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2017/0249 (NLE)

Proposal for a

COUNCIL IMPLEMENTING REGULATION

**amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for
intra-Community transactions**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• **Reasons for and objectives of the proposal**

On 7 April 2016, the Commission adopted the *Action Plan on VAT – Towards a single EU VAT area – Time to decide*¹ (VAT Action Plan). There the Commission announced, inter alia, its intention to adopt a definitive VAT system for Business-to-Business (B2B) intra-Union cross-border trade based on the principle of taxation in the Member State of destination of the goods in order to create a robust single European VAT area. A legislative proposal for such a simpler and fraud-proof definitive VAT system for intra-Union trade was included in the Commission’s Work Programme for 2017².

In its conclusions of 25 May 2016³, the Council took note of the points made by the Commission in its VAT Action Plan as regards the way forward towards the definitive VAT system and of its intention to present, as a first step, a legislative proposal in 2017 for the definitive VAT system for cross-border trade. It also reiterated its view that the principle of “taxation in the Member State of origin of the supply of goods or services” should be replaced by the principle of “taxation in the Member State of destination” for the definitive VAT system for B2B transactions.

In its conclusions of 8 November 2016⁴ the Council stated that, while the Commission is working on the definitive VAT system for intra-Union trade, improvements to the current VAT system should be made in the meantime. In this context, the Council requested amendments in four areas:

- **Proof of intra-Community supply:** the Council invited the Commission to explore possibilities for a common framework of recommended criteria for the documentary evidence required to claim an exemption for intra-Community supplies.
- **VAT identification number:** the Council invited the Commission to present a legislative proposal aimed at making the valid VAT identification number of the taxable person or non-taxable legal person acquiring the goods, allocated by a Member State other than that in which dispatch or transport of the goods began, an additional substantive condition for the application of the exemption in respect of an intra-Community supply of goods.
- **Chain transactions:** the Council invited the Commission to analyse and propose uniform criteria and appropriate legislative improvements which would lead to increased legal certainty and harmonised application of VAT rules when determining the VAT treatment of the transaction chain, including triangular transactions.
- **Call-off stock:** the Council invited the Commission to propose modifications to the current VAT rules in order to allow simplification and uniform treatment for call-off

¹ COM(2016) 148 final.

² See Commission Work Programme 2017: Delivering a Europe that protects, empowers and defends, COM(2016) 710 final.

³ See: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1487237841093&uri=CELEX:52016DC0710>

⁴ See: <http://www.consilium.europa.eu/en/press/press-releases/2016/05/25-conclusions-vat-action-plan/>

Council conclusions of 8 November 2016 on Improvements to the current EU VAT rules for cross-border transactions (No. 14257/16 FISC 190 ECOFIN 1023 of 9 November 2016) <http://data.consilium.europa.eu/doc/document/ST-14257-2016-INIT/en/pdf>

stock arrangements in cross-border trade. To this effect, "call-off stock" refers to the situation where a vendor transfers goods to a warehouse at the disposal of a known acquirer in another Member State and that acquirer becomes the owner of the goods upon calling them off the warehouse.

In order to meet the request of the Council, amendments to the VAT Implementing Regulation⁵ are proposed for the first domain. The three others require modifications to the VAT Directive⁶ and are therefore subject to a separate proposal.

- **Consistency with other Union policies**

The creation of a simple, modern and fraud-proof VAT system is one of the fiscal priorities set out by the Commission for 2017⁷.

Combating missing trader VAT fraud is also one of the European Union's ("Union" or "EU") priority crime areas, under the 2014-2017 EU Policy Cycle of Europol⁸.

Reducing administrative burden, particularly for SMEs, is also an important objective highlighted in the Union's growth strategy⁹.

The proposed initiative and its objectives are consistent with the Union SME policy as set by the Small Business Act (SBA)¹⁰, in particular principle VII on helping SMEs to benefit more from the opportunities offered by the Single Market.

It is consistent with the Single market strategy (SMS)¹¹ and the objectives of the Regulatory Fitness and Performance programme (REFIT).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Article 397 of the VAT Directive. This article provides that the Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement the VAT Directive.

- **Subsidiarity (for non-exclusive competence)**

According to the principle of subsidiarity, as set out in Article 5(3) of the Treaty on European Union (TEU), action at Union level may only be taken if the envisaged aims cannot be

⁵ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ L 77, 23.3.2011, p. 1).

⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

⁷ Annual Growth Survey 2017; see https://ec.europa.eu/info/publications/2017-european-semester-annual-growth-survey_en

⁸ [EMPACT priorities \(European multidisciplinary platform against criminal threats\)](#)

⁹ Europe 2020 – A strategy for smart, sustainable and inclusive growth: see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>

¹⁰ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – “Think Small First” – A “Small Business Act” for Europe (COM(2008) 394 final).

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions – "Upgrading the Single Market: more opportunities for people and business" (COM(2015) 550 final).

achieved sufficiently by the Member States alone and can therefore, by reason of the scale or effects of the proposed actions, be better achieved at Union level.

Issues related to the proof of intra-Community transport for the purposes of the VAT exemption for cross-border trade can be better addressed at Union level than by individual Member States since, inevitably, more than one Member State is involved. Moreover, VAT is a tax harmonised at Union level and therefore any new initiative for implementing a specific rule of the VAT Directive requires a proposal by the Commission to amend the VAT Implementing Regulation.

The proposed measure on the documentary evidence required to claim an exemption for intra-Community supplies has unanimously been requested by the Member States which demonstrates that action at Union level is likely to be more effective as, at national level, such action has proven not to be sufficiently successful.

- **Proportionality**

The proposed measure in relation to the proof of transport of goods from one Member State to another is a targeted reply towards a specific problem in relation to a VAT rule which has proven to be difficult to apply in a systematic and uniform way and which has created problems for taxable persons as well as for tax administrations.

- **Choice of the instrument**

This proposal amends Council Implementing Regulation (EU) No 282/2011.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

The Commission has set up two working groups for discussions at technical level regarding VAT, namely the Group on the Future of VAT (GFV) and the VAT Expert Group (VEG). These groups discussed improvements to the current VAT system, including the issue of the proof of transport of goods from one Member State to another in the framework of the VAT exemption for intra-Community B2B supplies of goods. In addition, a public consultation was organised from 20 December 2016 to 20 March 2017 resulting in 121 contributions¹².

- **Impact assessment**

Reference is made to the separate impact assessment [SWD(2017)325 and its summary SWD(2017)326] which has been carried out in relation to, inter alia, this proposal.

The impact assessment for the proposal was considered by the Regulatory Scrutiny Board on 14 July 2017 [Ares(2017)3573962-SEC(2017)423]. The Board gave a positive opinion to the proposal with some recommendations that have been taken into account. The opinion of the

¹² See, about stakeholder consultation, Annex 2 of the Staff Working Document - Impact assessment accompanying the document Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States and the results of the related open public consultation:
https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations_en

Board and the recommendations are mentioned in Annex 1 to the Staff Working Document for the impact assessment accompanying this proposal.

4. BUDGETARY IMPLICATIONS

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

5. OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

In 1994 the Commission drew the attention of the Council and the European Parliament¹³ on the question of the evidence to be provided in order to prove that the conditions for the exemption of an intra-Community supply of goods are met. Already at that time the Commission, less than 2 years after the introduction of the current transitional arrangements for the taxation of intra-Community trade (which entail that an intra-Community B2B transaction on goods gives rise to an exempt supply of goods in the Member State of departure and a taxed intra-Community acquisition in the Member State of arrival), pointed out that that issue was a source of difficulty.

Later discussions at Union level did not lead to practical results. Further the VAT Implementing Regulation does currently not contain any provision on this point, although over the years the case law of the Court of Justice of the European Union (CJEU) has dealt with the proof of the exemption for intra-Community supplies¹⁴.

Nevertheless, during the consultation process launched in connection with the Green Paper on the future of VAT¹⁵, numerous contributions pointed again to this issue as a major problem of the current VAT system. Clear and stable rules that provide legal certainty for businesses are essential. At the same time, tax administrations must be able to monitor and ensure the correct application of the exemption, in particular as exempt intra-Community supplies are often a basic component of cross-border carousel fraud schemes.

The solution proposed consists of introducing a rebuttable presumption in two specific cases which involve the certified taxable person status. As regards the certified taxable person status, reference is made to the proposed legislation on the definitive VAT regime for intra-Community trade.

In the first situation, whereby the goods have been transported or dispatched by the supplier, directly or by a third party on his behalf, and the supplier has the certified taxable person status, a presumption is introduced according to which the goods have been transported from the Member State of supply (departure) to another Member State in case the supplier is in possession of two non-contradictory documents (a list of which is contained in the

¹³ Report from the Commission to the Council and the European Parliament on the operation of the transitional arrangements for charging VAT in intra-Community trade (COM(94)515final of 23 November 1994).

