impact of the reverse charge mechanism on the functioning of the VAT systems within Member States who apply it or in other Member States. The end date coincides with the end of similar derogations granted in relation to mobile phones and integrated circuit devices so as to enable the development of a more elaborated and more harmonised anti-fraud policy in the future.

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

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, the Netherlands are authorised to designate the taxable person to whom supplies of the following goods are made as the person liable for the payment of the tax:

(a) mobile phones, being devices made or adapted for use in connection with a licensed network and operated on specified frequencies, whether or not they have any other use;

(b) integrated circuit devices such as microprocessors and central processing units in a state prior to integration into end-user products;

(c) game consoles, which by virtue of their objective characteristics and principal functions, are intended for playing video and other computer games, whether or not they have any other use;

(d) laptops and tablet PC's.

The derogation shall apply in respect of supplies of goods for which the taxable amount is equal to or higher than EUR 10 000.

Article 2

The derogation provided for in Article 1 is subject to the Netherlands introducing appropriate and effective control and reporting obligations on taxable persons who supply goods to which the reverse charge applies in accordance with this Decision.

Article 3

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

This Decision shall expire on the date of the entry into force of the Union rules allowing all Member States to adopt such measures derogating from Article 193 of Directive 2006/112/EC, but on 31 December 2013 at the latest.

Article 4

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

For the Council
The President