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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2024) 543 final
Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2018/789 authorising Hungary to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Delegations will find attached document COM(2024) 543 final.

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2024/0302 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision (EU) 2018/789 authorising Hungary 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[1] ('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 10 June 2024, Hungary requested authorisation to continue to derogate from Article 193 of the VAT Directive regarding the person liable for payment of VAT in case of certain supplies carried out by taxable persons subject to liquidation or any other proceedings legally establishing its insolvency. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 7 August 2024 of the request made by Hungary. By letter dated 9 August 2024 the Commission notified Hungary that it had all the information it considered necessary for appraisal of the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Based on Article 199(1)(g) of the VAT Directive, Member States may provide that the person liable for the payment of VAT is the taxable person to whom the supply of immovable property sold by a judgement debtor in a compulsory sale procedure is made (the reverse charge mechanism). In 2017, Hungary requested the extension of the application of the reverse charge mechanism to supplies of capital goods and to supplies of other goods and services with an open market value exceeding HUF 100 000 (approximately EUR 250) at the time of supply, when the taxable person supplying the goods or services is subject to liquidation or any other proceedings legally establishing its insolvency. The derogation was authorised by Council Implementing Decision (EU) 2018/789[2] until 31 December 2021.

The measure was further extended until 31 December 2024 by Council Implementing Decision (EU) 2021/1775 of 5 October 2021[3].

Capital goods are typically high value tools, machinery and objects. Furthermore, according to Hungary, there is a large number of transactions exceeding the threshold of HUF 100 000 carried out by insolvent taxable persons. The liquidator often fails to pay the VAT due, since that amount is used to settle earlier claims. At the same time, the purchaser, being a taxable person with the right of deduction, can still deduct the VAT incurred, which has a negative impact on the budget. Hungary also registered cases of fraud whereby companies in liquidation would issue fictitious invoices to active companies, greatly inflating the amount of deductible VAT without the guarantee that the issuer of the invoices would pay the VAT due.

Hungary therefore argues that there is a need to safeguard the tax revenue and the budgetary interests on account of the number of taxable persons in financial difficulties performing the above supplies. The reverse charge mechanism is, according to Hungary, an appropriate tool

[1] OJ L 347, 11.12.2006, p. 1, ELI: http://data.europa.eu/eli/dir/2006/112/oj.

[2] Council Implementing Decision (EU) 2018/789 of 25 May 2018 authorising Hungary to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 134, 31.5.2018, p. 10, ELI: http://data.europa.eu/eli/dec_impl/2018/789/oj).

[3] OJ L 360, 11.10.2021, p. 110, ELI: http://data.europa.eu/eli/dec_impl/2021/1775/oj.

to this aim. The taxable person in liquidation would not be liable to pay the VAT due and the customer would not be penalised while losses to the public budget would be avoided.

Pursuant to Article 199a of the VAT Directive, there is the possibility, for all Member States, to apply the reverse charge mechanism for specific transactions prone to fraud. That Article is in force until 31 December 2026 and the Commission will assess whether supplies of capital goods and of other goods and services, when the taxable person supplying the goods or services is subject to liquidation or any other proceedings legally establishing its insolvency, should be included as well in the supplies covered by reverse charge mechanism, should there be a new proposal in this respect.

Consequently, even though Hungary requested the authorisation to be prolonged until 31 December 2027, it is proposed to authorise the extension of the derogation until 31 December 2026.

A derogation allowing a single Member State making use of the reverse charge mechanism, instead of general measures, constitutes a means of last resort and should be limited in time as much as possible. Moreover, that period should be sufficient to implement other conventional measures to reduce the losses to the public budget, in particular for those losses connected with fraudulent behaviours, thereby avoiding that this measure is prolonged again.

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 it 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 tax collection and combat tax evasion or avoidance. It does not go beyond what is required to fulfil these aims.

• Choice of the instrument

The instrument proposed is a Council Implementing Decision.

Under Article 395 of the VAT Directive, a derogation from the common VAT rules is only possible upon authorisation by the Council, which is 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

No stakeholder consultation has been conducted. The present proposal is based on a request made by Hungary and concerns only this particular Member State.

• Collection and use of expertise

There was no need for external expertise.

• Impact assessment

The proposal for Implementing Decision aims at safeguarding tax revenues and budgetary interests on account of companies under insolvency procedure in case they carry out supplies of capital goods or supplies of goods or services with an open market value exceeding HUF 100 000. According to Hungary, applying the reverse charge mechanism to these types of transactions has effectively simplified tax collection and prevented tax evasion or avoidance.

According to the Hungarian tax authority's figures for 2021–2023, the number of taxable persons concerned in 2021 – following emergency measures introduced as a result of the COVID-19 pandemic – rose to 380, falling to 335 in 2022 and to 212 in 2023.

