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2021/0274 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision (EU) 2018/1493 authorising Hungary to introduce a special measure derogating from point (a) of Article 26(1) and Articles 168 and 168a 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 ('the VAT Directive[1]'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures derogating from the provisions of this Directive, in order to simplify the procedure for charging VAT or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Commission on 25 February 2021, Hungary requested an authorisation to continue to apply a measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of the VAT Directive and to restrict the right of deduction of VAT on the leasing of certain passenger cars not wholly used for business purposes. The request was accompanied by a report including a review of the percentage foreseen for the limitation of the right of deduction.

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 7 April 2021 of the request made by Hungary. The Commission notified Hungary by letter dated 8 April 2021 that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Articles 168 and 168a of the VAT Directive provide that a taxable person is entitled to deduct VAT charged on purchases made for the purpose of taxed transactions. Point (a) of paragraph 1 of Article 26 of that Directive contains a requirement to account for VAT when goods forming part of the assets of a business are put to use for private purposes of the taxable person or for that of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible. This system allows for the recovery of initially deducted VAT in relation to the private use.

In the case of passenger cars, this system is difficult to apply, in particular because it is difficult to identify the split between private and business use. Where records are kept, they add an additional burden to both the business and the administration in maintaining and checking them.

Pursuant to Article 395 of the VAT Directive, Member States may apply measures derogating from the provisions of the VAT Directive to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance if they have been authorised by the Council.

Hungary is currently authorised on the basis of Council Implementing Decision (EU) 2018/1493[2] to limit to 50% the right to deduct the VAT paid on expenditure eligible for deduction in respect of the leasing of passenger cars which are not wholly used for business purposes and to relieve taxable persons from having to treat the non-business use of such passenger cars as a supply of services. Passenger cars covered by the measure are motor vehicles principally designed for the transportation of maximum 9 persons with a gross vehicle weight not exceeding 5 tons. Vehicles designed for transport of goods, vehicles serving special purposes (i.e. crane truck, fire engine, truck-mixer), vehicles designed for the transport of 10 or more than 10 persons, tractors and trailers are excluded from the restriction

[1] OJ 347, 11.12.2006, p.1.

[2] Council Implementing Decision (EU) 2018/1493 of 2 October 2018 authorising Hungary to introduce a special measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 252/46, 8.10.2018, p. 44.

to the right of deduction of VAT and are treated under the normal rules. Taxable persons who do not wish to apply the 50% deduction limit and who wish to apply the VAT deduction up to the proportion of actual business use are allowed to do so provided they dispose of detailed evidence on the business use of leased passenger cars. This Council Implementing Decision shall expire on 31 December 2021.

Hungary has requested to prolong the authorisation to limit the initial deduction to a set flat percentage rate and in turn to relieve the business from accounting for tax on the private use. Hungary informed the Commission that the grounds for the prolongation of the measure are largely the same as described in the previous request. Hungary confirms that the special measure has delivered positive results for both companies and tax authorities, and the rationale for the derogation continues to apply. In accordance with Article 5 of Council Implementing Decision 2018/1493, Hungary has also presented a report on the percentage limit set for the VAT deduction. Hungary considers that the applied 50 percentage limit remains appropriate. According to the data submitted, the estimated extent of private use of leased company cars ranges from around 43% to 53% during the period 2016-2019. Since the estimate is based on indirect evidence and assumptions and could thus be overestimated, Hungary considers that the 50% input VAT deduction limit is the most appropriate. Moreover, experience from inspections by the tax authority has shown that the vast majority – roughly 90-95% – of taxable persons inspected apply the mandatory 50% deductible proportion. According to Hungary, the reason is, clearly, that they are thereby relieved of the obligation to keep itemised records, and that the rate of 50% private use is sufficiently close to practice.

Given the positive impact of the special measure on the administrative burden of tax payers and of tax authorities, it is proposed to grant the derogating measure for another limited period, until 31 December 2024. Any extension request should be accompanied by a report which includes a review of the percentage applied and should be sent to the Commission by 31 March 2024.

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

Similar derogations in relation to the right of deduction have been granted to other Member States (Estonia[3], Latvia[4], Croatia[5], Poland[6], Italy[7] and Romania[8]).

[3] Council Implementing Decision (EU) 2017/1854 of 10 October 2017 amending Implementing Decision 2014/797/EU authorising the Republic of Estonia to apply a measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 265, 14.10.2017, p. 17–18.

[4] Council Implementing Decision (EU) 2018/1921 of 4 December 2018 amending Implementing Decision (EU) 2015/2429 authorising Latvia to introduce a special measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 311, 7.12.2018, p. 36–37.

[5] Council Implementing Decision (EU) 2018/1994 of 11 December 2018 authorising Croatia to introduce a special measure derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 320, 17.12.2018, p. 35–37.

[6] Council Implementing Decision (EU) 2019/1594 of 24 September 2019 amending Implementing Decision 2013/805/EU authorising the Republic of Poland to introduce measures derogating from point (a) of Article 26(1) and Article 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 248, 27.9.2019, p. 71–72.

