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2015/0242 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Decisions 2009/791/EC and 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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Pursuant to Article 395(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[1], the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures derogating from the Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.

By letters registered with the Commission on respectively 19 March 2015 and on 16 March 2015, Austria and Germany requested an authorisation to continue applying a measure derogating from Articles 168 and 168a of Directive 2006/112/EC, in order to exclude from the right of deduction the VAT borne on goods and services which are used for more than 90 % for non-business purposes.

In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letters dated 15 September 2015 of the requests made by Austria and Germany. The Commission notified Austria and Germany by letters dated 17 September 2015 that it had all the information necessary to consider the requests.

Article 168 of Directive 2006/112/EC provides that a taxable person is entitled to deduct the VAT charged on purchases made for the purpose of his taxed transactions. Article 168a(1) of Directive 2006/112/EC 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 Directive 2006/112/EC Member States may also apply this rule in relation to expenditure related to other goods forming part of the business assets as they specify.

The measure pursued by Austria and Germany deviates from those principles and entirely excludes 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 derogating measure for Austria had initially been granted by Council Decision 2004/866/EC of 13 December 2004[2] for a period until 31 December 2009 and was again granted by Council Implementing Decision 2009/1013/EU of 22 December 2009[3] until 31 December 2012 and by Council Implementing Decision 2012/705/EU of 13 November 2012 until 31 December 2015[4].

The derogating measure for Germany had initially been granted by Council Decision 2003/354/EC of 13 May 2003[5] until 30 June 2004, by Council Decision 2004/817/EC of 19 November 2004[6] until 31 December 2009, by Council Decision 2009/791/EC of 20 October

1 OJ L 347, 11.12.2006, p.1.
2 OJ L 371, 18.12.2004, p. 47.
3 OJ L 348, 29.12.2009, p. 21.
4 OJ L 319, 16.11.2012, p.8.
5 OJ L 123, 17.5.2003, p. 47.
6 OJ L 357, 2.12.2004, p. 33.

2009[7] until 31 December 2012 and by Council Implementing Decision 2012/705/EU of 13 November 2012 until 31 December 2015.

In their current requests, Austria and Germany informed the Commission that they have been applying this special measure until now successfully, making the experience that it was very useful in terms of simplifying the VAT collection and preventing tax evasion and avoidance.

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 and Germany, 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 to 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 a private use pursuant to Articles 16 or 26 of Directive 2006/112/EC or adjustments to deduction as required under Articles 184 – 192 of that Directive. The amount of tax due at the level of final consumption is only affected to a negligible extent. 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 derogations are based, would still be valid. Therefore, it is proposed to extend the derogations until the end of 2018 and to request Austria and Germany to present, together with the extension request, a report by 1 April 2018 at the latest including a review of the applied apportionment between business and non-business use on which the exclusion from deduction is based in case a further extension would be envisaged beyond 2018.

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

Article 176 of Directive 2006/112/EC 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.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 395(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

- **Subsidiarity (for non-exclusive competence)**

The proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

- **Proportionality**

The proposal complies with the proportionality principle for the following reasons:

This Decision concerns an authorisation granted to Member States on their own request and does not constitute any obligation.

[7] OJ L 283, 30.10.2009, p. 55.

Given the narrow scope of the derogation, the special measure is proportionate to the aim pursued.

- **Choice of the instrument**

Proposed instruments: Council Implementing Decision.

Other means would not be adequate for the following reasons:

Under Article 395 of Council Directive 2006/112/EC, a derogation from the common VAT rules is only possible upon authorization of the Council acting unanimously on a proposal from the Commission. A Council Implementing Decision is the only suitable instrument since it can be addressed to individual Member States.

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

- **Stakeholder consultations**

Not relevant.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal is designed to simplify the procedure for charging tax and has, therefore, a potential positive impact for both businesses and administrations. The solution has been identified by Austria and Germany as a suitable measure and is comparable to other past and present derogations.

