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Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising the Republic of Poland to conclude with the Republic of Ukraine an agreement containing measures derogating from Articles 2(1)(d) and 5 of Directive 2006/112/EC on the common system of value added tax, as regards the maintenance of road bridges on the Polish and Ukrainian border

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Pursuant to Article 396 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 conclude with a third country or an international body an agreement which may contain derogations from the VAT Directive.

By letter registered with the Commission on 7 October 2016, Poland requested an authorisation to conclude an international agreement with Ukraine as regards the territorial application of the VAT system for the maintenance of road bridges on the Polish and Ukrainian border. In accordance with Article 396(2) of the VAT Directive, the Commission informed the other Member States by letter dated 24 January 2017. By letter dated 25 January 2017, the Commission notified Poland that it had all the information necessary to consider the request.

In order to improve traffic between Poland and Ukraine, these countries drew up a draft Agreement between them for the maintenance of road bridges on the Polish and Ukrainian border (hereafter the agreement).

This agreement concerns the maintenance of three road bridges on the Polish and Ukrainian border, all of which are partly on the territory of the Republic of Poland and partly on the territory of the Republic of Ukraine. These bridges form part of the public road system along the frontier between the two countries. Two border road bridges over the River Bug on the Polish and Ukrainian border have been built at Poland's expense and are owned by Poland: a steel bridge between Dorohusk and Jagodzín which will be maintained by Ukraine and a reinforced-concrete and steel bridge between Zosin and Ustyluh which will be maintained by Poland.

The third road bridge over the River Bug, with steel girders and a reinforced-concrete deck also located between Dorohusk and Jagodzín was built at the expense of both countries and is equally owned by them. Both countries agreed on sharing the maintenance to the extent that each country shall maintain the part of the bridge it owns except for the winter maintenance.

As far as the winter maintenance is concerned, the two countries shall be responsible for the border road bridge, along its entire length in turns: Poland from 1 October of every odd-numbered year until 30 September of every even-numbered year and Ukraine: from 1 October of every even-numbered year until 30 September of every odd-numbered year.

As regards the application of the Polish and Ukrainian VAT legislation, the agreement provides that, for the supply of goods and services intended to be used for the maintenance of border road bridges or parts thereof insofar as Poland is responsible for the maintenance in accordance with the Annex to the agreement, the border road bridge or part thereof are regarded as Polish territory. The agreement further stipulates that for the supply of goods and services intended to be used for the maintenance of border road bridges or parts thereof insofar as Ukraine is responsible for the maintenance in accordance with the Annex to the agreement, the border road bridges or parts thereof are regarded as Ukrainian territory.

¹ OJ L 347, 11.12.2006, p. 1.

The agreement also stipulates that goods imported from the country of one of the Contracting Parties into the country of the other Contracting Party will not be subject to either Polish or Ukrainian VAT on imports if these goods are used for works performed under the agreement.

In accordance with the principle of territorial application laid down by the VAT Directive, the supplies of goods and services in the context of maintenance work for the road bridges carried out on Polish sovereign territory would be subject to VAT in Poland, while such supplies of goods and services for maintenance work carried out on Ukrainian sovereign territory would lie outside the territorial scope of the VAT Directive. If these provisions were applied, it would be necessary to break down transactions on the basis of the territory on which they are carried out. In addition, each importation into Poland from the Ukraine of goods used for the maintenance of a border bridge would be subject to VAT in Poland.

Poland is of the opinion that the application of these rules would involve tax complications for contracting companies responsible for the maintenance of these bridges. It therefore takes the view that the tax provisions of the agreement are justified in order to simplify the contractors' tax obligations.

In light of the above, Poland requests that by way of derogation from Article 5 of VAT Directive, border road bridges or parts thereof be recognised as part of the Polish (or Ukrainian respectively) territory for the purposes of the supply of goods and services and for the import of goods intended for the maintenance of these bridges or parts thereof by either Poland or Ukraine.

The Council has on several previous occasions authorised Member States to conclude agreements with third countries in frontier areas and these agreements, inter alia, included tax provisions similar to those proposed here. Germany was authorised to conclude a number of agreements with Poland², the Czech Republic³, and Switzerland⁴ as well as Austria with Switzerland⁵.

The Commission agrees that the uniform taxation of maintenance work of the border road bridges or a part thereof, and the waiving of the collection of VAT on imports of goods intended for use in such work, would simplify matters for the contractors compared with application of the normal rules of taxation.

The Commission considers that the agreement in question could possibly have only a minor positive or negative effect on the Union's own resources accruing from VAT. However in view of the tax arrangements laid down in the agreement that aim at an overall balance and in light of previous agreements where an overall compensating balance was sought and taking into account the negligible amounts involved, the Commission considers that this should not be an obstacle to granting Poland the requested authorisation.

