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2018/0141 (NLE)

Proposal for a

**COUNCIL IMPLEMENTING DECISION**

**authorising Germany and Poland to introduce a special measure derogating from  
Article 5 of Council Directive 2006/112/EC on the common system of value added tax**

## **EXPLANATORY MEMORANDUM**

Pursuant to Article 395 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax<sup>1</sup> (hereafter 'the VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise Member States 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 letters registered with the Commission respectively on 9 January 2018 and 22 January 2018, Germany and Poland requested an authorisation to derogate from Article 5 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States of the request made by Germany and Poland by letters dated 5 March 2018. By letters dated 6 March 2018, the Commission notified Germany and Poland that it had all the information it considered necessary for the appraisal of the request.

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

In order to improve traffic between Germany and Poland, these Member States have the intention to conclude an agreement concerning the construction of a new bridge between Küstrin-Kietz and Kostrzyn nad Odrą (hereafter the agreement).

According to this agreement, Germany and Poland will carry out a common investment consisting of demolishing the existing border bridge and constructing a new bridge between Küstrin-Kietz and Kostrzyn nad Odrą. Article 9 of the agreement foresees that with respect to VAT the territory of the investment should be considered as the territory of Poland, as far as supplies of goods and services, intra-Community acquisitions and imports of goods are destined for the execution of the foreseen investment.

In accordance with the principle of territorial application laid down by the VAT Directive, with regards to supplies of goods and services it is necessary to establish where they are carried out. That is why for every supply of goods or services, intra-Community acquisition and import of goods related to the execution of the investment, it would normally be necessary to establish if they are carried out in Poland or in Germany. Poland and Germany are of the opinion that the application of this rule can appear complicated to taxable persons and tax authorities. They take the view that the tax provisions of the agreement will simplify tax obligations and tax collection.

In light of the above, Germany and Poland request an authorisation based on Article 395 of the VAT Directive to derogate from Article 5 of the VAT Directive and to provide that for VAT purposes all supplies of goods and services, intra-Community acquisitions and imports of goods destined for the execution of the foreseen investment are carried out in the territory of Poland and thus would be subject to Polish VAT.

What concerns the maintenance of border bridges between Germany and Poland, it is governed by an agreement signed between Germany and Poland on 20 March 1995.

The Council has on previous occasions authorised derogations from the territoriality principle, inter alia, between Germany and Poland<sup>2</sup>, the Czech Republic<sup>3</sup>, and Switzerland<sup>4</sup> as well as between Poland and Ukraine<sup>5</sup>.

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

<sup>2</sup> 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

As all supplies relating to the given investment will be subject to Polish VAT, the derogating measure will not have any negative impact on the taxation of the final consumption and thus on the Union's own resources accruing from VAT.

In light of the above, it is proposed to grant the requested derogating measure.

## **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 subsidiarity principle does not apply.

- **Proportionality**

The Decision concerns an authorisation granted to Member States upon their 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 395 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 individual Member States.

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

- **Stakeholder consultations**

This proposal is based on requests made by Germany and Poland and concerns only these Member States.

- **Collection and use of expertise**

There was no need for external expertise.

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257, 27.10.1995, p. 34) and Council Decision 2001/741/EC of 16 October 2001 (OJ L 278, 23.10.2001, p. 28).

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> Council Implementing Decision (EU) 2017/1769 of 25 September 2017 (OJ L250, 28.9.2017, p.73).

- **Impact assessment**

The proposal for a Council Implementing Decision allows Germany and Poland to treat all supplies of goods and services, intra-Community acquisitions and imports of goods destined for the demolition and construction of the border bridge between Küstrin-Kietz and Kostrzyn nad Odrą as carried out in Poland and thus subject to Polish VAT. The measure is expected to simplify the tax obligations of enterprises and the tax collection by tax authorities. 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 all supplies of goods and services, intra-Community acquisitions and imports of goods relating to the envisaged investment will be subject to Polish VAT.

Proposal for a

## **COUNCIL IMPLEMENTING DECISION**

**authorising Germany and Poland to introduce a special measure derogating from Article 5 of Council Directive 2006/112/EC on the common system of value added tax**

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>1</sup>, and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letters registered, respectively, on 9 January 2018 and 22 January 2018, Germany and Poland submitted to the Commission a request for an authorisation to introduce a special measure derogating from Article 5 of Directive 2006/112/EC.
- (2) In accordance with the second subparagraph of Article 395(2) of Directive 2006/112/EC, the Commission, by letters dated 5 March 2018, transmitted to the other Member States the request made by Germany and Poland. By letters dated 6 March 2018, the Commission notified Germany and Poland that it had all the information necessary to consider the request.
- (3) Pursuant to agreement that Germany and Poland intends to conclude regarding the demolition of the existing border bridge and construction of a new bridge between Küstrin-Kietz and Kostrzyn nad Odrą, with respect to value added tax ('VAT') the area of those works should be considered as the territory of Poland, insofar as the supplies of goods and services, the intra-Community acquisitions and imports of goods are destined for the execution of the works envisaged under the agreement.
- (4) Germany and Poland take the view that the tax provisions of the agreement are justified in order to simplify the procedure for complying with VAT obligations. Without these provisions, it would be necessary to break down transactions on the basis of the territory on which they are carried out, which would involve tax complications for contracting companies responsible for the works.
- (5) Considering that the special measure being the subject of the authorisation request will not, except to a negligible extent, affect the overall amount of the tax revenue of the Member States collected at the stage of final consumption, it is appropriate to derogate from Article 5 of Directive 2006/112/EC and to provide that for VAT purposes all supplies of goods and services, intra-Community acquisitions and imports of goods destined for the demolition of an existing border bridge and construction of a new border bridge between Küstrin-Kietz and Kostrzyn nad Odrą are carried out in the territory of Poland and thus would be subject to Polish VAT.

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

(6) The derogation will have no impact on the Union's own resources accruing from VAT,  
HAS ADOPTED THIS DECISION:

*Article 1*

By way of derogation from Article 5 of Directive 2006/112/EC, Germany and Poland are authorised to treat the area of the construction site of the border bridge between Küstrin-Kietz and Kostrzyn nad Odrą, as forming part of the territory of Poland for the purposes of supplies of goods and services, intra-Community acquisitions and imports of goods intended for the demolition of an existing border bridge and the construction of a new border bridge.

*Article 2*

This Decision is addressed to the Federal Republic of Germany and the Republic of Poland.

Done at Brussels,

*For the Council  
The President*