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PROPOSAL

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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2021/1778 as regards an extension of the authorisation for Germany to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Delegations will find attached document COM(2024) 294 final.

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Proposal for a

COUNCIL IMPLEMENTING DECISION

**amending Implementing Decision (EU) 2021/1778 as regards an extension of the
authorisation for Germany to apply a special measure derogating from Article 193 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 tax¹ (hereafter ‘the VAT Directive’), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation 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.

By letter registered with the Commission on 19 February 2024, Germany requested authorisation to continue to apply the special measure regarding the person liable for payment of VAT in case of transfer of emission allowances traded in the national system under the Fuel Emission Allowance Trading Act (BEHG) of 12 December 2019, extending the application of the special measure granted by Council Implementing Decision (EU) 2021/1778 of 5 October 2021², which derogates 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 27 March 2024 of the request made by Germany. By letter dated 2 April 2024 the Commission notified Germany 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

As a general rule, Article 193 of the VAT Directive stipulates that the taxable person supplying goods or services is liable to pay VAT.

Pursuant to Article 395 of the VAT Directive, Member States may apply measures derogating from the provisions of the VAT Directive to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance if they have been authorised by the Council.

Germany in 2021 requested a derogation from Article 193 of the VAT Directive, in order to designate taxable persons receiving transfers of emission allowances under the Fuel Emission Allowance Trading Act (BEHG) of 12 December 2019 as liable for payment of VAT (the reverse charge mechanism). The request was approved by Council Implementing Decision(EU) 2021/1778 of 5 October 2021, which is set to expire on 31 December 2024.

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community³ governs the greenhouse gas emission allowance trading scheme in the EU (EU Emissions Trading Scheme or EU ETS). The Directive allows Member States to maintain their own national trading systems in parallel.

Under the BEHG, Germany has created a legal framework for a national emissions trading scheme for the pricing of greenhouse gas emissions from fossil fuels, which do not fall under the EU Emissions Trading Scheme. The Act will help to achieve national climate targets,

¹ OJ L 347, 11.12.2006, p. 1.

² Council Implementing Decision (EU) 2021/1778 of 5 October 2021 authorising the Federal Republic of Germany to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 360, 11.10.2021, p. 117–119).

³ OJ L 275, 25.10.2003, p. 32-46.

including the long-term target of net-zero greenhouse gas emissions by 2050, and the reduction targets under the EU Climate Regulation, as well as improving energy efficiency.

Experience in allowance trading has generally shown that this sector is highly vulnerable to turnover tax fraud. For this reason, the VAT Directive provides in Article 199a(1) for the possibility for Member States to apply the reverse charge mechanism to the transmission of certain allowances and certificates. Germany makes use of the possibilities provided for in Article 199a(1)(a) and (f) of the VAT Directive and applies the reverse charge mechanism to greenhouse gas emission allowance trading under the EU Emissions Trading Scheme and to trading in gas and electricity certificates. This has helped to reduce tax losses related to the transfer of such allowances and certificates.

Similar to the experience in allowance trading in the scope of the EU ETS, it can be assumed that trading in allowances for fuel emissions under the BEHG could also be exploited for fraudulent purposes and that losses in turnover tax are therefore to be expected in this field. One particular feature of emission allowance trading is that the allowances can be exchanged quickly, repeatedly and easily, without the expense required for the transport of goods for example. The corresponding supply chains are obscured by the frequent and rapid change of ownership, making it very difficult for the authorities to detect and hence to ensure that the proper amount of tax is levied.

It is also expected that the supply chain could involve ‘missing traders’ who, when discovered, have either disappeared already or no longer have any assets, so that the tax evaded can no longer be collected by the authorities. Under such scenario, the purchaser of the allowances in the supply chain declares the turnover tax shown in the supplier’s invoice as deductible input tax under Articles 167 and 168 of the VAT Directive, but the supplier does not pay the invoiced turnover tax to the tax authorities. Since the input tax deduction is not matched by any turnover tax revenue, the input tax represents a tax loss for the German tax authorities.

The application of the reverse charge mechanism for trading in greenhouse gas emissions pursuant to Article 199a(1)(a) and (b) of the VAT Directive is limited to allowances traded under the EU emission trading system. Therefore, Articles 199a(1)(a) and (b) of the VAT Directive do not provide legal basis for applying the reverse charge mechanism to the trade of allowances under national trading systems such as the BEHG.

As provided by Article 2 of Council Implementing Decision (EU) 2021/1778, Germany submitted, together with the extension request, a report on the impact of the measure. According to the German authorities, the special measure helped to prevent tax evasion and avoidance in the sector of emissions allowances trading and they find good reasons to continue with such a procedure.

Taking into consideration the vulnerability to fraud in the allowance-trading sector, and the impossibility to apply Articles 199a(1)(a) and (b) of the VAT Directive to transmissions of allowances under the BEHG, it is therefore appropriate to authorise Germany to continue to apply the reverse charge mechanism to the abovementioned transmissions until 31 December 2026.

In case Germany would consider an extension of the special measure beyond 2026, it should submit to the Commission a request for an extension accompanied by a report on the application of the special measure by 31 March 2026 at the latest. This report shall include an

assessment of the impact of the measure on the fight against VAT fraud and the number of traders and transactions affected by the measure.