4. BUDGETARY IMPLICATIONS

The proposal will not adversely affect the Union's own resources from VAT.

5. OTHER ELEMENTS

The proposal includes a review clause and a sunset clause.

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

Having regard to the proposal from the European Commission,

Whereas:

(1) Germany and Austria were each granted a derogating measure by Council Decisions 2009/791/EC[9] and 2009/1013/EU[10] respectively. The application of the measure was extended by Council Implementing Decision 2012/705/EU[11] until 31 December 2015.

(2) The special measure derogates from Articles 168 and 168a of Directive 2006/112/EC which govern taxable persons` right to deduct VAT charged on goods and services supplied to them for the purposes of their taxed transactions. The derogating measure is intended to exclude VAT borne on goods and services completely from the right of deduction where those goods and services are used by the taxable person for more than 90% for private purposes or for purposes of his employees, or in general for non-business purposes or non-economic activities.

(3) In order to take into account the case-law of the Court of Justice of the European Union, according to which input VAT relating to expenditure incurred by a taxable person cannot be deducted if it relates to activities which, in view of their non-economic nature, do not come within the scope of Directive 2006/112/EC, it is appropriate to clarify that the special measures also apply to goods and services used for activities of a non-economic nature.

(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.

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8 OJ L 347, 11.12.2006, p.1.

9 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).

10 Council Implementing Decision 2009/1013/EU 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).

11 Council Implementing Decision 2012/705/EU of 13 November 2012 amending Decision 2009/791/EC and Implementing Decision 2009/2013/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).

(5) By letters registered with the Commission on 16 March 2015 and 19 March 2015, Germany and Austria requested authorisation to continue to apply the special measure.

(6) In accordance with the second subparagraph of Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States, by letters dated 15 September 2015, of the requests made by Austria and Germany. By letters dated 17 September 2015, the Commission notified Austria and Germany that it had all the information necessary to consider the request.

(7) According to the information provided by Austria and Germany, the legal and factual situation which justified the current application of the special measure concerned has not changed and continues to exist. Austria and Germany should therefore be authorised to continue applying this special measure during a further period, but limited in time until 31 December 2018 at the latest in order to allow for a review of the necessity and effectiveness of the derogating measure and the apportionment rate between business and non-business use it is based on.

(8) Where Austria or Germany consider a further extension beyond 2018 to be necessary, a report on the application of the measure, which includes a review of the apportionment rate applied, should be submitted to the Commission together with the extension request no later than 31 March 2018 in order to reserve sufficient time for the Commission to examine the request.

(9) The derogations will only have a negligible effect on the overall amount of tax collected at the stage of final consumption and will not adversely affect the Union's own resources accruing from value added tax.

(10) Decisions 2009/791/EC and 2009/1013/EU should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Articles 1 and 2 of Decision 2009/791/EC are replaced by the following:

'Article 1

By way of derogation from Article 168 and Article 168a of Directive 2006/112/EC, Germany is authorised to 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 more than 90 % for the private purposes of a taxable person or of his employees, or, more generally, for non-business purposes or non-economic activities.

Article 2

This Decision shall expire on 31 December 2018.

Any request for the extension of the special measure provided for in this Decision shall be submitted to the Commission by 31 March 2018 at the latest.

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

Article 2

Articles 1 and 2 of Decision 2009/1013/EU are replaced by the following:

'Article 1

By way of derogation from Article 168 and Article 168a of Directive 2006/112/EC, Austria is authorised to 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 more than 90 % for the private purposes of a taxable person or of his employees, or, more generally, for non-business purposes or non-economic activities.

Article 2

This Decision shall expire on 31 December 2018.

Any request for the extension of the special measure provided for in this Decision shall be submitted to the Commission by 31 March 2018 at the latest.

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

Article 3

This Decision shall apply as from 1 January 2016.

Article 4

This Decision is addressed to the Republic of Austria and the Federal Republic of Germany.

Done at Brussels,

For the Council
The President