



Brussels, 18.7.2018
COM(2018) 539 final

2018/0288 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision 2009/1013/EU, authorising 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

EXPLANATORY MEMORANDUM

1. CONTEXT 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 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 23 March 2018, Austria requested an authorisation to continue to apply 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 % 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. By letter registered with the Commission on 4 April 2018, Austria sent 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 Implementing Decision 2009/1013/EU² as amended by Council Implementing Decision (EU) 2015/2428³.

In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letters dated 11 April 2018 of the request made by Austria. The Commission notified Austria by letter dated 12 April 2018 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 and services received 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 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 2004⁴ for a period until 31 December 2009 and was again granted by Council Implementing Decision 2009/1013/EU of 22 December 2009⁵ until 31 December 2012 and by Council Implementing Decision 2012/705/EU of 13 November 2012 until 31 December 2015⁶ and by Council Implementing Decision (EU) 2015/2428 of 10 December 2015 until 31 December 2018⁷.

¹ OJ 347, 11.12.2006, p.1.

² OJ L 348, 29.12.2009, p. 21.

³ OJ L 334, 22.12.2015, p.12.

⁴ OJ L 371, 18.12.2004, p. 47.

⁵ OJ L 348, 29.12.2009, p. 21.

⁶ OJ L 319, 16.11.2012, p.8.

⁷ OJ L 334, 22.12.2015, p.12.

In its current request, Austria informed the Commission that it has been applying this special measure successfully until now, indicating that the measure is very useful in terms of simplifying VAT collection and preventing tax evasion and avoidance as well as enhancing fairness in taxation thus resulting in an increase of tax compliance. The abolition of the derogation would lead to an unjustified cash flow benefit 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. 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.

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 Directive 2006/112/EC 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 2021 and to request Austria to present, together with the extension request, a report by 31 March 2021 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 2021.

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 for taxable persons.

Notwithstanding previous initiatives to establish rules on which categories of expenditure may be subject to a restriction on the right to deduct⁸, such derogation is appropriate in the awaiting of a harmonisation of these rules at EU level.

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

Consultation of interested parties

Not relevant.

Collection and use of expertise

⁸ 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)

There was no need for external expertise.

Impact assessment

The proposal is designed to simplify the procedure for collecting VAT and has, therefore, a potential positive impact for both businesses and administrations. The solution has been identified by 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 Austria to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC so as to completely 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 his private use or for that of his employees, or in general, for non-business purposes or non-economic activities.

The apportionment rate and the necessity for the derogating measure are to be reviewed and reported on by Austria upon any request for an extension.

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

Considering the provision of Council Directive 2006/112/EC on which the proposal is based, the subsidiarity principle 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. It will reduce administrative burden and only slightly increase the tax burden for those taxable persons using the goods or services for up to 10% for business purposes.

Choice of instruments

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 authorisation 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.

4. BUDGETARY IMPLICATION

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

5. OPTIONAL ELEMENTS

The proposal is limited in time and includes a review clause.

Proposal for a

COUNCIL IMPLEMENTING DECISION

amending Implementing Decision 2009/1013/EU, authorising 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

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 tax¹, and in particular the first subparagraph of Article 395(1) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Austria has been granted a derogating measure by Council Implementing Decision 2009/1013/EU². The application of the derogating measure was subsequently extended by Council Implementing Decision 2012/705/EU³ until 31 December 2015 and by Council Implementing Decision (EU) 2015/2428⁴ until 31 December 2018.
- (2) 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 derogating 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 his private purposes or for purposes of his employees, or in general for non-business purposes or non-economic activities.
- (3) 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.
- (4) By letter registered with the Commission on 23 March 2018, Austria requested to be authorised to continue to apply this special measure.
- (5) By letter registered with the Commission on 4 April 2018, Austria sent a report on the application of the special measure including a review of the apportionment rate

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 Implementing Decision of 13 November 2012 amending Decision 2009/791/EC and Implementing Decision 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 (OJ L 319, 16.11.2012, p. 8).

⁴ Council Implementing Decision (EU) 2015/2428 of 10 December 2015 amending Decision 2009/791/EC and Implementing Decision 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 (OJ L 334, 22.12.2015, p. 12).

applied on the right to deduct VAT as required by Article 2 of Implementing Decision 2009/1013/EU.

- (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 11 April 2018, of the request made by Austria. By letter dated 12 April 2018, the Commission notified Austria that it had all the information necessary to consider the request.
- (7) According to the information provided by Austria, the legal and factual situation which justified the current application of the special measure concerned has not changed, but continues to exist. Austria should, therefore, be authorised to continue applying this special measure during a further period, but limited in time until 31 December 2021 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 upon.
- (8) Where Austria considers that a further extension beyond 2021 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 by no later than 31 March 2021 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) Implementing Decision 2009/1013/EU should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Articles 1 and 2 of Implementing 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 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 his employees, or, more generally, for non-business purposes or non-economic activities.

Article 2

This Decision shall expire on 31 December 2021.

Any request for the extension of the derogating measure provided for in this Decision shall be submitted to the Commission by 31 March 2021 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 shall apply from 1 January 2019.

Article 3

This Decision is addressed to the Republic of Austria.

Done at Brussels,

*For the Council
The President*