

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.7.2009
COM(2009) 364 final

Proposal for a

COUNCIL DECISION

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

EXPLANATORY MEMORANDUM

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 (hereafter: 'the VAT Directive'), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures to derogate from the provisions of that Directive, in order to simplify the procedure for collecting value added tax (VAT) or to prevent certain forms of tax evasion or avoidance.

By letter registered with the Secretariat-General of the Commission on 19 December 2008, the Federal Republic of Germany (hereinafter 'Germany') requested authorisation to continue a measure derogating from Article 168 of the VAT Directive. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 3 June 2009 of the request made by Germany. By letter dated 9 June 2009, the Commission notified Germany that it had all the information necessary to consider the request.

General context

According to Article 168 of the VAT Directive, a taxable person is entitled to deduct the VAT charged on purchases of goods and services made for the purposes of his taxed transactions. The derogating measure however, of which the extension is requested by Germany, excludes VAT borne on goods and services that are used for more than 90% for private or non-business purposes by a taxable person entirely from the right of deduction.

This derogating measure had initially been granted by Council Decision 2000/186/EC of 28 February 2000 (OJ L 59, 4.3.2000, p. 12) for a period until 31 December 2002 and was subsequently extended by Council Decision 2003/354/EC of 13 May 2003 (OJ L 123, 17.5.2003, p. 47) until 30 June 2004 and again by Council Decision 2004/817/EC of 19 November 2004 (OJ L 357, 2.12.2004, p. 33) until 31 December 2009.

The Commission already stated in its proposal prior to Decision 2000/186/EEC (COM(1999)690 final) that it considers the measure in question to be compatible with Article 27 of the Sixth Directive 77/388/EEC (OJ L 145, 13.6.1977, p. 1); which has been replaced, without any substantial modification, by Article 395 of the VAT Directive. In particular, the Commission put forward that the derogation is based on the need to simplify the procedure for charging VAT where, at the same time, it affects the amount of tax due at the final consumption stage only to a negligible extent. The derogation should therefore be granted taking into account that the situation and facts, on which the initial derogation was based, continue to exist. However, the extension should be limited in time in order to be able to assess, before considering a possible new extension request and on the basis of appropriate information provided by Germany, whether these circumstances, justifying the derogation, have not changed over time. Therefore, the derogation should in be limited to 31 December 2012.

Existing provisions in the area of the proposal

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).

Consistency with the other policies and objectives of the Union

Not applicable.

CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation of interested parties

Not relevant.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

The Decision proposal aims at simplifying the procedure for charging the VAT in relation to goods and services which are to a very large extent used for non-business purposes and has, therefore, a potential positive impact.

However, because of the narrow scope of the derogation and the limited application in time, the impact will in any case be limited.

LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

Authorisation for Germany to continue to apply a derogating measure from the VAT Directive as regards the total exclusion of the right of deduction in case goods and services are used by a taxable person for more than 90% for non-business purposes.

Legal basis

Article 395 of the VAT Directive.

Subsidiarity principle

In accordance with Article 395 of the VAT Directive, a Member State wishing to introduce measures derogating from the said Directive must obtain an authorisation from the Council, which will take the form of a Council Decision. Therefore, the proposal complies with the subsidiarity principle.

Proportionality principle

The proposal complies with the proportionality principle for the following reason(s).

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.

Choice of instruments

Under Article 395 of the VAT Directive, derogation from the common VAT rules is only possible with the authorisation of the Council acting unanimously on a proposal from the Commission. A Council Decision is the most suitable instrument since it can be addressed to individual Member States.

BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

ADDITIONAL INFORMATION

Review/revision/sunset clause

The proposal includes a sunset clause.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

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) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) By letter registered with the Secretariat-General of the Commission on 19 December 2008, the Federal Republic of Germany (hereinafter 'Germany') requested authorisation to continue to apply a measure derogating from the provisions of Directive 2006/112/EC governing the right of deduction and previously granted by Council Decision 2004/817/EC[2] under the then applicable Sixth Directive 77/388/EC[3].

(2) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States of the request made by Germany in a letter dated 3 June 2009. By a letter dated 9 June 2009, the Commission notified Germany that it had all the information that it considered necessary to consider the request.

(3) The derogating measure is intended to exclude VAT borne on goods and services completely from the right of deduction when the goods and services are used for more than 90% for the private purposes of the taxable person, or of his employees, or for non-business purposes in general.

(4) The measure derogates from Article 168 of Directive 2006/112/EC establishing the general principle of the right of deduction and is intended to simplify the procedure for charging VAT. The amount of tax due at the final consumption is only affected to a negligible effect.

(5) The legal and factual situation which justified the current application of the simplification measure in question has not changed and continues to exist. Germany should therefore be authorised to apply the simplification measure during a further

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1 OJ L 347, 11.12.2006, p. 1.
2 OJ L 357, 2.12.2004, p. 33.
3 OJ L 145, 13.6.1977, p.1.

period, but limited in time until 31 December 2012 in order to allow an evaluation of the measure.

(6) The derogation will not adversely affect the Community's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 168 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

The Decision shall apply until 31 December 2012.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

For the Council
The President