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European Union

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### **LEGISLATIVE ACTS AND OTHER INSTRUMENTS**

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Subject: COUNCIL IMPLEMENTING DECISION amending Decision 2009/791/EC authorising the Federal Republic of Germany to continue to apply a measure derogating from Article 168 of Directive 2006/112/EC on the common system of value added tax

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**COUNCIL IMPLEMENTING DECISION (EU) .../...**

**of ...**

**amending Decision 2009/791/EC authorising the Federal Republic of Germany  
to continue to apply a measure derogating from Article 168 of Directive 2006/112/EC  
on the common system of value added tax**

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<sup>1</sup>, and in particular Article 395(1), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

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<sup>1</sup> OJ L 347, 11.12.2006, p. 1.

Whereas:

- (1) Articles 168 and 168a of Directive 2006/112/EC govern taxable persons' right to deduct value added tax (VAT) charged on goods and services supplied to them for the purposes of their taxed transactions. The Federal Republic of Germany ('Germany') has been authorised to introduce a derogating measure intended to exclude VAT borne on goods and services from the right of deduction where those goods and services are used by the taxable person for more than 90 % for their private purposes or for purposes of their employees, or in general for non-business purposes or non-economic activities.
- (2) Initially, Council Decision 2000/186/EC<sup>1</sup> authorised Germany to introduce and apply measures derogating from Articles 6 and 17 of Council Directive 77/388/EEC<sup>2</sup> until 31 December 2002. Council Decision 2003/354/EC<sup>3</sup> authorised Germany to apply a measure derogating from Article 17 of Directive 77/388/EEC until 30 June 2004. Council Decision 2004/817/EC<sup>4</sup> extended that authorisation until 31 December 2009.

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<sup>1</sup> Council Decision 2000/186/EC of 28 February 2000 authorising the Federal Republic of Germany to apply measures derogating from Articles 6 and 17 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment (OJ L 59, 4.3.2000, p. 12).

<sup>2</sup> Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

<sup>3</sup> Council Decision 2003/354/EC of 13 May 2003 authorising Germany to apply a measure derogating from Article 17 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ L 123, 17.5.2003, p. 47).

<sup>4</sup> Council Decision 2004/817/EC of 19 November 2004 authorising Germany to apply a measure derogating from Article 17 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ L 357, 2.12.2004, p. 33).

- (3) Council Decision 2009/791/EC<sup>1</sup> authorised Germany to continue to apply a measure derogating from Article 168 of Directive 2006/112/EC. Following successive extensions, that authorisation is due to expire on 31 December 2021.
- (4) Council Directive 2009/162/EU<sup>2</sup> inserted Article 168a into Directive 2006/112/EC in order to limit the deduction to the proportion of effective business use and thus apply more effectively the principle whereby the deduction arises only insofar as the goods and services concerned are used for the purposes of the taxable person's business. Article 1 of Decision 2009/791/EC has been amended to include a reference to Article 168a of Directive 2006/112/EC. The title of Decision 2009/791/EC therefore needs to refer to Article 168a of Directive 2006/112/EC as well.
- (5) By letter registered with the Commission on 19 February 2021, Germany submitted a request to the Commission that the authorisation to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC to entirely exclude from the right of deduction the VAT borne on goods and services that are used by a taxable person for more than 90 % for private or non-business purposes, including non-economic activities ('the special measure') be prolonged ('the request'). The request was accompanied by a report on the application of the special measure, including a review of the apportionment rate applied on the right to deduct VAT as required by Article 2 of Decision 2009/791/EC.

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<sup>1</sup> Council Decision 2009/791/EC of 20 October 2009 authorising the Federal Republic of Germany to continue to apply a measure derogating from Article 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 283, 30.10.2009, p. 55).

<sup>2</sup> Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax (OJ L 10, 15.1.2010, p. 14).

- (6) Pursuant to Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission transmitted the request to the other Member States by letters dated 17 March 2021. By letter dated 18 March 2021, the Commission notified Germany that it had all the information necessary to consider the request.
- (7) According to Germany, the special measure has proven very effective in simplifying the collection of VAT and preventing tax evasion and avoidance. The special measure reduces administrative burden for businesses and tax administrations, as there is no need for any monitoring of the subsequent use of the goods and services to which the exclusion from deduction applied at the time of their acquisition. Germany should therefore be authorised to continue to apply the special measure for a further limited period until 31 December 2024.
- (8) In the event that Germany considers an extension beyond 2024 to be necessary, it should submit a request to the Commission by 31 March 2024, accompanied by a report on the application of the special measure, which should include a review of the apportionment rate applied.
- (9) The special measure will have no adverse impact on the Union's own resources accruing from VAT.
- (10) Decision 2009/791/EC should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

## *Article 1*

Decision 2009/791/EC is amended as follows:

- (1) The title is replaced by the following:

‘Council Decision of 20 October 2009 authorising the Federal Republic of Germany to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax’;

- (2) Article 2 is replaced by the following:

*Article 2*

This Decision shall expire on 31 December 2024.

Any request for the extension of the derogating measure provided for in this Decision shall be submitted to the Commission by 31 March 2024.

Such request shall be accompanied by a report on the application of this measure, including a review of the apportionment rate applied on the right to deduct VAT on the basis of this Decision.’.

*Article 2*

This Decision shall take effect on the date of its notification.

*Article 3*

This Decision is addressed to the Federal Republic of Germany.

Done at ...,

*For the Council*

*The President*

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