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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION amending Decision 2009/791/EC authorising Germany to continue to apply a measure derogating from Article 168 of Directive 2006/112/EC on the common system of value added tax

Delegations will find attached document COM(2021) 435 final.

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2021/0249 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Decision 2009/791/EC authorising Germany to continue to apply a measure derogating from Article 168 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 ('the VAT Directive'[1]), 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 2021, the Federal Republic of Germany (hereinafter Germany) requested the authorisation to continue to apply a measure derogating from Articles 168 and 168a of the VAT Directive, to exclude from the right of deduction the VAT borne on goods and services which are used for more than 90 % by the taxable person for their private use or for that of their employees, or in general, for non-business purposes or non-economic activities. The request was accompanied by a report on the application of this measure as required by Article 2 of Council Decision 2009/791/EC of 20 October 2009[2] as amended by Council Implementing Decision (EU) 2018/2060 of 20 December 2018[3].

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 17 March 2021 of the request made by Germany. By letter dated 18 March 2021, the Commission notified Germany 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. Article 168a was inserted in the VAT Directive by Council Directive 2009/162/EU of 22 December 2009[4], in order to limit the deduction to the proportion of effective business use and apply thus more effectively the principle whereby the deduction arises only in so far as the goods and services concerned are used for the purpose of the taxable person's business.

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 requested to continue to apply a measure derogating from Articles 168 and 168a of the VAT Directive 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.

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1 OJ L 347, 11.12.2006, p. 1.
2 OJ L 283, 30.10.2009, p.55.
3 OJ L 329, 7.12.2018, p. 20.
4 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. 14–18.

This derogating measure for Germany had initially been granted by Council Decision 2000/186/EC of 28 February 2000[5] for a period until 31 December 2002 and was again granted by Council Decision 2003/354/EC of 13 May 2003[6] for a period until 30 June 2004, by Council Decision 2004/817/EC of 19 November 2004[7] for a period until 31 December 2009 and by Council Decision 2009/791/EC of 20 October 2009 for a period until 31 December 2012. The latter has been prolonged until 31 December 2015 by Council Implementing Decision 2012/705/EU of 13 November 2012[8], until 31 December 2018 by Council Implementing Decision (EU) 2015/2428 of 10 December 2015[9] and until 31 December 2021 by Council Implementing Decision (EU) 2018/2060 of 20 December 2018[10].

In its current request, Germany informed the Commission that the application of the derogating measure has proven to be very effective and constitutes a major simplification for the collection of VAT. It also helps to prevent tax evasion and avoidance.

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 Germany, the prolongation of this 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.

According to Germany, the measure reduces administrative burdens for taxpayers and tax administrations, because the ratio of the use of such goods for business and non-business purposes does not have to be monitored nor adapted and therefore no records have to be kept on these changes. The 10 % limit also corresponds to what is foreseen in the German income tax legislation, which provides that only goods that are used for at least 10 % for business purposes can be regarded as business assets.

Derogations are in general granted for a limited time as to allow an assessment whether the special measure is appropriate and effective. In this respect, based on the information provided by Germany, 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 administrations 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 derogating measure is therefore appropriate.

However, any extension should be limited in time in order to assess 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 2024 and to request Germany to present, together with the extension request, a report by 31 March 2024 at the latest including a review of the applied

5 OJ L 59, 4.3.2000, p.12.
6 OJ L 123, 17.5.2003, p. 47.
7 OJ L 357, 2.12.2004, p. 33.
8 OJ L 319, 16.11.2012, p. 8.
9 OJ L 334, 22.12.2015, p. 12.
10 OJ L 329, 7.12.2018, p. 20.

apportionment rate between business and non-business use on which the exclusion from deduction is based in case a further extension would be envisaged beyond 2024.

Since Council Decision 2009/791/EC of 20 October 2009 was adopted prior to the adoption of Council Directive 2009/162/EU of 22 December 2009, which inserted Article 168a in the VAT Directive, its title does not refer to Article 168a. To eliminate this inconsistency between the title and the content of Council Decision 2009/791/EC, the title of Council Decision 2009/791/EC should therefore be amended by including a reference to Article 168a of the VAT Directive.

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

Similar derogations in relation to the exclusion of VAT due 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 that person's employees or, in general, for non-business purposes or non-economic activities, have been granted to other Member States (Austria[11], the Netherlands[12]).

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[13], such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

The proposed 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.

- **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.

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11 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. 33–34.

12 Council Implementing Decision (EU) 2020/2189 of 18 December 2020 authorising the Netherlands to introduce a special measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 434, 23.12.2020, p. 1–2.

13 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)

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.

- **Choice of the instrument**

Proposed instrument: Council Implementing Decision.

Under Article 395 of Council Directive 2006/112/EC, 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**

This proposal is based on a request made by Germany and concerns only this 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 Germany to continue to apply a derogation 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. This measure has proven to be a suitable and efficient tool.

According to Germany, the extension of this measure will not have a negative 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 implications for the EU budget.

5. OTHER ELEMENTS

The proposal is limited in time and includes a sunset clause set at 31 December 2024.

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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 taxable persons' right to deduct value added tax (VAT) charged on goods and services supplied to them for the purposes of their taxed transactions. Germany was 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[2] authorised Germany to introduce and apply measures derogating from Articles 6 and 17 of Council Directive 77/388/EEC[3] until 31 December 2002. Council Decision 2003/354/EC[4] authorised Germany to apply a measure derogating from Article 17 of Directive 77/388/EEC until 30 June 2004. Council Decision 2004/817/EC[5] extended that authorisation until 31 December 2009.

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1 OJ L 347, 11.12.2006, p. 1.

2 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).

3 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).

4 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).

5 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) By Council Decision 2009/791/EC[6], Germany was authorised 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[7] of 22 December 2009 inserted Article 168a in Directive 2006/112/EC in order to limit the deduction to the proportion of effective business use and apply thus more effectively the principle whereby the deduction arises only in so far as the goods and services concerned are used for the purpose of the taxable person's business. The title of Decision 2009/791/EC therefore needs to refer to Article 168a of Directive 2006/112/EC as well.

(5) By letter of 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, be prolonged ('the request'). The request was accompanied by a report on the application of the derogating 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.

(6) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission informed the other Member States, by letters dated 17 March 2021, of the request made by Germany. 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 measure has proven very effective in simplifying the collection of VAT and preventing tax evasion and avoidance. The 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 this 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 measure, which should include a review of the apportionment rate applied.

(9) The derogating 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:

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6 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).

7 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. 14–18.

"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 is addressed to the Federal Republic of Germany.

Done at Brussels,

For the Council
The President