Supplies of goods and services recorded under the reverse charge mechanism stood at HUF 34 billion in 2021 and HUF 31 billion in 2022. In 2023, the figure rose to HUF 157 billion, of which HUF 109 billion was linked to a single large taxpayer.

Consequently – assuming the standard tax rate – the tax liability amounted to HUF 8.3–9.3 billion in 2021 and 2022, rising to an exceptionally high figure of HUF 42 billion in 2023.

Considering, therefore, that there is little chance of recovering VAT from taxable persons subject to liquidation proceedings, the Hungarian tax authority estimates at around HUF 3.6–4 billion (HUF 5.6 billion in 2023 if we exclude the outlier, or HUF 18 billion if we include it) the amount of VAT that would have been lost to the budget each year if the derogation had not been maintained for movable tangible property.

Therefore, the derogating measure has a positive impact. Given this limited impact, Hungary should implement other conventional measures to reduce the losses to the budget, which could achieve similar results.

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 will have no negative implications for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause set at 31 December 2026.

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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 valued added tax[1], and in particular Article 395(1), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) In accordance with Article 193 of Directive 2006/112/EC, any taxable person carrying out a taxable supply of goods or services is, as a general rule, liable for the payment of value added tax ('VAT') to the tax authorities.

(2) By Council Implementing Decision (EU) 2018/789[2], Hungary was authorised to introduce a special measure derogating from Article 193 of Directive 2006/112/EC ('the special measure') as regards the person liable for payment of VAT where certain supplies are carried out by a taxable person subject to liquidation or any other proceedings legally establishing its insolvency.

(3) Council Implementing Decision (EU) 2021/1775 of 5 October 2021[3] extended the authorisation to apply the special measure until 31 December 2024.

(4) By letter of 10 June 2024 ('the request'), Hungary requested the Commission to further extend the authorisation to apply the special measure until 31 December 2027. Hungary submitted a report, including a review of the special measure, together with the request.

(5) Pursuant to Article 395(2), second subparagraph, of Directive 2006/112/EC, by letters dated 7 August 2024 the Commission transmitted the request to the other Member States. By letter dated 9 August 2024, the Commission notified Hungary that it had all the information necessary to consider the request.

(6) Hungary argues that taxable persons in liquidation or under insolvency procedure often do not pay the VAT due to the tax authorities. At the same time the purchaser, being a taxable person with the right of deduction, can still deduct the VAT incurred, thus negatively impacting the public budget. Hungary has also registered cases of

[1] OJ L 347, 11.12.2006, p. 1, ELI: http://data.europa.eu/eli/dir/2006/112/oj.

[2] Council Implementing Decision (EU) 2018/789 of 25 May 2018 authorising Hungary to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 134, 31.5.2018, p. 10, ELI: http://data.europa.eu/eli/dec_impl/2018/789/oj).

[3] OJ L 360, 11.10.2021, p. 110, ELI: http://data.europa.eu/eli/dec_impl/2021/1775/oj.

fraud whereby companies in liquidation would issue fictitious invoices to active companies and greatly reduce their payable tax, without the guarantee that the issuer of the invoices would pay the VAT due.

(7) In accordance with Article 199(1), point (g), of Directive 2006/112/EC, Member States may provide that the person liable for the payment of VAT is the taxable person to whom the supply of immovable property sold by a judgment debtor in a compulsory sale procedure is made ('the reverse charge mechanism'). The special measure allows Hungary to extend the application of the reverse charge mechanism to other supplies by taxable persons under insolvency procedure, namely the supply of capital goods and the supply of other goods or services with an open market value exceeding HUF 100 000.

(8) On the basis of information provided by Hungary, applying the reverse charge mechanism to those types of transactions has effectively simplified tax collection and prevented tax evasion or avoidance. The implementation of the measure has limited losses to public revenues and generated additional budget revenue.

(9) The requested extension should be limited in time, to allow the tax administration time to introduce other conventional measures to tackle the respective problem and to reduce the losses to the public budget, in particular those connected with fraudulent practices, until the special measure expires, thus making a further extension of that measure redundant. A derogation from Article 193 of Directive 2006/112/EC to allow making use of the reverse charge mechanism is only granted exceptionally for specific fraudulent areas and constitutes a means of last resort. Furthermore, Article 199a of Directive 2006/112/EC will remain in force until 31 December 2026. The authorisation to apply the special measure should therefore be extended only until 31 December 2026.

(10) The special measure will have no adverse impact on the Union's own resources accruing from VAT.

(11) Implementing Decision (EU) 2018/789 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

In Article 2 of Implementing Decision (EU) 2018/789, the second paragraph is replaced by the following:

'This Decision shall expire on 31 December 2026'.

Article 2

This Decision is addressed to Hungary.

Done at Brussels,

For the Council
The President