Pursuant to Article 199a(1)(a) and (b) of the VAT Directive, the possibility to apply the reverse charge mechanism for trading in greenhouse gas emissions will end on 31 December 2026. The Commission will assess whether the trade of allowances under national trading systems, such as the BEHG, should be included as well in the supplies covered by reverse charge mechanism, should there be a new proposal in this respect.

For this reason, the extension period of this derogation is limited to two years as to coincide with the date of 31 December 2026.

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

Articles 199a(1)(a) and (b) of the VAT Directive allow Member State to apply the reverse charge mechanism to the transfer of allowances to emit greenhouse gases, as defined in Article 3 of Directive 2003/87/EC, and to the transfer of other units that may be used by operators for compliance with the same Directive.

The extension of a special measure allowing to apply the reverse charge mechanism to the transmission of allowances referring to emissions that do not fall within the EU Emissions Trading Scheme regulated by Directive 2003/87/EC is consistent with the objectives pursued by the abovementioned provisions in the VAT Directive.

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 subsidiarity principle does not apply.

- **Proportionality**

The Decision concerns an authorisation granted to a Member State 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 tax collection and combat tax evasion. It does not go beyond what is required to fulfil these aims.

- **Choice of the instrument**

The instrument proposed is a Council Implementing Decision.

Under Article 395 of the VAT Directive, a derogation from the common VAT rules is only possible upon authorisation by the Council, which is acting unanimously on a proposal from the Commission. A Council Implementing Decision is the most suitable instrument since it can be addressed to an individual Member State.

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

- **Stakeholder consultations**

No stakeholder consultation has been conducted. The present proposal is based on a request made by Germany and concerns only this particular Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for a Council Implementing Decision aims at preventing certain forms of tax evasion or avoidance in the allowance-trading sector, which is especially vulnerable to VAT fraud. The reverse charge mechanism should help Germany to curb VAT fraud in this sector. Consequently, the special measure will have a potential positive impact.

Germany reported that no cases of VAT evasion was ascertained in the relevant period due to the special measure in the trade of emission allowances issued on the basis of the Fuel Emissions Trading Act.

Because of the narrow scope of the special measure and the limited application in time, its impact will in any case be limited.

4. BUDGETARY IMPLICATIONS

The proposal will have no negative implications for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause set at 31 December 2026.

A report including a review of the measure should be submitted to the Commission together with the extension request and this no later than 31 March 2026.

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 tax¹, and in particular Article 395(1), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Pursuant to Article 193 of Directive 2006/112/EC, the taxable person supplying the goods or services is, as a general rule, liable for the payment of value added tax (VAT) to the tax authorities.
- (2) In accordance with Council Implementing Decision (EU) 2021/1778², Germany was authorised to apply, until 31 December 2024, a special measure derogating from Article 193 of Directive 2006/112/EC ('the special measure'), to designate the taxable person receiving transfers of emission allowances under the BEHG as liable for payment of VAT.
- (3) By letter registered with the Commission on 19 February 2024, Germany requested the extension of the special measure granted by Implementing Decision (EU) 2021/1778 and thereby an authorisation to continue to apply the special measure beyond 31 December 2024 ('the request').
- (4) Pursuant to Article 395(2), second subparagraph of Directive 2006/112/EC, by letters dated 27 March 2024, the Commission transmitted the request to the other Member States and, by letter dated 2 April 2024, it notified Germany that it had all the information necessary to consider the request.
- (5) According to the information provided by Germany, the factual situation which justified the application of the special measure has not changed. Germany submitted to the Commission, together with the request, a report on the overall positive practical experience that shows that the use of the reverse charge mechanism in the transfer of emission allowances under the BEHG has proved its worth in practice. The arrangement is an important component in combating VAT fraud, whose importance is expected to increase in the coming years because of changing market conditions.

¹ OJ L 347, 11.12.2006, p. 1, ELI: <http://data.europa.eu/eli/dir/2006/112/oj>.

² Council Implementing Decision (EU) 2021/1778 authorising the Federal Republic of Germany to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 360, 11.10.2021, p. 117, ELI: http://data.europa.eu/eli/dec_impl/2021/1778/oj).

- (6) It is therefore appropriate to extend the authorisation granted in Implementing Decision (EU) 2021/1778. The extension of the authorisation should be limited in time to allow for an evaluation of the effectiveness and appropriateness of the special measure. The derogating measure should therefore expire on 31 December 2026.
- (7) If Germany wishes to extend that measure beyond 2026, it should submit a report to the Commission, including a review of the special measure together with the extension request by 31 March 2026 at the latest. That report should include an assessment of the impact of the measure on the fight against VAT fraud and the number of traders and transactions affected by the measure.
- (8) The special measure will have no adverse impact on the Union's own resources accruing from VAT.
- (9) Implementing Decision (EU) 2021/1778 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 2 of Implementing Decision (EU) 2021/1778 is replaced by the following:

‘Article 2

This Decision shall expire on 31 December 2026.

Any request for extension of the measure provided for in this Decision shall be submitted to the Commission by 31 March 2026 and shall be accompanied by a report which includes an assessment of the measure and of its impact on the fight against VAT fraud and the number of traders and transactions affected by the measure.’.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

*For the Council
The President*