[7] Council Implementing Decision (EU) 2019/2138 of 5 December 2019 amending Decision 2007/441/EC authorising the Italian Republic to apply measures derogating from Articles 26(1)(a) and 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 324, 13.12.2019, p. 7–8.

Article 176 of the VAT Directive stipulates that the Council shall determine the expenditure on which the VAT is not deductible. Until such time, it authorises Member States to maintain exclusions which were in place on 1 January 1979. There are therefore a number of “stand still” provisions restricting the right to deduct VAT in relation to passenger cars.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct[9], such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

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 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 the procedure for charging the tax and to prevent certain forms of tax evasion or avoidance. In particular, given the potential for businesses to under declare their liability and the burdensome check of mileage data for tax authorities, the 50% restriction would simplify the VAT collection in a specific sector.

• Choice of the instrument

Proposed instrument: Council Implementing Decision.

Under Article 395 of the VAT Directive, a derogation from the common VAT provisions 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 Hungary and concerns only this Member State.

• Collection and use of expertise

There was no need for external expertise.

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8 Council Implementing Decision (EU) 2020/1262 of 4 September 2020 amending Implementing Decision 2012/232/EU authorising Romania to apply measures derogating from Article 26(1)(a) and Article 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 296, 10.09.2020, p. 6.

9 COM (2004) 728 final - Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations (OJ C 24, 29.1.2005, p.10) withdrawn on 21 May 2014 (OJ C 153 21. 05. 2014, p. 3)

- **Impact assessment**

The proposal is designed to simplify the procedure for charging the tax by removing the need for taxable persons to keep records on the private use of leased business cars, and, at the same time, to prevent certain form of VAT evasion through incorrect record keeping. The proposed measure has, therefore, a potential positive impact for both businesses and tax administrations. The solution has been identified by Hungary as a suitable measure and is comparable to other past and present derogations.

4. BUDGETARY IMPLICATIONS

The proposal will not adversely affect the Union's own resources from VAT.

5. OTHER ELEMENTS

The proposal is limited in time and includes a sunset clause set at 31 December 2024.

In case Hungary would consider another extension of the derogating measure beyond 2024, a report including a review of the percentage limit should be submitted to the Commission together with the extension request no later than 31 March 2024.

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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[1], and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Council Implementing Decision (EU) 2018/1493[2], authorised Hungary to apply, until 31 December 2021, a special measure consisting, on the one hand, in limiting to 50% the right to deduct value added tax ('VAT') on expenditure related to passenger cars not wholly used for business purposes, by way of derogation from Articles 168 and 168a of Directive 2006/112/EC, and, on the other hand, in not treating as supplies of services for consideration the use for non-business purposes of a passenger car included in the assets of a taxable person's business, where that car has been subject to a limitation authorised under Article 1 of that Implementing Decision, by way of derogation from Article 26(1), point (a), of that Directive ('the special measure').

(2) By letter registered by the Commission on 25 February 2021, Hungary requested an authorisation to continue to apply the special measure ('the extension request').

(3) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission transmitted the extension request to the other Member States by letters dated 7 April 2021. By letter dated 8 April 2021, the Commission notified Hungary that it had all the information necessary to consider the request.

(4) In accordance with Article 5 of Implementing Decision 2018/1493, Hungary submitted, together with the extension request, a report including the review of the percentage set for the VAT deduction. Based on currently available information, namely tax audit experience and statistical data relating to private use of passengers cars, Hungary confirms in its extension request that the limit of 50% is still justifiable and remains appropriate. Moreover, the special measure effectively reduced the administrative burden of businesses and of tax authorities. Hungary should therefore be authorised to continue to apply this special measure.

[1] OJ L 347, 11.12.2006, p. 1.

[2] Council Implementing Decision (EU) 2018/1493 of 2 October 2018 authorising Hungary to introduce a special measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax (OJ L 252/46, 8.10.2018, p. 44).

(5) The extension of the special measure should be limited in time to allow for an evaluation of its effectiveness and of the appropriate percentage. Hungary should therefore be authorised to continue to apply the special measure for a limited period, until 31 December 2024.

(6) In the event that Hungary considers that an extension of the authorisation beyond 2024 is necessary, it should submit to the Commission a report which includes a review of the percentage limit applied together with the request for an extension no later than 31 March 2024.

(7) The special measure will only have a negligible effect on the overall amount of tax revenue collected at the stage of final consumption and will have no adverse impact on the Union's own resources accruing from VAT.

(8) Implementing Decision (EU) 2018/1493 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 5 of Implementing Decision (EU) 2018/1493 is replaced by the following:

'*Article 5*

This Decision shall apply from 1 January 2019 until 31 December 2024.

Any request for the extension of the authorisation provided for in this Decision shall be submitted to the Commission by 31 March 2024 and shall be accompanied by a report which includes a review of the percentage set out in Article 1.'.

Article 2

This Decision is addressed to Hungary.

Done at Brussels,

For the Council
The President