Accordingly, the Commission takes the view that Poland should be authorised to conclude the proposed agreement.

² Council Decision 95/115/EC of 30 March 1995 (OJ L 80, 8.4.1995, p. 47); Council Decision 96/402/EC of 25 June 1996 (OJ L 165, 4.7.1996, p. 35); Council Decision 95/435/EC of 23 October 1995 (OJ L 257, 27.10.1995, p. 34) and Council Decision 2001/741/EC of 16 October 2001 (OJ L 278, 23.10.2001, p. 28).

³ Council Decision 97/188/EC of 17 March 1997 (OJ L 80, 21.3.1997, 21 of March 1997 p. 18); Council Decision 97/511/EC of 24 July 1997 (OJ L 214, 6.8.1997, p. 39) and Council Decision 2001/742/EC of 16 October 2001 (OJ L 278, 23.10.2001, p. 30).

⁴ Council Decision 2003/544/EC of 15 July 2003 (OJ L 186, 25.7.2003, p. 36) and Council Decision 2005/911/EC of 12 December 2005 (OJ L 331, 17.12.2005, p. 30).

⁵ Council Decision 2007/485/EC of 10 July 2007 (OJ L 182, 12.7.2007, p. 29).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 396 of the VAT Directive.

- **Subsidiarity (for non-exclusive competence)**

Considering the provision of the VAT Directive on which the proposal is based, 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 very limited scope of the derogation, the special measure is proportionate to the aim pursued.

- **Choice of the instrument**

Proposed instrument: Council Implementing Decision.

Under Article 396 of the VAT Directive, 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 Poland and concerns only this Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for a Council Implementing Decision concerns the situation as regards the maintenance of road bridges on the Polish and Ukrainian border. Given the limited scope of this derogation, the impact will in any case be limited.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the Union's own resources accruing from VAT since the importers or third country suppliers would have, in any case, a full right of deduction for the VAT paid on importation or on the supplies made under the normal system.

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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 tax⁶, and in particular Article 396(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By a letter registered with the Commission on 7 October 2016, Poland requested authorisation to conclude an agreement with Ukraine in relation to the maintenance of three road bridges crossing the River Bug on the Polish and Ukrainian border (two bridges between Dorohusk and Jagodzin and a third between Zosin and Ustyluh).
- (2) In accordance with the second subparagraph of Article 396(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 24 January 2017 of the request made by Poland. By letter dated 25 January 2017, the Commission notified Poland that it had all the necessary information to consider the request.
- (3) The maintenance work carried out on Polish territory is subject to VAT in Poland while that carried out on Ukrainian territory lies outside the scope of Directive 2006/112/EC. In addition, each importation from Ukraine into Poland of goods used for the maintenance of the border bridges is subject to VAT in Poland.
- (4) In order to ensure the achievement of the purposes of the agreement, and in particular to improve the traffic between Poland and Ukraine, it is appropriate to simplify the VAT rules applicable to maintenance works and the related importation of goods.
- (5) The derogation will have no impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

Poland is authorised to conclude an agreement with Ukraine that includes provisions derogating from Article 2(1)(d) and Article 5 of Directive 2006/112/EC regarding the territorial scope of the value added tax system and the VAT treatment of transactions as regards the maintenance of road bridges on the Polish and Ukrainian border.

⁶ OJ 347, 11.12.2006, p. 1.

This agreement concerns the maintenance of the three border bridges mentioned in the Annex.

Article 2

By way of derogation from Article 5 of Directive 2006/112/EC, with regard to the bridges mentioned in the Annex for which Poland has the responsibility to maintain, in so far as these bridges extend onto the sovereign territory of Ukraine, the border bridges shall be treated as forming part of the sovereign territory of Poland, as regards supplies of goods or services intended for their maintenance.

Article 3

By way of derogation from Article 5 of Directive 2006/112/EC, with regard to the bridges for which Ukraine has the responsibility to maintain, in so far as these bridges extend onto the sovereign territory of Poland, the border bridges shall be treated as forming part of the sovereign territory of Ukraine, as regards supplies of goods or services intended for their maintenance.

Article 4

By way of derogation from Article 2(1)(d) of Directive 2006/112/EC, goods imported by taxable persons with a full right of deduction from Ukraine into Poland shall not be subject to VAT in so far as those goods are used for the maintenance of the bridges mentioned in the Annex.

Article 5

This Decision is addressed to the Republic of Poland.

Done at Brussels,

*For the Council
The President*