Concerns:
Regulation of the Minister for Finance on software-based cash registers
Notification number: 2020/38/PL (Poland)

On behalf of Bulgarian association of distributors of business software (BADBS) **I am hereby presenting reservations to the draft Regulation of the Minister for Finance on software-based cash registers (of 17 January 2020)**, **due to contradiction thereof with Article 56 of the Treaty on the Functioning of the European Union**, as regards requirements towards an entity being a non-national producer within the meaning of the draft regulation concerned.

Justification of the reservations

The draft Regulation of the Minister for Finance on software-based cash registers, dated 17th of January 2020, notified by Poland (hereinafter: the "Notified Draft Regulation"), determines, *inter alia*, technical requirements for such cash registers.
Numerous provisions of the Notified Draft Regulation, determining technical requirements for software-based cash registers (hereinafter: the „Cash Registers"), include the term "manufacturer" within the meaning of an entity who (pursuant to the Notified Draft Regulation) is supposed to undertake certain activities necessary for that software to be approved as compliant with technical requirements for Cash Registers.
As an example, a reference can be made to:
- §2(2) from which it appears that a manufacturer shall assign to a given Cash Register public key certificate containing the unique number and a taxpayer's tax identification number (NIP) (pursuant to §6 par. 1 a taxpayer is permitted to use only a Cash Register provided with the valid certificate);
- §21 under which a manufacturer shall be obligated to receive – for the given type of Cash Registers – Central Measurement Office President's confirmation of the Cash Registers' having met all functions and technical requirements as specified by the law;
- § 27 under which a manufacturer shall be obligated to provide a Cash Register with a unique number allotted by a Minister responsible for public finance, before such Cash Register is placed on market.
The above shows that only an entity being a manufacturer within the meaning of the Notified Draft Regulation can place on market both given types and the given-type specific models of the Cash Register concerned.
Pursuant to Article 1 par. 1(f) of the Directive 2015/1535 (EU) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (hereinafter: Directive 2015/1535) the term "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de iure* or *de facto*, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions

of Member States, except those provided for in Article 7 of the Directive 2015/1535, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider. In addition, pursuant to Article 1 par. 1(e) of the Directive 2015/1535, "rule on services" means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of Article 1 par. 1(b) of the Directive 2015/1535, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

The above means that the definition of the manufacturer, as provided in the Notified Draft Regulation, constitutes the technical regulation within the meaning of the Directive 2015/1535. The aforementioned has been confirmed by the Court of Justice in the judgement of 19 July 2012 in joined cases C-213/11, C-214/11 and C-217/11. Even though the judgement has been based on the provisions of the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, however – having regard to analogous content of the law provisions determining which regulations are deemed to be technical regulations – that judgement remains valid and up-to-date also under the rule of the Directive 2015/1535.

Pursuant to §2(20) of the Notified Draft Regulation, the term "manufacturer" means a national manufacturer or an operator carrying out an intra-Community acquisition or importation of Cash Registers with a view to placing them on the market.

Next, according to the definition in §2(21) of the Notified Draft Regulation, the national manufacturer is a legal entity, organisational unit without legal personality or a natural person with their registered office or place of residence in the Republic of Poland that has manufactured Cash Registers and is placing them on the market within the scope of business activities.

The Notified Draft Regulation contains no definition of an entity engaged in the intra-Community acquisition or importation of Cash Registers with a view to placing them on market.

Whereas:

- The Notified Draft Regulation shall (as from the moment of passing thereof) constitute executive law to the Act of 11 March 2004 on goods and services tax (hereinafter: the „VAT Act"); thus, the VAT Act must be referred to in order to determine the meaning of terms which have been mentioned without definition thereof in the Notified Draft Regulation,
- provision of a software is a service within the meaning of Article 8 par. 1 of the VAT Act (the transaction regards granting the right to use the intangible asset, i.e. a work, in the form of a software), no matter whether the software is provided on a physical carrier (CD, pendrive) or downloaded from the provider's web page,
- as regards services, the VAT Act does not provide the same or similar solution as with respect to goods, pursuant to Article 11 par. 1 thereof; according to the provision concerned, the intra-Community acquisition of goods also takes place where a movement of goods belonging to a VAT payer's business is conducted by or for the VAT payer, while those goods are transferred from another EU Member State to Poland (there is no "legal

assumption" of "acquisition of a service from oneself" for the purpose of establishment of tax obligation in particular Member States); that means that a service can be acquired only from another entity,

