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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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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 2009/1013/EU authorising the Republic of Austria 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

Delegations will find attached document COM(2024) 448 final.

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COM(2024) 448 final

2024/0247 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision 2009/1013/EU authorising the Republic of Austria 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

EXPLANATORY MEMORANDUM

Pursuant to Article 395(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[1] ('the VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures derogating from the provisions of this 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 with the Commission on 20 March 2024, Austria requested an authorisation to continue to apply a special measure derogating from Articles 168 and 168a of the VAT Directive in order to exclude from the right to deduct the VAT borne on goods and services which are used for more than 90 % by the taxable person for their private use or for the use of their employees, or more generally, for non-business purposes or non-economic activities. The request was accompanied by a report on the application of this special measure including a review of the apportionment rate applied on the right to deduct VAT as required by Article 2 of Council Implementing Decision 2009/1013/EU[2] as amended by Council Implementing Decision (EU) 2021/1779[3].

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 16 May 2024 of the request made by Austria. By letter dated 17 May 2024, the Commission notified Austria that it had all the information necessary to consider the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Article 168 of the VAT Directive provides that a taxable person is entitled to deduct the VAT charged on purchases made and services received for the purpose of their taxed transactions. Article 168a(1) of the VAT Directive provides that the VAT on expenditure related to immovable property forming part of the business assets of a taxable person and used both for business and non-business purposes shall be deductible only up to the proportion of the property's use for purposes of the taxable person's business. Pursuant to Article 168a(2) of the VAT Directive Member States may also apply this rule in relation to expenditure related to other goods forming part of the business assets as they specify.

Pursuant to Article 395 of the VAT Directive, Member States may apply special 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.

Austria requested an authorisation to continue to apply a special measure derogating from Articles 168 and 168a of the VAT Directive allowing it to entirely exclude from the right to deduct the VAT borne on goods and services which are used for more than 90 % by the taxable person for private or non-business purposes, including non-economic activities.

[1] OJ 347, 11.12.2006, p.1.

[2] Council Implementing Decision (2009/1013/EU) of 22 December 2009 authorising the Republic of Austria to continue to apply a measure derogating from Articles 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 348, 29.12.2009, p. 21.

[3] Council Implementing Decision (EU) 2021/1779 of 5 October 2021 amending Implementing Decision 2009/1013/EU authorising the Republic of Austria 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 360, 11.10.2021, p. 120.

This special measure was initially granted to Austria by Council Decision 2004/866/EC of 13 December 2004[4] for a period until 31 December 2009 and was again granted by Council Implementing Decision 2009/1013/EU of 22 December 2009 until 31 December 2012. The latter had subsequently been prolonged until 31 December 2015 by Council Implementing Decision 2012/705/EU of 13 November 2012[5], until 31 December 2018 by Council Implementing Decision (EU) 2015/2428 of 10 December 2015[6], until 31 December 2021 by Council Implementing Decision (EU) 2018/1487 of 2 October 2018[7] and until 31 December 2024 by Council Implementing Decision (EU) 2021/1779 of 5 October 2021.

In its current request, Austria informed the Commission that the application of the special measure has proved to be effective in simplifying VAT collection since it reduces administrative costs and increases legal certainty for both the tax administration and taxpayers. There is no need to determine the actual use of goods and services in cases where their use for business purposes represents less than 10%. Otherwise, personal use would have to be documented and determined, and would have to be subject to taxation under Article 26 of the VAT Directive. The correct taxation of the personal use would have to be monitored by the tax administration. Thanks to the special measure, it is possible to dispense with extensive documentation, monitoring and verification measures, thus relieving the burden on both tax authorities and taxpayers.

Moreover, minimal changes in the ratio of private and business use of a good or service only marginally used for business purposes would result in an adjustment of the VAT deducted. This minor adjustment would be disproportionate both from the taxpayers' and tax administration's point of view.

