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2021/0030 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

authorising the United Kingdom in respect of Northern Ireland to apply a special measure derogating from Articles 16 and 168 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'[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 that Directive in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

The United Kingdom has left the European Union (EU) on 31 January 2020. In accordance with the Withdrawal Agreement[2], it is now a third country to the EU.

As from 1 January 2021, the EU VAT legislation is no longer applicable in the United Kingdom. However, on the basis of the Protocol on Ireland/Northern Ireland[3] (hereafter the 'Protocol'), which is part of the Withdrawal Agreement, Northern Ireland remains under the EU VAT legislation regarding goods with a view to avoiding a hard border between Ireland and Northern Ireland. For services, on the other hand, Northern Ireland is, together with the rest of the United Kingdom, considered as outside the EU.

This inevitably leads to a dual or mixed VAT system in Northern Ireland whereby supplies, intra-Community acquisitions and importations of goods that are located in Northern Ireland, according to the rules on the place of taxable transactions laid down in Title V of the VAT Directive, are subject to the harmonised EU rules, while supplies of services made in that same territory are not subject to the EU VAT system.

Therefore, to continue applying in Northern Ireland a special scheme on VAT, which provides for flat-rate measures in respect of non-deductible value added tax charged on fuel expenditure in company cars, which deviate from the general rules laid down in the VAT Directive, the granting of a derogation pursuant to Article 395(1) of the VAT Directive is needed.

By letter registered with the Commission on 27 November 2020, the United Kingdom requested authorisation to continue to apply a measure derogating from Articles 16 and 168 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the Member States by letter dated 10 December 2020 of the request made by the United Kingdom. By letter dated 11 December 2020, the Commission notified United Kingdom 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

Article 168 of the VAT Directive provides that a taxable person is entitled to deduct VAT charged on purchases made for the purpose of taxed transactions. Article 16 of the same Directive requires the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff to be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. This system allows for the recovery of initially deducted VAT in relation to the private use.

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1 OJ L 347, 11.12.2006, p. 1.

2 Council agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C384 I of 12.11.2019, p. 1).

3 OJ C384 I of 12.11.2019, p. 92.

In the case of company cars, partly used for private (non-business) purposes, it is often a difficult matter to calculate and to tax expenditure related to the private use under the above-mentioned rules.

In this context, the United Kingdom has operated a special scheme of flat rate taxation of private use of company cars authorised by Council Decision 86/356/EEC of 21 July 1986, authorising the United Kingdom to apply flat-rate measures in respect of non-deductible value added tax charged on fuel expenditure in company cars[4], which was based on the engine capacity and fuel type of the car.

This original derogation was abolished and replaced by Council Decision 2006/659/EC of 25 September 2006 authorising the United Kingdom to introduce a special measure derogating from Articles 5(6) and 11(A)(1)(b) of Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes[5], introducing a flat rate taxation of the private use on the basis of the car's CO_2 emission rating. The latter Council Decision was on its turn replaced by Council Implementing Decision (EU) 2015/2109 of 17 November 2015[6], which expired on 31 December 2018. A further extension of the measure, until 31 December 2020, was granted by Council Implementing Decision (EU) 2018/1918 of 4 December 2018[7].

The scheme is based on the fact that there is a direct relationship between the emission and the amount of fuel consumed as higher emissions correspond with greater fuel consumption. Based on these emission ratings, the fuel consumption per kilometre is calculated, which is then combined with the average private mileage determined on the basis of direct tax data and the retail price of road fuel. This results in a private use charge which corresponds with the amount of VAT due on the private use of the vehicle. The system is optional for taxable persons who may choose not to recover VAT on their fuel. Alternatively, they may keep detailed mileage records to provide evidence and support a calculation of their private mileage.

The United Kingdom included in its request an explanation on the functioning of the derogating measure. According to the United Kingdom, this system has proven to be accurate and has led to a substantial simplification, both for businesses and the tax administration. The United Kingdom also submits that it provides taxable persons with legal certainty by providing a simplified method which can be used to account for VAT on private use of fuel.

On this basis, the United Kingdom in respect of Northern Ireland has requested to be authorised to continue the application of the derogation from 1 January 2021. The derogation should be limited in time to 31 December 2023, so that it can be assessed whether the flat-rate scheme is still a correct reflection of the overall apportionment between business and private use.

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

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.

[4] OJ L 212, 2.8.1986, p. 35.
[5] OJ L 272, 3.10.2006, p. 15.
[6] OJ L 305, 21.11.2015, p. 49-50.
[7] OJ L 311, 7.12.2018, p.30-31.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct[8], 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 proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

• Proportionality

The Decision concerns an authorisation granted to the United Kingdom in respect of Northern Ireland 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 collecting VAT. It does not go beyond what is required to simplify VAT collection in a specific sector.

The system remains optional for taxable persons.

• 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 individually.

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

• Stakeholder consultations

This proposal is based on a request made by the United Kingdom in respect of Northern Ireland and concerns only this territory.

• Collection and use of expertise

There was no need for external expertise.

