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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 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

Delegations will find attached document COM(2021) 458 final.

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COM(2021) 458 final

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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 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 derogating from the provisions of this Directive, in order to simplify the procedure for charging VAT or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Commission on 19 March 2021, the Republic of Austria (hereinafter Austria) requested an authorisation to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC, 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 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) 2018/1487[3].

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 7 April 2021 of the request made by Austria. The Commission notified Austria by letter dated 8 April 2021 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.

Austria requested an authorisation 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 for more than 90 % by the taxable person for his private use or for that of his employees, or in general, for non-business purposes or non-economic activities.

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1 OJ 347, 11.12.2006, p.1.
2 OJ L 348, 29.12.2009, p. 21.
3 OJ L 251, 5.10.2018, p. 33.
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 Austria had initially been granted by Council Decision 2004/866/EC of 13 December 2004[5] for a period until 31 December 2009 and was again granted by Council Implementing Decision 2009/1013/EU of 22 December 2009[6] 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[7], until 31 December 2018 by Council Implementing Decision (EU) 2015/2428 of 10 December 2015[8] and until 31 December 2021 by Council Implementing Decision (EU) 2018/1487[9].

In its current request, Austria informed the Commission that the application of the derogating measure has proven to be very successful and effective in terms of simplifying VAT collection and preventing tax evasion and avoidance, as well as enhancing fairness by preventing distortions due to unjustified cash flow advantages and imporving tax compliance as a result of the simplified VAT collection. According to Austria, the abolition of the derogating measure would lead to an unjustified cash flow advantage for 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. Moreover, a subsequent minimal change in the ratio of private and business use of a good or service only marginally used for business purposes would lead to an adjustment of the VAT deducted. This minor adjustment would be disproportionate both from the taxpayer's and tax administration's perspective.

The requested minimal use of goods and services 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 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.

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 Austria, the Commission understands that the 90% - 10% 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 Austria to present, together with the extension request, a report by 31 March 2024 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 in case a further extension would be envisaged beyond 2024.

Council Decision 2009/1013/EU of 22 December 2009 was adopted at the same time as Council Directive 2009/162/EU of 22 December 2009, which inserted Article 168a in the

5 OJ L 371, 18.12.2004, p. 47.
6 OJ L 348, 29.12.2009, p. 21.
7 OJ L 319, 16.11.2012, p.8.
8 OJ L 334, 22.12.2015, p.12.
9 OJ L 251, 5.10.2018, p. 33.

VAT Directive. However, the title of Council Decision 2009/1013/EU does not refer to Article 168a. To eliminate this inconsistency between the title and the content of Council Decision 2009/1013/EU, the title of Council Decision 2009/1013/EU 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 (Germany[10], the Netherlands[11]).

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[12], 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.

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.

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10 Council Implementing Decision (EU) 2018/2060 of 20 December 2018 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 329, 27.12.2018, p. 20–21.

11 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.

12 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)

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

This proposal is based on a request made by Austria 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 Austria to continue to apply a derogating 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.

The measure reduces administrative burdens 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, 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 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 not adversely affect the Union's own resources from VAT.

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) Council Implementing Decision 2009/1013/EU[2] authorised Austria to apply a special measure derogating from Directive 2006/112/EC ('the special measure'). Following successive extensions, that authorisation is due to expire on 31 December 2021.

(2) Council Directive 2009/162/EU[3] 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 2009/1013/EU therefore needs to refer to Article 168a of Directive 2006/112/EC as well.

(3) The special measure derogates from Articles 168 and 168a of Directive 2006/112/EC which 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 special measure is 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.

(4) The objective of the special measure is to simplify the procedure for charging and collecting VAT. The amount of tax due at the level of final consumption is only affected to a negligible extent.

(5) By letter registered with the Commission on 19 March 2021, Austria requested to be authorised to continue to apply the special measure ('the request').

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1 OJ 347, 11.12.2006, p. 1.

2 Council Implementing Decision of 22 December 2009 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 348, 29.12.2009, p. 21).

3 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.

(6) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, by letters dated 7 April 2021, the Commission informed the other Member States of the request made by Austria. By letter dated 8 April 2021, the Commission notified Austria that it had all the information necessary to consider the request.

(7) According to Austria, the special measure has proven very effective in simplifying the collection of VAT and preventing tax evasion and avoidance. It reduces administrative burdens 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. Austria 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 Austria 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, including 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) Implementing Decision 2009/1013/EU should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Decision 2009/1013/EU is amended as follows:

(1) The title is replaced by the following:

“Council Implementing Decision of 22 December 2009 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”;

(2) Articles 1 and 2 are replaced by the following:

"*Article 1*

By way of derogation from Articles 168 and 168a of Directive 2006/112/EC, Austria is authorised to completely exclude value added tax (VAT) borne on goods and services from the right to deduct VAT when the goods and services in question 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.

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 at the latest.

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