Austria further indicates that the special measure has also proved to be effective in preventing tax evasion or avoidance as it prevents unjustified and fraudulent deduction of input VAT. The special measure helps to enhance fairness by preventing distortions due to unjustified cash flow advantages obtained by a taxable person who uses a good or service only marginally for business purposes and who is allowed to deduct VAT for this minor business use compared to a taxable person who uses the good or service for business purposes only.

According to the report submitted by Austria, the review of the minimum percentage of business use of goods and services required to allow the deduction of input VAT shows that the 10% threshold for business purposes is low enough to have no significant impact on the total amount of VAT actually collected at the final consumption stage and thus, does not affect the Union's VAT own resources in a negative way.

[4] Council Decision 2004/866/EC of 13 December 2004 authorising the Republic of Austria 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 371, 18.12.2004, p. 47.

[5] Council Implementing Decision 2012/705/EU of 13 November 2012 amending Decision 2009/791/EC and Implementing Decision 2009/1013/EU authorising Germany and Austria respectively 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, OJ L 319, 16.11.2012, p.8.

[6] Council Implementing Decision (EU) 2015/2428 of 10 December 2015 amending Decision 2009/791/EC and Implementing Decision 2009/1013/EU authorising Germany and Austria respectively 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, OJ L 334, 22.12.2015, p.12.

[7] Council Implementing Decision (EU) 2018/1487 of 2 October 2018 amending Implementing Decision 2009/1013/EU authorising the Republic of Austria 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, OJ L 251, 5.10.2018, p. 33.

Based on the information provided by Austria, the Commission understands that the 10% / 90% apportionment between business and non-business use still represents a sound basis to sort out transactions in respect of which the business use can be considered as negligible.

As a consequence, the special measure in question provides a facilitation for both tax administration and businesses 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, particularly with respect to a possible taxation of private use pursuant to Articles 16 or 26 of the VAT Directive or adjustments to the deduction as required under Articles 184 – 192 of that Directive. An extension of the special measure is therefore appropriate.

However, any extension should be limited in time in order to assess whether the special measure is appropriate and effective and whether the conditions, on which the derogation is based, would still be valid. Therefore, it is proposed to extend the derogation until the end of 2027 and, in case a further extension would be envisaged beyond 2027, to request Austria to present, together with the extension request, a report by 31 March 2027 at the latest including a review of the applied apportionment rate between business and non-business use on which the exclusion from deduction is based.

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

A similar derogation in relation to the exclusion of input VAT on goods and services from the right to deduct VAT where the goods and services in question are used for more than 90 % for the private purposes of a taxable person or of the taxable person's employees or, in general, for non-business purposes or non-economic activities, has been granted to another Member State (Germany[8]).

Article 176 of the VAT Directive stipulates that the Council shall determine the expenditure on which the VAT is not deductible. Until such time, it authorises Member States to maintain exclusions, which were in place on 1 January 1979. There are therefore a number of "stand still" provisions restricting the right to deduct for taxable persons.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct[9], such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

The proposed special measure is, therefore, consistent with the existing provisions of the VAT Directive.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• **Legal basis**

Article 395 of the VAT Directive.

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[8] Council Implementing Decision (EU) 2021/1776 of 5 October 2021 amending Decision 2009/791/EC authorising 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, OJ L 360, 11.10.2021, p. 112.

[9] COM (2004) 728 final - Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations (OJ C 24, 29.1.2005, p.10) withdrawn on 21 May 2014 (OJ C 153 21. 05. 2014, p. 3)

- **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 the procedure for collecting VAT and to prevent certain forms of tax evasion or avoidance. It does not go beyond what is required to fulfil this aim.

The derogation is also limited in time and a report on the functioning and the effectiveness of the special measure is to be prepared in case Austria wishes to prolong the special measure.

- **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 provisions is only possible upon authorisation of the Council 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. This proposal is based on a request made by Austria 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 is designed to simplify the procedure for collecting VAT by allowing Austria to continue to apply a special measure allowing it 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.

According to Austria, the special measure reduces administrative burdens for businesses and tax administration, 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, particularly with respect to a possible taxation of private use or adjustments to the deduction.

