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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	9 September 2024
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2024) 399 final
Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION amending Decision 2009/791/EC 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

Delegations will find attached document COM(2024) 399 final.

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COM(2024) 399 final

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Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Decision 2009/791/EC 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

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 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, 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 his private use or for that of his 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[2] as amended by Council Implementing Decision (EU) 2021/1776[3]. An email was sent to Germany asking for further explanations on 26 March 2024 and a reply was received on 27 March 2024.

In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letters dated 27 May 2024 of the request made by Germany. By letter dated 28 May 2024, 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 his 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.

Germany requested 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 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 special measure was initially granted by Council Decision 2000/186/EC of 28 February 2000[4] for a period until 31 December 2002 and was again granted by Council

[1] OJ L 347, 11.12.2006, p. 1.
[2] OJ L 283, 30.10.2009, p.55.
[3] OJ L 360, 11.10.2021, p. 112.
[4] OJ L 59, 4.3.2000, p.12.

Decision 2003/354/EC of 13 May 2003[5] for a period until 30 June 2004, by Council Decision 2004/817/EC of 19 November 2004[6] 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[7], until 31 December 2018 by Council Implementing Decision (EU) 2015/2428 of 10 December 2015[8], until 31 December 2021 by Council Implementing Decision (EU) 2018/2060 of 20 December 2018[9] and until 31 December 2024 by Council Implementing Decision (EU) 2021/1776 of 5 October 2021.

In its current request, Germany informed the Commission that the application of the special 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. Since its implementation, the special measure has only been applied to goods. In its reply dated 27 March 2024, Germany indicates that an extension of the special measure to services is in the process of being proposed to the German legislator.

The requested minimal use of goods and services for at least 10 % for business purposes in order to allow the deduction of input VAT is relatively low. According to Germany, 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.

According to Germany, the special measure reduces administrative burdens for taxpayers and tax administrations, because the ratio of the use of such goods and services 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.

Special measures derogating from the VAT Directive are in general granted for a limited time as to allow an assessment of 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 special 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 2027 and, in case a further extension would be envisaged beyond

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

2027, to request Germany 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**

Similar special measures 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[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 special measure 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.

- **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 and its limitation in time, 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.

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10 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 Articles 168 of Directive 2006/112/EC on the common system of value added tax, OJ L 360, 11.10.2021, p. 120-121.

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)

- **Choice of the instrument**

Proposed instrument: 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**

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 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. This special measure has proven to be a suitable and efficient tool.

According to Germany, the extension of this special 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 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 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 has been authorised to introduce a special 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 his private purposes or for purposes of his 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 special 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 special measure derogating from Article 17 of Directive 77/388/EEC until 30 June 2004. Council Decision 2004/817/EC[5] extended the authorisation until 31 December 2009.

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

2 Council Decision 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, ELI: http://data.europa.eu/eli/dec/2000/186/oj).

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, ELI: http://data.europa.eu/eli/dir/1977/388/oj).

4 Council Decision 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 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, ELI: http://data.europa.eu/eli/dec/2004/817/oj).

(3) Council Decision 2009/791/EC[6] authorised Germany to continue to apply a special measure derogating from Article 168 of Directive 2006/112/EC until 31 December 2021. The authorisation to apply the special measure under Council Decision 2009/791/EC, as amended by Council Implementing Decision (EU) 2021/1776[7], is due to expire on 31 December 2024.

(4) By letter registered by the Commission on 19 February 2024, Germany requested the authorisation to continue to apply a special 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. That 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 Council Decision 2009/791/EC. The Commission requested further explanations from Germany on 26 March 2024 and a reply was received on 27 March 2024.

(5) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, the Commission informed the other Member States, by letters dated 27 May 2024 of the request made by Germany. By letter dated 28 May 2024, the Commission notified Germany that it had all the information necessary to consider the request.

(6) According to Germany the special measure has proven very effective to simplify the collection of VAT and to avoid tax evasion and avoidance. The special 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. Germany should therefore be authorised to continue to apply this special measure for a further limited period until 31 December 2027.

(7) In the event that Germany considers an extension 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 measure which should include a review of the apportionment rate applied.

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

(9) Decision 2009/791/EC should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 2 of Decision 2009/791/EC is replaced by the following:

'*Article 2*

[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 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 of Directive 2006/112/EC on the common system of value added tax (OJ L 360, 11.10.2021, p. 112, ELI: http://data.europa.eu/eli/dec_impl/2021/1776/oj).

This Decision shall expire on 31 December 2027.

Any request for the extension of the special 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 Federal Republic of Germany.

Done at Brussels,

For the Council
The President