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Proposal for a

COUNCIL IMPLEMENTING DECISION

**authorising the Republic of Poland 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 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 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 7 October 2016, Poland requested a derogation from Article 193 of the VAT Directive in order to apply the reverse charge mechanism to hard drives such as solid-state drives (SSDs) and hard disk drives (HDDs). In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 12 and 13 July 2017 of the request made by Poland. By letter dated 13 July 2017, the Commission notified Poland that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

As a general rule, Article 193 of the VAT Directive stipulates that the taxable person supplying goods or services is normally liable to pay value added tax (VAT).

Pursuant to Article 395 of the VAT Directive, Poland requests a derogation from Article 193 of the VAT Directive to be authorised to apply the reverse charge mechanism to supplies of all hard drives (including SSDs and HDDs) which are not covered by Article 199a of the VAT Directive. Under this procedure, the taxable person, to whom the supplies are made, becomes liable for the payment of VAT. This taxable person, provided it 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.

Poland requests the derogation to prevent further spreading of the VAT fraud in the sector of hard drives. A number of electronic products have been covered in Poland by the reverse charge mechanism based on Article 199a of the VAT Directive (smart phones, laptops, gaming consoles, etc. and recently processors). According to Poland, after the introduction of the reverse charge mechanism to supplies of the latter products, hard drives became another commodity in the category of electronic products used for VAT fraud. A growing practice of VAT fraud appeared on the hard drive market through the use of the "missing trader" mechanism (MTIC). The scale and scope of this practice has a direct, very negative impact on distributors not participating in the fraud and it leads to the decrease of VAT revenues.

Based on the information submitted by Poland, the fraud mechanism consists in fraudulent operators registering entities at a specified address and for a period of time submitting tax returns. These entities wait for a right moment to perform a few large domestic sales, collecting the VAT from their customers and close their business without paying VAT due to the budget. It is impossible in the majority of cases to audit the entities given the problems in finding their actual place of business and people involved in the activities due to the phenomenon of virtual offices, the frequent changes of the registered office, the lack of documents regarding the performed transactions, etc.

Poland undertook a number of measures to tackle and prevent such types of fraud (reform of the tax administration to focus resources on fight against fraud, introduction of Single Audit File, obligatory monthly VAT returns, introduction of administrative sanctions, etc.) and

further reforms are being undertaken (e.g. voluntary system of split payment). However, until the measures bring effective results, Poland considers that additional support, in the form of a temporary measure such as the introduction of the domestic reverse charge mechanism, is necessary.

It is proposed to grant the derogation from 1 January 2018 until 31 December 2020. As until the expiry of the derogation, the measures undertaken by Poland should bring the expected results, Poland will not need any longer to derogate from Article 193 of the VAT Directive with regards to the supplies of hard drives. A renewal of the derogation should therefore not be necessary.

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. to prevent certain forms of tax evasion or avoidance 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 Poland and concerns only this Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for Implementing Decision aims at preventing certain forms of tax evasion or avoidance in the sector of hard drives. The reverse charge mechanism should help Poland to stop further spreading of the fraud and to prevent VAT fraud in hard drives' sector. Consequently, the derogating measure will have a potential positive impact.

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

4. BUDGETARY IMPLICATIONS

The proposal has no implication for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause set at 31 December 2020.

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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 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) 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 value added tax (VAT) to the tax authorities.
- (2) By letter registered with the Commission on 7 October 2016, Poland has requested a derogation from Article 193 of Directive 2006/112/EC in order to apply the reverse charge mechanism to supplies of hard drives such as solid-state drives and hard disk drives.
- (3) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letters dated 12 and 13 July 2017 of the request made by Poland. By letter dated 13 July 2017, the Commission notified Poland that it had all the information necessary to consider the request.
- (4) Hard drives, which are not covered by Article 199a of Directive 2006/112/EC, became another commodity in the category of electronic products used for VAT fraud in Poland. According to Poland, an increase of VAT fraud appeared on the hard drive market through the use of the "missing trader" mechanism.. The scale and scope of this practice has a direct, very negative impact on distributors not participating in the fraud and it leads to the decrease of VAT revenues.
- (5) Poland undertook a number of measures to tackle and prevent the VAT fraud. However, until the measures bring effective results, Poland considers that additional support, in the form of a temporary measure such as the introduction of the reverse charge mechanism, is necessary.
- (6) Poland should therefore be authorised to apply the reverse charge mechanism to supplies of hard drives such as solid-state drives and hard disk drives from 1 January 2018. The derogation should be limited in time until 31 December 2020.
- (7) Until the expiry of the derogation the measures undertaken by Poland should prevent further spreading of the VAT fraud in the sector of hard drives and thus Poland will not need to derogate any more from Article 193 of Directive 2006/112/EC with

¹ OJ 347, 11.12.2006, p.1.

regards to these supplies. Poland should therefore not seek the renewal of the derogation.

(8) The derogation has no impact 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, Poland is authorised to designate the recipient as the person liable to pay VAT in the case of supplies of hard drives such as solid-state drives and hard disk drives.

Article 2

This Decision shall apply from 1 January 2018 and shall expire on 31 December 2020.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Brussels,

*For the Council
The President*