The requested minimal use of goods for at least 10 % for business purposes in order to allow to deduct input VAT is relatively low. According to Austria, the prolongation of this special measure will therefore only have little impact on the total amount of VAT revenue collected at the final stage of consumption and thus, does not affect the Union's VAT own resources in a negative way.

4. BUDGETARY IMPLICATIONS

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

5. OTHER ELEMENTS

The proposal is limited in time and includes a sunset clause set at 31 December 2027.

In case Austria would consider another extension of the special measure beyond 2027, a report on the application of the special measure, including a review of the apportionment rate applied should be submitted to the Commission together with the extension request no later than 31 March 2027.

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

Having regard to the proposal from the European Commission,

Whereas:

(1) Articles 168 and 168a of Directive 2006/112/EC govern the right of taxable persons to deduct value added tax (VAT) charged on goods and services supplied to them for the purposes of their taxed transactions.

(2) Council Implementing Decision 2009/1013/EU[2] authorised Austria to continue to apply a special measure derogating from Articles 168 and 168a of Directive 2006/112/EC to completely exclude VAT borne on goods and services from the right to deduct VAT when those goods and services are used for more than 90 % for the private purposes of a taxable person or of a taxable person's employees, or, more generally, for non-business purposes or non-economic activities ('the special measure'). The authorisation to apply the special measure expires on 31 December 2024.

(3) By letter registered by the Commission on 20 March 2024, Austria requested an authorisation, in accordance with Article 395(2), first subparagraph, of Directive 2006/112/EC, to continue to apply the special measure.

(4) Pursuant to Article 2 of Council Implementing Decision 2009/1013/EU, Austria submitted, together with the extension request, a report on the application of the special measure including a review of the apportionment rate applied on the right to deduct VAT.

(5) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission transmitted the request submitted by Austria to the other Member States by letter dated 16 May 2024.

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[1] OJ 347, 11.12.2006, p.1, ELI: http://data.europa.eu/eli/dir/2006/112/oj.

[2] Council Implementing Decision (2009/1013/EU) of 22 December 2009 authorising the Republic of Austria to continue to apply a measure derogating from Articles 168 of Directive 2006/112/EC on the common system of value added tax (OJ L 348, 29.12.2009, p. 21, ELI: http://data.europa.eu/eli/dec_impl/2009/1013/oj).

(6) By letter dated 17 May 2024, the Commission notified Austria that it had all the information it considered necessary for appraisal of the request.

(7) According to Austria, the special measure has proved very effective in simplifying the collection of VAT and preventing tax evasion and avoidance. The special measure reduces administrative burdens for businesses and tax administration, 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.

(8) Based on the report submitted by Austria, the minimum apportionment rate of 10 % of business use of goods and services required to allow the deduction of input VAT is low enough to have no significant impact on the total amount of VAT actually collected at the final consumption stage.

(9) Taking into account the positive impact for both businesses and tax administration, the Commission considers it to be appropriate to extend the special measure.

(10) The special measure should be limited to the time needed to evaluate its effectiveness and the appropriateness of the apportionment rate applied on the right to deduct VAT. Austria should therefore be authorised to continue to apply the special measure for another 3 years, it should expire on 31 December 2027.

(11) The special measure is proportionate to the objectives pursued, namely, to simplify the procedure for collecting VAT and to prevent certain forms of tax evasion or avoidance, since it is limited in time and scope.

(12) In the event that Austria considers an extension of the special measure beyond 2027 to be necessary, it should submit a request for an extension to the Commission by 31 March 2027 accompanied by a report on the application of the special measure, including a review of the apportionment rate applied.

(13) The special measure will have no adverse impact on the Union's own resources accruing from VAT.

(14) Implementing Decision 2009/1013/EU should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 2 of Implementing Decision 2009/1013/EU is replaced by the following:

'*Article 2*

This Decision shall expire on 31 December 2027.

Any request for the extension of the derogating measure provided for in this Decision shall be submitted to the Commission by 31 March 2027.

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

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels,

For the Council
The President