• Impact assessment

The proposed Decision aims at simplifying VAT collection in relation to fuel expenditure for company cars partly used for non-business purposes and has therefore a potential positive impact.

[8] 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)

For taxable persons, who would opt to make use of this system, it reduces administrative burdens and compliance costs by removing the need to keep detailed mileage records for each company car for VAT purposes. Such record keeping requirements are likely to be time consuming and often impose significant administrative burdens for relatively small amounts of tax. The simplification method also reduces burdens for the tax authorities, which would otherwise be required to audit numerous individual situations.

However, 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 Union budget.

In this context, it is reminded that, in accordance with the second paragraph of Article 8 of the Protocol, revenues resulting from transactions that are taxable in Northern Ireland shall not be remitted to the EU.

5. OTHER ELEMENTS

The proposal includes a sunset clause; an automatic time limit which is set at 31 December 2023.

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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 the first subparagraph of Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The United Kingdom withdrew from the European Union on 31 January 2020 on the basis of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'). Thus, Union legislation on value added tax ('VAT') is no longer applicable to or in the United Kingdom.

(2) However, in accordance with Article 8 of the Protocol on Ireland/Northern Ireland ('the Protocol'), which forms an integral part of the Withdrawal Agreement, Union legislation on VAT continues to apply in Northern Ireland[2] as regards goods.

(3) Therefore, taxable persons and certain non-taxable legal persons in the United Kingdom continue to be subject to Union legislation on VAT for transactions in goods in Northern Ireland.

(4) Article 168 of Directive 2006/112/EC provides that a taxable person is entitled to deduct VAT charged on purchases made for the purpose of taxed transactions. However, Article 16 of that Directive requires the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff to be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. This system allows for the recovery of initially deducted VAT in relation to the private use.

(5) By Council Decision 2006/659/EC[3], the United Kingdom was authorised to apply, until 31 December 2015, a special measure in order to determine on a flat-rate basis the proportion of non-deductible VAT relating to expenditure on fuel in business cars not exclusively used for business purposes ("the special measure"). The special measure, which is optional for taxable persons, is based on the level of carbon dioxide

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

[2] Subject to the democratic consent, referred to in Article 18 of the Protocol, to the continued application of Article 8 thereof.

[3] Council Decision 2006/659/EC of 25 September 2006 authorising the United Kingdom to introduce a special measure derogating from Articles 5(6) and 11(A)(1)(b) of Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ L 272, 3.10.2006, p. 15).

emissions from the car, as there is a proportional correlation between emissions and fuel consumption and therefore with expenditure on fuel.

(6) By Council Implementing Decision (EU) 2015/2109[4], the United Kingdom was authorised to continue applying the special measure until 31 December 2018. A further extension, until 31 December 2020, was granted by Council Implementing Decision (EU) 2018/1918[5].

(7) By letter registered with the Commission on 27 November 2020, the United Kingdom in respect of Northern Ireland requested authorisation to continue to apply the special measure from 1 January 2021. The request included an explanation on the functioning of the special measure.

(8) The Commission transmitted the request made by the United Kingdom to the Member States by letter dated 10 December 2020. By letter dated 11 December 2020, the Commission notified the United Kingdom that it had all the information necessary to consider the request.

(9) According to the United Kingdom, the special measure has provided an efficient simplified procedure for collecting VAT in relation to expenditure on fuel for business cars partly used for private purposes, for both taxable persons and the tax authority. It is therefore appropriate that the United Kingdom in relation to Northern Ireland be authorised to continue to apply the special measure.

(10) The derogation should be limited in time to 31 December 2023, as it is necessary to periodically reassess whether the flat-rate scheme continues to correctly reflect the overall apportionment between business and private use.

(11) In accordance with the second paragraph of Article 8 of the Protocol, revenues resulting from transactions that are taxable in Northern Ireland are not to be remitted to the Union. Therefore, the special measure will have no impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Articles 16 and 168 of Directive 2006/112/EC, the United Kingdom in respect of Northern Ireland is authorised, until 31 December 2023, to fix on a flat-rate basis the proportion of VAT relating to expenditure on fuel used for private purposes in business cars.

[4] Council Implementing Decision (EU) 2015/2109 of 17 November 2015 authorising the United Kingdom to apply a special measure derogating from Articles 26(1)(a), 168 and 168a of Directive 2006/112/EC on the common system of value added tax (OJ L 305, 21.11.2015, p. 49).

[5] Council Implementing Decision (EU) 2018/1918 of 4 December 2018 authorising the United Kingdom to apply a special measure derogating from Articles 16 and 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 311, 7.12.2018, p. 30).

Article 2

The proportion of the tax referred to in Article 1 shall be expressed in fixed amounts, established on the basis of the carbon dioxide emission level of the type of vehicle, that reflects fuel consumption. The United Kingdom in respect of Northern Ireland shall adjust those fixed amounts annually to reflect changes in the average cost of fuel.

Article 3

The system set up on the basis of this Decision shall be optional for taxable persons.

Article 4

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland in respect of Northern Ireland.

Done at Brussels,

For the Council
The President