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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: COUNCIL IMPLEMENTING DECISION authorising the Federal Republic of Germany to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

COUNCIL IMPLEMENTING DECISION (EU) 2021/...

of ...

authorising the Federal Republic of Germany to apply a special measure derogating from Article 193 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 valued added tax¹, and in particular Article 395(1), first subparagraph, thereof,

Having regard to the proposal from the European Commission,

¹ OJ L 347, 11.12.2006, p. 1.

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 registered with the Commission on 15 March 2021, the Federal Republic of Germany ('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 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 – 'BEHG') of 12 December 2019 ('the request').
- (3) Pursuant to 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 Directive 2003/87/EC of the European Parliament and of the Council¹, and transfers of other units that can be used by operators for compliance with that Directive, as liable for payment of VAT ('the reverse charge mechanism'). Those provisions were included in Directive 2006/112/EC by means of Council Directive 2010/23/EU² 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').
- (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.

¹ 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).

² 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).

- (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. It is therefore very difficult for the authorities to detect such changes of ownership and 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 has requested authorisation to derogate from Article 193 of Directive 2006/112/EC in order 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 ('the special measure').

- (8) The special measure should be limited in time. Germany should therefore be authorised to apply the special 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 event that Germany wishes to extend the special 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. That report should include an assessment of the impact of the special measure on the fight against VAT fraud and the number of traders and transactions affected by the special measure.
- (10) The special 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, the Federal Republic of 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 shall take effect on the date of its notification.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at ...,

For the Council

The President
