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Proposal for a

COUNCIL IMPLEMENTING DECISION

**authorising Germany to apply a special measure derogating from Article 193 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 tax¹ (hereafter ‘the VAT Directive’), the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation 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 15 March 2021, Germany requested authorisation to derogate from Article 193 of the VAT Directive regarding the person liable for payment of VAT in case of transfer of emission allowances traded in the national system under the Fuel Emission Allowance Trading Act (BEHG) of 12 December 2019. In accordance with Article 395(2) of the VAT Directive, the Commission informed the other Member States by letter dated 7 April 2021 of the request made by Germany. By letter dated 8 April 2021 the Commission notified Germany that it had all the information it considered necessary for appraisal of the request.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

As a general rule, Article 193 of the VAT Directive stipulates that the taxable person supplying goods or services is liable to pay VAT.

Pursuant to Article 395 of the VAT Directive, Member States may apply 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 a derogation from Article 193 of the VAT Directive, in order to designate taxable persons receiving transfers of emission allowances under the Fuel Emission Allowance Trading Act (BEHG) of 12 December 2019 as liable for payment of VAT (the reverse charge mechanism).

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community² governs the greenhouse gas emission allowance trading scheme in the EU (EU Emissions Trading Scheme or EU ETS). The Directive allows Member States to maintain their own national trading systems in parallel.

Under the BEHG, Germany has created a legal framework for a national emissions trading scheme for the pricing of greenhouse gas emissions from fossil fuels, which do not fall under the EU Emissions Trading Scheme. The Act will help to achieve national climate targets, including the long-term target of net-zero greenhouse gas emissions by 2050, and the reduction targets under the EU Climate Regulation, as well as improving energy efficiency.

Experience in allowance trading has generally shown that this sector is highly vulnerable to turnover tax fraud. For this reason, the VAT Directive provides in Article 199a(1) for the possibility for Member States to apply the reverse charge mechanism to the transmission of certain allowances and certificates. Germany makes use of the possibilities provided for in Article 199a(1)(a) and (f) of the VAT Directive and applies the reverse charge mechanism to

¹ OJ L 347, 11.12.2006, p. 1.

² OJ L 275, 25.10.2003, p. 32-46.

greenhouse gas emission allowance trading under the EU Emissions Trading Scheme and to trading in gas and electricity certificates. This has helped to reduce tax losses related to the transfer of such allowances and certificates.

Based on this experience, it must be assumed that trading in allowances for fuel emissions under the BEHG could also be exploited for fraudulent purposes and that losses in turnover tax are therefore to be expected in this field. One particular feature of emission allowance trading is that the allowances can be exchanged quickly, repeatedly and easily, without the expense required for the transport of goods for example. The corresponding supply chains are obscured by the frequent and rapid change of ownership, making it very difficult for the authorities to detect and hence to ensure that the proper amount of tax is levied.

It is also expected that the supply chain could involve ‘missing traders’ who, when discovered, have either disappeared already or no longer have any assets, so that the tax evaded can no longer be collected by the authorities. Under such scenario, the purchaser of the allowances in the supply chain declares the turnover tax shown in the supplier’s invoice as deductible input tax under Articles 167 and 168 of the VAT Directive, but the supplier does not pay the invoiced turnover tax to the tax authorities. Since the input tax deduction is not matched by any turnover tax revenue, the input tax represents a tax loss for the German tax authorities.

The application of the reverse charge mechanism for trading in greenhouse gas emissions pursuant to Article 199a(1)(a) and (b) of the VAT Directive is limited to allowances traded under the EU emission trading system. Therefore, Articles 199a(1)(a) and (b) of the VAT Directive do not provide legal basis for applying the reverse charge mechanism to the trade of allowances under national trading systems such as the BEHG.

Taking into consideration the vulnerability to fraud in the allowance-trading sector, and the impossibility to apply Articles 199a(1)(a) and (b) of the VAT Directive to transmissions of allowances under the BEHG, it is therefore proposed to introduce a special measure allowing Germany to apply the reverse charge mechanism to the abovementioned transmissions until 31 December 2024. Given the scope and novelty of the derogation, which refers to the trading of greenhouse gas emissions from fossil fuels, a sector prone to fraud, it is important to evaluate its impact. Therefore, if Germany would consider an extension of the special measure beyond 2024, it should submit to the Commission a request for an extension accompanied by a report on the application of the special measure by 31 March 2024 at the latest. This report shall include an assessment of the impact of the measure on the fight against VAT fraud and the number of traders and transactions affected by the measure.

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

Articles 199a(1)(a) and (b) of the VAT Directive allow Member State to apply the reverse charge mechanism to the transfer of allowances to emit greenhouse gases, as defined in Article 3 of Directive 2003/87/EC, and to the transfer of other units that may be used by operators for compliance with the same Directive.

The granting of a derogation allowing to apply the reverse charge mechanism to the transmission of allowances referring to emissions that do not fall within the EU Emissions Trading Scheme regulated by Directive 2003/87/EC is consistent with the objectives pursued by the abovementioned provisions in 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 it is based, the proposal falls under the exclusive competence of the European Union. Hence, 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, the special measure is proportionate to the aim pursued, i.e. to simplify tax collection and combat tax evasion. It does not go beyond what is required to fulfil these aims.

- **Choice of the instrument**

The instrument proposed is a Council Implementing Decision.

