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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	30 July 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 433 final
Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2018/789 authorising Hungary to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Delegations will find attached document COM(2021) 433 final.

Encl.: COM(2021) 433 final



EUROPEAN
COMMISSION

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Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision (EU) 2018/789 authorising Hungary to introduce a special measure derogating from Article 193 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 tax¹ (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 18 February 2021, Hungary requested authorisation to continue to derogate from Article 193 of the VAT Directive regarding the person liable for payment of VAT in case of certain supplies carried out by taxable persons subject to liquidation or any other proceedings legally establishing its insolvency. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 7 April 2021 of the request made by Hungary. By letter dated 8 April 2021 the Commission notified Hungary that it had all the information it considered necessary for appraisal of the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Based on Article 199(1)(g) of the VAT Directive, Member States may provide that the person liable for the payment of VAT is the taxable person to whom the supply of immovable property sold by a judgement debtor in a compulsory sale procedure is made (the reverse charge mechanism). In 2017, Hungary requested the extension of the application of the reverse charge mechanism to supplies of capital goods and to supplies of other goods and services with an open market value exceeding HUF 100 000 (approximately EUR 275) at the time of supply, when the taxable person supplying the goods or services is subject to liquidation or any other proceedings legally establishing its insolvency. The derogation was authorised by Council Implementing Decision (EU) 2018/789² until 31 December 2021.

Capital goods are typically high value tools, machinery and objects. Furthermore, according to Hungary, there are a large number of transactions exceeding the threshold of HUF 100 000 carried out by insolvent taxable persons. The liquidator frequently fails to pay the VAT due since the amount has to be used to settle earlier claims. At the same time, the purchaser, being taxable person with the right of deduction, can still deduct the VAT incurred, negatively impacting the budget and basically financing the liquidation. Hungary also registered cases of fraud whereby companies in liquidation would issue fictitious invoices to active companies greatly reducing their payable tax without the guarantee that the issuer would pay the VAT due.

Even though the figures provided by the Hungarian National Tax and Customs Administration show a steady fall in the number of insolvency proceedings during the 2017-2020 period, the economic effects of the COVID-19 outbreak could lead to a sharp increase in the number of liquidations in the near future, making necessary keeping the reverse charge mechanism for these transactions.

Hungary therefore argues that there is a need to safeguard the tax revenue and the budgetary interests on account of the number of taxable persons in financial difficulties performing the above supplies. The reverse charge mechanism is, according to Hungary, an appropriate tool

¹ OJ L 347, 11.12.2006, p. 1.

² OJ L 134, 31.5.2018, p. 10–11.

to this aim. The taxable person in liquidation would not be liable to pay the VAT due and the customer would not be penalised while losses to the public budget would be avoided.

Even though Hungary requested the authorisation to be prolonged until 31 December 2026, it is proposed to authorise the extension of the derogation until 31 December 2024. A derogation allowing making use of the reverse charge mechanism constitutes a means of last resort and should be limited in time as much as possible. Moreover, that period should be sufficient to implement other conventional measures to reduce the losses to the public budget, in particular for those losses connected with fraudulent behaviours, thereby avoiding that this measure is prolonged again.

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 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 the limited scope of the derogation, the special measure is proportionate to the aim pursued, i.e. to simplify tax collection and combat tax evasion. It does not go beyond what is required to fulfil these aims.

- **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 Hungary and concerns only this particular Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for Implementing Decision aims at safeguarding tax revenues and budgetary interests on account of companies under insolvency procedure in case they carry out supplies of capital goods or supplies of goods or services with an open market value exceeding HUF 100 000. According to Hungary, applying the reverse charge mechanism to these types of transactions has effectively simplified tax collection and prevented tax evasion. The implementation of the measure has limited losses to public revenues and generated additional budget revenue of approximately HUF 1.5-2 billion (approximately EUR 4.2–5.6 million) each year. Therefore, the derogating measure has a positive impact even though very limited. Given this limited impact, Hungary should implement other conventional measures to reduce the losses to the budget, which could achieve similar results.

Because of the narrow scope of the derogation and the limited application in time, the impact will in any case be limited.

- **Fundamental rights**

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

4. BUDGETARY IMPLICATIONS

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

5. OTHER ELEMENTS

The proposal includes a sunset clause set at 31 December 2024.

Proposal for a

COUNCIL IMPLEMENTING DECISION

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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), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) In accordance with Article 193 of Directive 2006/112/EC, any taxable person carrying out a taxable supply of goods or services is, as a general rule, liable for the payment of value added tax (VAT) to the tax authorities.
- (2) By Council Implementing Decision (EU) 2018/789², Hungary was authorised to introduce a measure derogating from Article 193 of Directive 2006/112/EC ('the special measure') regarding the person liable for payment of VAT in case of certain supplies carried out by a taxable person subject to liquidation or any other proceedings legally establishing its insolvency.
- (3) By letter of 18 February 2021, Hungary submitted a request to the Commission that the authorisation to apply the special measure be prolonged until 31 December 2026 ('the request'). Hungary submitted a report, including a review of the special measure, together with the request.
- (4) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, by letters dated 7 April 2021 the Commission transmitted the request to the other Member States. By letter dated 8 April 2021, the Commission notified Hungary that it had all the information necessary to consider the request.
- (5) Hungary argues that taxable persons in liquidation or under insolvency procedure frequently do not pay the VAT due to the tax authorities. At the same time the purchaser, being a taxable person with the right of deduction, can still deduct the VAT incurred, thus negatively impacting the budget and financing the liquidation. Hungary also registered cases of fraud whereby companies in liquidation would issue fictitious invoices to active companies and greatly reduce their payable tax without the guarantee that the issuer would pay the VAT due.
- (6) In accordance with Article 199(1), point (g), of Directive 2006/112/EC, Member States may provide that the person liable for the payment of VAT is the taxable person

¹ OJ L 347, 11.12.2006, p. 1.

² OJ L 134, 31.5.2018, p. 10–11.

to whom the supply of immovable property sold by a judgment debtor in a compulsory sale procedure is made ('the reverse charge mechanism'). The special measure allows Hungary to extend the application of the reverse charge mechanism to other supplies by taxable persons under insolvency procedure, namely the supply of capital goods and the supply of other goods or services with an open market value exceeding HUF 100 000.

- (7) On the basis of information provided by Hungary, applying the reverse charge mechanism to those types of transactions has effectively simplified tax collection and prevented tax evasion. The implementation of the measure has limited losses to public revenues and generated additional budget revenue. Furthermore, the economic effects of the COVID-19 outbreak could lead to a sharp increase in the number of liquidations in the near future, underlining the need for prolonging the special measure.
- (8) The requested derogation should be limited in time to allow the tax administration time to introduce other conventional measures to tackle the respective problem and to reduce the losses to the public budget, in particular for those losses connected with fraudulent practices until the expiry of the derogating measure, thus making an extension of the derogation redundant. A derogation to allow making use of the reverse charge mechanism is only granted exceptionally for specific fraudulent areas and constitutes a means of last resort. The authorisation should therefore be prolonged only until 31 December 2024.
- (9) The derogating measure will have no adverse impact on the Union's own resources accruing from VAT.
- (10) Implementing Decision (EU) 2018/789 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

In Article 2 of Implementing Decision (EU) 2018/789, the second paragraph is replaced by the following:

“This Decision shall expire on 31 December 2024”.

Article 2

This Decision is addressed to Hungary.

Done at Brussels,

*For the Council
The President*