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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

in accordance with Article 395 of Council Directive 2006/112/EC

1. BACKGROUND

By letter registered with the Commission on 22 February 2016, Slovakia requested an authorisation to apply a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 4 November 2016 of the request made by Slovakia. By letter dated 7 November 2016, the Commission notified Slovakia that it had all the information it considered necessary for appraisal of the request.

Pursuant to Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance. As this procedure provides for derogations from the general principles of VAT, in accordance with the consistent rulings of the Court of Justice of the European Union, such derogations should be proportionate and limited in scope.

As a general rule, the person liable for the payment of VAT to the tax authorities under Article 193 of the VAT Directive is the taxable person supplying the goods. The purpose of the derogation requested by Slovakia is to place that liability on the taxable person to whom the supplies are made (the so-called reverse charge mechanism), in the case of particular products, notably as regards certain meat products, live bovine animals, swine and poultry. These particular goods covered by the Slovak request are listed in detail under point 3.

According to Slovakia, a number of businesses within these trade sectors engage in tax evasion by not paying VAT to the tax authorities after selling the products. However, their customers, insofar as they are taxable persons with a right of deduction, being in receipt of a valid invoice, remain entitled to a tax deduction.

Therefore, Slovakia would want to apply the reverse charge mechanism, thus eliminating the possible fraud insofar as, in the absence of VAT being charged, the potential missing trader would not be able to keep the VAT received from his customer. The taxable recipient, insofar as being a taxable person with a full right of deduction, would declare and deduct the VAT in the same return. This would have the effect of preventing this type of fraud and, therefore, further losses.

2. REVERSE CHARGE

The person liable for the payment of VAT pursuant to Article 193 of the VAT Directive is the taxable person supplying the goods or services. The purpose of the reverse charge mechanism is to shift that liability onto the taxable person to whom the supplies are made.

Missing trader occurs when traders evade paying VAT to the tax authorities after selling their products. In the most aggressive cases of such tax evasion, the same goods or services are, via a "carousel" scheme (which involves the goods or services being traded between Member States), supplied several times without payment of VAT to the tax authorities. By designating the person to whom the goods or services are supplied as the person liable for the payment of VAT in such cases, the reverse charge mechanism has particularly been found to eliminate the opportunity to engage in that form of tax evasion.

3. THE REQUEST

Slovakia requests, under Article 395 of the VAT Directive, that the Council, acting upon a proposal of the Commission, authorises Slovakia to apply a special measure derogating from Article 193 of the VAT Directive as regards the application of the reverse charge mechanism in relation to supplies of the following goods:

CN code[1]	Product
ex 0201	Meat of bovine animals, fresh or chilled – just meat from domestic bovine animals
ex 0202	Meat of bovine animals, frozen – just meat from domestic bovine animals
ex 0203	Meat of swine, fresh, chilled or frozen – just meat from domestic swine
ex 0207	Meat and edible offal, of the poultry of heading 0105, fresh, chilled or frozen – just meat and edible offal of the domestic poultry
ex 0102	Live bovine animals – just live domestic bovine animals
ex 0103	Live swine – just live domestic swine
ex 0105	Live poultry, that is to say, fowls of the species Gallus domesticus, ducks, geese, turkeys and guinea fowls – just live domestic poultry

4. THE COMMISSION'S VIEW

When the Commission receives requests in accordance with Article 395, these are examined to ensure that the basic conditions for their granting are fulfilled i.e. whether the proposed specific measure simplifies procedures for taxable persons and/or the tax administration or whether the proposal prevents certain types of tax evasion or avoidance. In this context, the Commission has always taken a limited, cautious approach to ensure that derogations do not undermine the operation of the general VAT system, are limited in scope, necessary and proportionate.

Any derogation from the system of fractionated payment can therefore not be more than a last resort and emergency measure and must offer guarantees as to the necessity and exceptional nature of the derogation granted.

Against this background, it should be recalled that it has been the Commission's policy to consider derogations on the reverse charge mechanism only when, at the

[1] Combined nomenclature code established by Regulation (EEC) No 2658/87

same time, the goods at stake cannot reach the final consumption, a weak taxpayer is replaced by a reliable one, there is no risk of fraud to the retail level or to other Member States that do not use the mechanism.

In the first place, it is the Commission's view that the type of the various goods in question, as listed, are of a nature which should make auditing possible through conventional means without the need to implement the reverse charge mechanism. In this context, reference is made to a previous request for the pig-farming and animal fodder industry which contained certain products that are also covered by this request (COM(2013)148 of 19.3.2013 (in response to a request from Hungary)) (for comparable Communications see e.g. COM(2014)229 of 22.4.2014 ('sugar' (Hungary)), COM(2014) 623 of 10.10.2014 ('precious stones' (Estonia)).

Further, at least some of the listed products could be intended for private consumption, and transferring the whole VAT liability to the last link of the chain would therefore increase the risks. As previously noted in relation to goods in the agricultural sector, a shift of fraud to other Member States exists.

As to the concrete situation, it would appear, from the information provided by Slovakia, that one of the main problems is related to the fact that untrustworthy persons (straw men) are nominated in prominent functions within fraudulent companies from whom it would be impossible to obtain relevant cooperation or which are even difficult to contact. It would however not appear that the application of the reverse charge mechanism would be the most appropriate measure to deal with this problem.

5. CONCLUSION

On the basis of the above-mentioned elements, the Commission objects to the request made by Slovakia.