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EUROPEAN COMMISSION

Brussels, 4.5.2011
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2011/0104 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

**authorising Romania to introduce a special measure derogating from Article 193 of
Directive 2006/112/EC on the common system of value added tax**

EXPLANATORY MEMORANDUM

1. BACKGROUND TO THE PROPOSAL

Article 395 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('VAT Directive') provides that the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures derogating from the provisions of that Directive in order to simplify the procedure for collecting value added tax (VAT) or to prevent certain forms of tax evasion or avoidance.

By letter registered at the Commission on 4 November 2009 Romania requested authorisation to introduce a special measure derogating from Article 193 of the VAT Directive in order to designate the taxable recipients of supplies of wheat, rye, barley, maize, soya, rapeseed and sunflower seed as the persons liable to pay VAT instead of the suppliers.

By letter registered at the Commission on 2 July 2010 Romania requested a further derogation to extend the scope of the measure to other products.

By letter registered at the Commission on 26 July 2010 Romania sought authorisation for a period of two years, and undertook not to request its extension.

By letter registered at the Commission on 20 December 2010 Romania again confined its derogation request to wheat, rye, barley and barley for malting, maize, soya, rapeseed, sunflower seed, and sugar beet.

In accordance with Article 395(2) of the VAT Directive, the Commission notified the other Member States of Romania's requests by letter of 15 March 2011. By letter of 22 March 2011, the Commission notified Romania that it had all the information it considered necessary for appraisal of the requests.

In support of its request, Romania explained that it had found cases of tax evasion in the trade in certain cereals and oilseeds, usually carried out by setting up fly-by-night businesses. These businesses buy goods, without payment of VAT, either from suppliers outside Romania - and so their supplies are exempt under Article 138 of the VAT Directive - or from local producers covered by the tax exemption scheme for small enterprises provided for in Article 287 of the Directive, or do not declare their sales.

They then supply these goods to customers in Romania – wholesalers, exporters and processors – and invoice the VAT but disappear after delivery of the goods without paying the tax to the Treasury.

Their customers, however, are entitled to deduct the VAT as they are in possession of a valid invoice.

The special measure that is the subject of this proposal would make the customer the taxable person liable to the tax instead of the supplier, while still allowing the customer to deduct the tax in accordance with the ordinary rules. In this way the supplier would no longer be able to collect the VAT from its taxable customer without paying it back to the Treasury. Such a measure would put an immediate stop to this particular type of tax evasion.

During its application Romania would be able to introduce conventional anti-fraud measures that are compatible with the VAT Directive and designed to combat this type of VAT evasion after expiry of the authorisation.

This is nevertheless a radical measure that goes against the fractionated-payment principle of the VAT system and so carries the risk that evasion will shift to the stage when the raw materials are processed into industrial or food products, or to other sectors.

To forestall such risks Romania should, after a short application period, introduce appropriate declaration and control measures to run concurrently. The taxable persons covered by the measure will be required, in particular, to verify the taxable status of their customers before applying the measure, make separate reference to these operations in their VAT returns, and keep a list of customers for which the measure was applied at the disposal of the Romanian administration.

The Romanian authorities must also tighten up controls on taxable persons engaged in processing these products as, once they no longer incur VAT on their purchases of raw materials, they might be tempted not to declare the sales of their processed products.

Lastly, the Romanian authorities must ensure that the persons involved in the cases of evasion relating to the products covered by the special measure do not transfer their fraudulent activities to other agricultural products or other sectors of the economy.

The Commission must be notified of the measures adopted.

The taxable persons who, among other similar transactions involving agricultural products, are engaged in supplying the goods in question, together with the persons to whom these supplies are made, should be allowed to apply the special measure without incurring disproportionate administrative costs or running any risk as to legal certainty. The measure should apply only to unprocessed products, which are not normally used in the unaltered state for final consumption.

The goods targeted by the special measure can be determined accurately, avoiding any ambiguity, by using the combined nomenclature laid down in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.

Bearing in mind the provisions of Article 395 of the VAT Directive, the arguments put forward by Romania and the context in which the proposed special measure will be applied, the Commission believes that the derogation requested meets the conditions laid down in that article and, in particular, that it helps to prevent tax fraud, without affecting the amount of tax revenue collected at the stage of final consumption. Consequently, the Commission believes it must present the corresponding proposal to the Council.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The proposed decision concerns implementation of a measure to prevent tax fraud in connection with a number of products of a specific economic sector. It will therefore have a beneficial impact, particularly for honest taxable persons operating in that sector and for the Member State in question. There was no need to consult external experts or interested parties

or to assess the impact of this decision. The impact will in any case be limited because of the narrow scope and limited period of application of the derogation.