- unlike law provisions on goods, the VAT Act (Article 2(9) in connection to Article 17 par. 1(4)) does not provide differentiation between intra-Community acquisition and importation of services (every provision of a service for a VAT payer registered in Poland by a value-added-tax payer having its place of establishment beyond the territory of Poland constitutes importation of services),

it must be acknowledged, that an entity exercising intra-Community acquisition or importation of the Cash Registers with the intent to place them on the market is the one that has jointly fulfilled both of the following conditions:

1) it has not created a software-based Cash Register within the scope of its business activity, but (i) acquired – from another entity having its place of establishment beyond the territory of Poland – author's economic rights to the Cash Register being the work, or (ii) obtained from that entity the permit to grant – in its own name and on its own account – to Polish VAT payers, licence to use the Cash Register being another party's work;

2) its permanent address [*i.e. place of residence within the meaning of the Notified Draft Regulation's §2(21) referred to above*] / place of establishment (or at least fixed establishment) is located in Poland; in the light of the definition contained in the Article 11 of the Council Implementing Regulation (EU) no. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, and in the light of the settled case-law of the Court of Justice of the European Union, an establishment may be regarded as a fixed one only where it entails the permanent presence of both the human and technical resources constituting the structure necessary for the provision of those services independently (i.e. without involvement of human and technical resources of the entrepreneur's main place of establishment) and where no base exists to deem those services to have been provided at the service provider's place of establishment (for example: Judgements of the CJEU of 4 July 1985 in the case 168/84, of 17 July 1997 in the case C-190/95, of 20 February 1997 in the case C-260/95, and of 28 June 2007 in the case C-73/06).

The above means that pursuant to the provision of §2(20) of the Notified Draft Regulation, entrepreneurs having their seats located in another Member State of the European Union (i.e. out of Poland), who on their own have created software that meets technical conditions for the Cash Registers, as well as (notwithstanding the aforementioned) entrepreneurs having their place of establishment located in another Member State of the European Union (i.e. out of Poland), who have no permanent facility (fixed establishment) in Poland, are excluded from the range of entities that may place the Cash Registers on the market.

Requirement for an entrepreneur established in another Member State of the European Union (i.e. out of Poland) to keep permanent human and technical resources in Poland in order to render services consisting in providing Polish service recipients with software is contradictory to Article 56 of the Treaty on the Functioning of the European Union, pursuant to which restrictions on freedom to provide services within the Union shall be

prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The principle of freedom to provide services, as expressed in Article 56 of the Treaty on the Functioning of the European Union, has been developed under the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereinafter: Directive 2006/123). Article 16 of Directive 2006/123 provides that Member States shall respect the right of providers to provide services in a Member State other than that in which they are established (par. 1) and they may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing on the provider obligation to have an establishment in their territory (par. 2(a)). In addition, pursuant to Article 19 of the Directive 2006/123 (which regulates the issue of protection of a service recipient), Member States may not impose on a service recipient requirements which restrict the use of a service supplied by a provider established in another Member State.
According to the settled case-law of the Court of Justice of the European Union, all measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions of that freedom, whereas the requirement of a permanent establishment is the very negation of that freedom (Judgement of 9 July 1997, case no. C-222/95; of 15 January 2002, case no. C-439/99; of 3 October 2006, case no. C-452/04).
In other judgements the Court of Justice of the European Union explained that the establishment requirement ran directly contrary to the freedom to provide services, since it prevented the provision, in a given State, of the services in question in that Member State by private entities established only in other Member States (judgements of 9 March 2000 in the case C-355/98, of 29 November 2007 in the case C-393/05, of 29 November 2007 in the case C-404/05).
In the light of the case-law of the Court of Justice of the European Union referred to above, the requirement that an entity established in another Member State of the European Union (i.e. out of Poland), can be permitted to provide a Cash Register only if it has not created the Cash Register within the scope of its business activity (and that requirement – in terms of the Notified Draft Regulation, with respect to an entity established in another Member State of the European Union – shall come down to the one that a software manufacturer must not be a software manufacturer), must be deemed to be the more contradictory to Article 56 of the Treaty on the Functioning of the European Union.

Yours faithfully,

on behalf of Bulgarian association of distributors of business software (BADBS):