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2017/0243 (NLE)

Proposal for a

**COUNCIL IMPLEMENTING DECISION**

**authorising the Kingdom of the Netherlands 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 11 July 2017, the Netherlands requested a derogation from Article 193 of the VAT Directive in order to apply the reverse charge mechanism to supplies of telecommunication services. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 5 September 2017 of the request made by the Netherlands. By letter dated 6 September 2017, the Commission notified the Netherlands 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 199a of the VAT Directive Member States may provide that the person liable for payment of VAT on supplies listed in this Article is the taxable person to whom the supply is made (the reverse charge mechanism). Under the reverse charge procedure, the taxable person, to whom the supplies are made, becomes liable for the payment of VAT. This taxable person, 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. Telecommunication services are included in point (g) of Article 199a.

The Netherlands do not make use of the option of Article 199a (g) of the VAT Directive and do not apply the reverse charge mechanism to telecommunication services. However, due to the recently discovered fraud in the sector of telecommunication services in the Netherlands, the latter Member State would like to introduce the reverse charge mechanism to domestic supplies of telecommunication services.

Following Article 199a of the VAT Directive, the reverse charge mechanism may be applied until 31 December 2018 and for a minimum period of two years. As the condition of two year period is not fulfilled, the Netherlands cannot apply the reverse charge mechanism based on this Article.

Consequently, the Netherlands requests a derogation from Article 193 of the VAT Directive to be authorised to apply the reverse charge mechanism to the supplies of telecommunication services based on Article 395 of the VAT Directive.

The aim of the requested derogation is to prevent the VAT fraud in the sector of telecommunication services. Although the supplies of telecommunication services are susceptible to fraud and are being closely monitored by the Netherlands, they recently discovered fraudulent schemes of trade in call minutes involving a number of missing traders and buffer companies, including traders established in third countries. These schemes result in a significant loss of VAT revenue.

Based on the information submitted by the Netherlands, the conventional methods of fraud detection and prevention are not effective, as the services involved are supplied from outside

the EU and are not mentioned in any register or listing. The payments are made via payment platforms at bank accounts outside the EU making the transactions more difficult to detect and making it impossible to obtain information from banks. The Netherlands point out that without a reverse charge for the services concerned the tax loss will increase exponentially.

Telecommunication services are considered to be susceptible to fraud and are included in Article 199a (g) of the VAT Directive. If the condition regarding the minimum period of application was fulfilled, the Netherlands would be able to rely on the latter Article for the application of the reverse charge mechanism.

It is proposed to grant the derogation for the period of validity of Article 199a of the VAT Directive. The derogation is thus proposed until 31 December 2018, i.e. the date of expiry of Article 199a of the VAT Directive.

- **Consistency with existing policy provisions in the policy area**

Based on Article 199a (g) of the VAT Directive the reverse charge mechanism may be applied to the supplies of telecommunication services. A few Member States apply the reverse charge relying on this provision<sup>1</sup>. If the condition of the minimum period of two years was fulfilled, the Netherlands could apply the reverse charge mechanism to telecommunication services without requesting a derogation based on Article 395 of the VAT Directive.

The proposed measure is, therefore, consistent with the existing provisions of the VAT Directive.

## **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.

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<sup>1</sup> See list of notifications of the VAT Committee:  
[http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/vat/key\\_documents/vat\\_committee/notifications.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/key_documents/vat_committee/notifications.pdf)

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

- **Stakeholder consultations**

This proposal is based on a request made by the Netherlands 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 telecommunication. The reverse charge mechanism should help the Netherlands to stop further spreading of the recently discovered VAT fraud and to prevent fraud in supplies of telecommunication services. Consequently, the derogating measure will have a potential positive impact.

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

### **4. BUDGETARY IMPLICATIONS**

The proposal has no negative implication for the EU budget.

### **5. OTHER ELEMENTS**

The proposal includes a sunset clause set at 31 December 2018.

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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<sup>2</sup>, and in particular Article 395(1) 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) Pursuant to Article 199a (g) of the VAT Directive, Member States may provide that the person liable for payment of VAT on supplies of telecommunication services is the taxable person to whom the supply is made (the reverse charge mechanism). The Netherlands do not make use of this option.
- (3) Due to the recently discovered fraud in the sector of telecommunication services in the Netherlands, the latter Member State would like to introduce the reverse charge mechanism to domestic supplies of telecommunication services.
- (4) Following Article 199a of the VAT Directive, the reverse charge mechanism may be applied until 31 December 2018 and for a minimum period of two years. As the condition of two year period is not fulfilled, the Netherlands cannot apply the reverse charge mechanism based on Article 199a (g) of the VAT Directive.
- (5) Consequently, by letter registered with the Commission on 11 July 2017 the Netherlands requested a derogation from Article 193 of the VAT Directive to be authorised to apply the reverse charge mechanism to the supplies of telecommunication services based on Article 395 of the VAT Directive.
- (6) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 5 September 2017 of the request made by the Netherlands. By letter dated 6 September 2017, the Commission notified the Netherlands that it had all the information necessary to consider the request.
- (7) The aim of the requested derogation is to prevent the VAT fraud in the sector of telecommunication services. Although the supplies of telecommunication services are susceptible to fraud and are being closely monitored, the Netherlands recently discovered fraudulent schemes of trade in call minutes involving a number of missing

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<sup>2</sup> OJ 347, 11.12.2006, p.1.

traders and buffer companies. These schemes result in the significant loss of tax revenue.

- (8) Based on the information submitted by the Netherlands, the conventional methods of fraud detection and prevention are not effective, as the services involved come from outside the EU and are not mentioned in any register or listing. The payments are made via payment platforms at bank accounts outside the European Union making the transactions more difficult to detect and making it impossible to obtain information from banks. The Netherlands point out that without a reverse charge mechanism for the services concerned the tax loss will increase exponentially.
- (9) The Netherlands should therefore be authorised to apply the reverse charge mechanism to supplies of telecommunication services for the period of validity of Article 199a of the VAT Directive. The derogation should be granted until 31 December 2018.
- (10) The derogation has no adverse 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, the Netherlands are authorised to designate the recipient of the supply as the person liable to pay VAT to the tax authorities in the case of supplies of telecommunication services.

*Article 2*

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

This Decision shall expire on 31 December 2018.

*Article 3*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

*For the Council*  
*The President*