



EUROPEAN COMMISSION

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2012/0233 (NLE)

Proposal for a

COUNCIL 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

Grounds 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, 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 5 January 2012 and on 16 April 2012, the Federal Republic of Germany and the Republic of Austria respectively 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 letter dated 4 April 2012 of the request made by the Federal Republic of Germany and by letter dated 20 April 2012 of the request made by the Republic of Austria. The Commission notified the Federal Republic of Germany by letter dated 11 April 2012 and the Republic of Austria by letter dated 23 April 2012 that it had all the information necessary to consider the request.

General context

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 the Federal Republic of Germany and the Republic of Austria however deviates from those principles as it 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.

The derogating measure of the Federal Republic of Germany had initially been granted by Council Decision 2000/186/EC of 28 February 2000¹ for a period until 31 December 2002 and was again granted by Council Decision 2003/354/EC of 13 May 2003² until 30 June 2004, by Council Decision 2004/817/EC of 19 November 2004³ until 31 December 2009 and by Council Decision 2009/791/EC of 20 October 2009⁴ until 31 December 2012.

¹ OJ L 59, 4.3.2000, p. 12

² OJ L 123, 17.5.2003, p. 47

³ OJ L 357, 2.12.2004, p. 33

⁴ OJ L 283, 30.10.2009, p. 55

The derogating measure of the Republic of Austria had initially been granted by Council Decision 2004/866/EC of 13 December 2004⁵ for a period until 31 December 2009 and was again granted by Council Decision 2009/1013/EU of 22 December 2009⁶ until 31 December 2012.

In their current requests, the Federal Republic of Germany and the Republic of Austria informed the Commission that they have been applying this special measure until now, making the experience that they are 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 the Federal Republic of Germany and the Republic of 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 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 2015 and to request the Federal Republic of Germany and the Republic of Austria to present, together with the extension request, a report by 1 April 2015 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 2015. The Decision would, however, in any case expire when Union rules, adopted by the Council after this Decision takes effect, establishing restrictions on the right of deduction shall or may be applied by Member States.

Existing provisions in the area of the proposal

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.

In 2004, the Commission made a proposal⁷, which contains rules on which categories of expenditure may be subject to a restriction on the right to deduct but the Council has not been able yet to reach an agreement on that proposal.

⁵ OJ L 371, 18.12.2004, p. 47

⁶ OJ L 348, 29.12.2009, p. 21

⁷ COM(2004) 728 final

http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0728en01.pdf

Consistency with other policies and objectives of the Union

Not applicable.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

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 the Federal Republic of Germany and the Republic of Austria as a suitable measure and is comparable to other past and present derogations.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The proposal aims to authorise the Federal Republic of Germany and the Republic of Austria to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC so as to exclude from the right of deduction the VAT borne on goods and services which are used by the taxable person for more than 90% for non-business purposes.

The apportionment rate and the necessity for the derogating measure are to be reviewed and reported on by the Federal Republic of Germany and the Republic of Austria upon any request for an extension. The Decision will expire on the earlier of the date specified in the Decision or the date as from which Union rules adopted by the Council governing restrictions on the right of deduction are to be applied or may be applied by Member States.

Legal basis

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

Subsidiarity principle

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

Proportionality principle

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

This Decision concerns an authorisation granted to a Member State on its own request and does not constitute any obligation.

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

Choice of instruments

Proposed instruments: Council 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 Decision is the only suitable instrument since it can be addressed to an individual Member State.

4. BUDGETARY IMPLICATION

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

5. OPTIONAL 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 tax⁸, and in particular Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By letter registered with the Commission on 5 January 2012, Germany requested authorisation to continue to apply a special measure that was previously granted by Council Decision 2009/791/EC⁹, derogating from the provisions of Directive 2006/112/EC governing the right of deduction.
- (2) By letter registered with the Commission on 16 April 2012, Austria requested authorisation to continue to apply a special measure that was previously granted by Council Decision 2009/1013/EU¹⁰, derogating from the provisions of Directive 2006/112/EC governing the right of deduction.
- (3) In accordance with the second subparagraph of Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States, by letter dated 4 April 2012, of the request made by Germany. By letter dated 11 April 2012, the Commission notified Germany that it had all the information necessary to consider the request.
- (4) In accordance with the second subparagraph of Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States, by letter dated 20 April 2012, of the request made by Austria. By letter dated 23 April 2012, the Commission notified Austria that it had all the information necessary to consider the request.

⁸ OJ 347, 11.12.2006, p.1.

⁹ OJ L 283, 30.10.2009, p. 55

¹⁰ OJ L 348, 29.12.2009, p. 21

- (5) The derogating measure pursued by both Member States 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 for non-business purposes in general.
- (6) 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 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.
- (7) According to the information provided by Germany and Austria, the legal and factual situation which justified the current application of the special measure concerned has not changed and continues to exist. Germany and Austria should therefore be authorised to continue applying this special measure during a further period, but limited in time until 31 December 2015 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 Germany or Austria considers a further extension beyond 2015 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 2015 in order to reserve sufficient time for the Commission to examine the request and, in case the Commission would come forward with a proposal, for the Council to adopt it.
- (9) On 29 October 2004, the Commission adopted a proposal¹¹ for a Council Directive amending Directive 77/388/EEC (now Directive 2006/112/EC) that includes the harmonisation of the categories of expenses for which exclusions of the right of deduction may apply. The derogating measure provided for in this Decision should expire on the date as from which Member States shall or may apply the rules laid down in such amending Directive adopted by the Council after this Decision takes effect, if that date is earlier than the date of expiry provided for in this Decision.
- (10) 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.
- (11) Decision 2009/791/EC and Decision 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:

¹¹ COM(2004) 728 final
http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0728en01.pdf

'Article 1

By way of derogation from Article 168 and Article 168a of Directive 2006/112/EC, Germany is authorised to exclude 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.

Article 2

1. This Decision shall expire on the date as from which Member States shall or may apply Union rules governing restrictions on a taxable person's right of deduction adopted by the Council after this Decision takes effect, or on 31 December 2015, whichever is the earlier.
2. Any request for the extension of the special measure provided for in this Decision shall be submitted to the Commission by 31 March 2015 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 VAT borne on goods and services from the right to deduct 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.

Article 2

1. This Decision shall expire on the date as from which Member States shall or may apply Union rules governing restrictions on a taxable person's right of deduction adopted by the Council after this Decision takes effect, or on 31 December 2015, whichever is the earlier.
2. Any request for the extension of the special measure provided for in this Decision shall be submitted to the Commission by 31 March 2015 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 2013.

Article 4

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

Done at Brussels,

*For the Council
The President*