3. LEGAL ELEMENTS OF THE PROPOSAL

The purpose of the proposed decision is to allow Romania to apply a special measure derogating from Article 193 of the VAT Directive for the purpose of shifting VAT liability away from the supplier to the taxable recipient of supplies of certain agricultural products on which VAT is due and the taxable amount of which is over a given threshold.

The legal basis of this decision is Article 395 of the VAT Directive, which was adopted pursuant to Article 113 of the Treaty on the Functioning of the European Union. Under this article, a Member State wishing to apply special measures derogating from the Directive must obtain an authorisation from the Council, which will take the form of a Council Implementing Decision. Since it is an implementing measure involving the harmonisation of legislation on turnover taxes, the principle of subsidiarity has been adhered to.

The proposal complies with the principle of proportionality and therefore does not go beyond what is necessary to achieve the objective of preventing tax fraud because it involves only a part of a specific, limited economic sector and a small number of taxable persons and transactions. Accordingly, it derogates from the principles of the VAT Directive, in particular the principle of fractionated payments, only to a limited and appropriate extent.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Union budget.

Proposal for a

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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 (VAT)¹, and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letters registered at the Commission on 4 November 2009, 2 July 2010, 26 July 2010 and 20 December 2010, Romania requested authorisation, for a period of two years, to designate as liable to value added tax (VAT) the taxable persons to whom supplies of certain cereals and oilseeds are made, by way of derogation from Article 193 of Directive 2006/112/EC; it has said that it will not seek renewal of this authorisation.
- (2) The Commission forwarded Romania's request to other Member States by letter of 15 March 2011. By letter of 22 March 2011, the Commission notified Romania that it had all the information it considered necessary for appraisal of the requests.
- (3) Romania has found cases of tax evasion in the trade in certain unprocessed agricultural products, cereals and oilseeds. Some operators do not pay VAT on to the Treasury after delivering their products, especially if they have acquired them without payment of input tax. Their customers, however, are entitled to deduct the VAT as they are in possession of a valid invoice.
- (4) Designating the taxable person to whom the goods are supplied as liable for the VAT instead of the supplier would be a temporary emergency measure that would put an end to this form of evasion. Application of this measure for two years should give Romania time to introduce in the agricultural sector definitive measures compatible with the Directive 2006/112/EC that would prevent and combat this form of evasion.
- (5) To prevent the fraudulent activity being transferred to the processing stage of food or industrial goods, or to other products, Romania should introduce at the same time appropriate declaration and control measures and notify the Commission thereof.

¹ OJ L 347, 11.12.2006, p. 1.

- (6) To ensure that the special measure applies only to unprocessed agricultural products and that the taxable persons concerned do not incur disproportionate administrative costs or run any risk as to legal certainty, the goods covered by the special measure should be determined by using the combined nomenclature laid down in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff².
- (7) The special measure is justified and proportionate to the objectives pursued. It is of fixed duration and concerns only a number of clearly designated products that are not normally used in the unaltered state for final consumption and have been the subject of tax evasion activities that have caused a substantial loss of VAT revenue. Given the scale of this lost tax revenue, the measure should be adopted as soon as possible.
- (8) The special measure will not affect the amount of VAT collected by Romania at the final consumption stage and will have no adverse impact on the European Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, Romania is hereby authorised to designate as the person liable to pay VAT the taxable recipient of supplies of the following goods, as set out in the combined nomenclature established by Regulation (EEC) No 2658/87:

CN code	Product
1001 10 00	Durum wheat
1001 90 10	Spelt for sowing
ex 1001 90 91	Common wheat, seed
ex 1001 90 99	Other spelt and common wheat, not for sowing
1002 00 00	Rye
1003 00	Barley
1005	Maize
1201 00	Soya beans, whether or not broken
1205	Rape or colza seeds, whether or not broken
1206 00	Sunflower seeds, whether or not broken

² OJ L 256, 7.9.1987, p. 1.

Article 2

The authorisation provided for in Article 1 is subject to Romania's introducing appropriate and effective declaration and control obligations on taxable persons who supply the goods to which that authorisation applies.

Romania shall notify the Commission of the introduction of the obligations and measures referred to in the first paragraph.

Article 3

This Decision shall apply for two years from the time of its notification.

Article 4

This Decision is addressed to Romania.

Done at Brussels,

*For the Council
The President*