Under Article 395 of the VAT Directive, a derogation from the common VAT rules is only possible upon authorisation by the Council, which is 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**

No stakeholder consultation has been conducted. The present proposal is based on a request made by Germany and concerns only this particular Member State.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The proposal for a Council Implementing Decision aims at preventing certain forms of tax evasion or avoidance in the allowance-trading sector, which is especially vulnerable to VAT fraud. The reverse charge mechanism should help Germany to curb VAT fraud in this sector. Consequently, the derogating measure will have a potential positive impact.

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

- **Fundamental rights**

The proposal does not have any consequences for the protection of fundamental rights.

4. BUDGETARY IMPLICATIONS

The proposal will have no negative implications for the EU budget.

5. OTHER ELEMENTS

The proposal includes a sunset clause set at 31 December 2024.

Proposal for a

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) Article 193 of Directive 2006/112/EC provides that the taxable person supplying the goods or services is, as a general rule, liable for the payment of value added tax (VAT) to the tax authorities.
- (2) By letter of 15 March 2021, Germany submitted a request to the Commission for authorisation to apply a special measure derogating from Article 193 of Directive 2006/112/EC regarding persons liable for payment of VAT in the case of transfer of emission allowances traded in a national trade system under the Fuel Emission Allowance Trading Act² (BEHG) of 12 December 2019 (“the request”).
- (3) In accordance with Article 395(2), second subparagraph, of Directive 2006/112/EC, by letters dated 7 April 2021, the Commission transmitted the request to the other Member States and, by letter dated 8 April 2021, it notified Germany that it had all the information necessary to consider the request.
- (4) Article 199a(1), points (a) and (b), of Directive 2006/112/EC allows Member States to designate taxable persons receiving transfers of allowances to emit greenhouse gases, as defined in Article 3 of Council Directive 2003/87/EC³, and transfers of other units that may be used by operators for compliance with that Directive, as liable for payment of VAT (“the reverse charge mechanism”). These provisions were included in Directive 2006/112/EC by Council Directive 2010/23/EU⁴ in order to contribute to fighting VAT fraud. The application of the reverse charge mechanism for trading in greenhouse gas emissions pursuant to Article 199a(1), points (a) and (b), of Directive 2006/112/EC is limited to allowances traded under the EU emission trading system (“EU ETS”).

¹ OJ L 347, 11.12.2006, p. 1.

² Gesetz über einen nationalen Zertifikatehandel für Brennstoffemissionen (BGBl. I S. 2728).

³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁴ Council Directive 2010/23/EU of 16 March 2010 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain services susceptible to fraud (OJ L 72, 20.3.2010, p. 1).

- (5) Under the BEHG, Germany has created a legal framework for a national emissions trading scheme, which covers emissions that do not fall within the EU ETS. Therefore, Articles 199a(1), points (a) and (b), of Directive 2006/112/EC do not provide a legal basis for applying the reverse charge mechanism to trading under the BEHG.
- (6) According to Germany, trading in allowances is highly vulnerable to VAT fraud. Trading in allowances for fuel emissions under the BEHG might be exploited for fraudulent purposes in the same way as under the EU ETS. Emission allowances can be exchanged quickly, repeatedly and easily. The frequent and rapid change of ownership of these emission allowances makes it very difficult for the authorities to detect and hence to ensure that the proper amount of tax is levied. The purchaser of the allowances, being a taxable person with the right of deduction, could deduct the VAT incurred, without the supplier having paid the invoiced turnover tax to the tax authorities. In particular, the involvement in the supply chain of ‘missing traders’, who quickly disappear or do not have any assets, prevents the evaded tax from being collected by the authorities, negatively impacting the budget. To remedy the losses to public revenues, Germany requests a derogation from Article 193 of Directive 2006/112/EC to be authorised to introduce the reverse charge mechanism to the transfer of emission allowances.
- (7) Designating the recipient, being a taxable person, as the person liable for the payment of VAT in those particular cases would simplify the procedure for collecting VAT and prevent tax evasion and avoidance. Therefore, Germany should be authorised to apply the reverse charge mechanism to the transfer of emission allowances traded in a national trade system under the BEHG.
- (8) The special measure should be limited in time. Germany should therefore be authorised to apply that measure until 31 December 2024.
- (9) Given the scope and novelty of the special measure, it is important to evaluate its impact. Therefore, in the case that Germany wishes to extend that measure beyond 2024, it should submit a report to the Commission, including a review of the special measure together with the extension request by 31 March 2024 at the latest. That report should include an assessment of the impact of the measure on the fight against VAT fraud and the number of traders and transactions affected by the measure.
- (10) The derogating measure will have no adverse impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, Germany is authorised to provide that the person liable for payment of VAT is the taxable person to whom the transfer of emission allowances traded in a national trade system under the Fuel Emission Allowance Trading Act (Gesetz über einen nationalen Zertifikatehandel für Brennstoffemissionen) of 12 December 2019 is made.

Article 2

This Decision shall expire on 31 December 2024.

Any request for the extension of the special measure provided for in this Decision shall be submitted to the Commission by 31 March 2024 and shall be accompanied by a report on the

application of this measure which includes an assessment of the impact of the measure on the fight against VAT fraud and the number of traders and transactions affected by the measure.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels,

*For the Council
The President*