¹⁴ See e.g. judgements of 27 September 2007, *Teleos*, C-409/04, ECLI:EU:C:2007:548; of 27 September 2007, *Collée*, C-146/05, ECLI:EU:C:2007:549; of 27 September 2007, *Twoh International*, C-184/05, ECLI:EU:C:2007:550; of 16 December 2010, *Euro Tyre Holding*, C-430/09, ECLI:EU:C:2010:786; of 27 September 2012, *VSTR*, C-587/10, ECLI:EU:C:2012:592; of 6 September 2012, *Mecsek-Gabona*, C-273/11, ECLI:EU:C:2012:547; of 9 October 2014, *Traum*, C-492/13, ECLI:EU:C:2014:2267.

¹⁵ Green paper on the future of VAT – Towards a simpler, more robust and efficient VAT system COM(2010) 695; Commission Staff Working Document accompanying document to the Green Paper on the future of VAT Towards a simpler, more robust and efficient VAT system (SEC(2010) 1455, 1.12.2010).

Regulation) attesting to the transport. However, a tax authority may rebut this presumption on the basis of evidence indicating that the goods were not transported from the Member State of supply to another Member State.

In the second situation, where the customer is a certified taxable person and where the goods have been transported or dispatched by that customer, directly or by a third party on his behalf, a presumption is introduced according to which the goods can be regarded as transported from the Member State of supply to another Member State if the supplier is in possession of (i) a written statement by the acquirer that the goods have been transported by the acquirer or on his behalf with mention of the Member State of arrival of the goods (without, however, the need to disclose the exact destination in order to preserve the confidentiality of the acquirer's business); and (ii) two non-contradictory documents (of those mentioned in the list contained in the Regulation) attesting to the transport. The statement in (i), which is to be recorded by the supplier, has to be provided no later than on the tenth day of the month following the supply. This period should provide the acquirer sufficient time to transmit the information while, at the same time, it does not exceed the time limit for the supplier to issue an invoice (at the latest on the fifteenth of the month following the supply in accordance with the conditions of Article 222 of the VAT Directive).

For the situations which are not covered by these presumptions, e.g. because the taxable persons involved do not have the certified taxable person status, the current rules, as interpreted by the CJEU, remain applicable.

Proposal for a

COUNCIL IMPLEMENTING REGULATION

amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions

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 397 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) In its VAT Action Plan², the Commission announced its intention to put forward a proposal for a definitive value added tax (VAT) system in relation to cross-border business-to-business trade between Member States. The Council, in its conclusions of 8 November 2016³, invited the Commission to propose in the meantime certain improvements to the Union VAT rules for cross-border transactions, inter alia for the purposes of exemptions in respect of intra-Community transactions.
- (2) Directive 2006/112/EC sets out a number of conditions to exempt from VAT supplies of goods in the context of certain intra-Community transactions. One of those conditions is that the goods have to be transported or dispatched from one Member State to another.
- (3) However, the divergent approach amongst Member States in the application of these exemptions for cross-border transactions has created difficulties and legal uncertainty for businesses. This is contrary to the objective of enhancing intra-Union trade and to the abolition of the fiscal borders. It is therefore important to specify and harmonise the conditions under which the exemptions can apply.
- (4) As cross-border VAT fraud is primarily linked to the exemption for intra-Community supplies, it is necessary to specify certain circumstances in which goods should be considered as having been transported or dispatched from the territory of the Member State of supply.

¹ OJ L 347, 11.12.2006, p. 1.

² Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT - Towards a single EU VAT area – Time to decide (COM(2016) 148 final of 7.4.2016).

³ Council conclusions of 8 November 2016 on Improvements to the current EU VAT rules for cross-border transactions (No. 14257/16 FISC 190 ECOFIN 1023 of 9 November 2016).

- (5) In order to provide a practical solution for businesses and also assurance for tax administrations, two rebuttable presumptions are introduced in respect of transactions involving certified taxable persons in Implementing Regulation (EU) No 282/2011.⁴
- (6) Taking into account that the provisions included in this Regulation are linked to amendments introduced by Council Directive [...]⁵/EU as regards the certified taxable person, this Regulation should apply from the date of the application of those amendments.
- (7) Implementing Regulation (EU) No 282/2011 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

In Chapter VIII of Implementing Regulation (EU) No 282/2011, the following SECTION 2a is inserted:

'SECTION 2a

Exemptions for intra-Community transactions (Articles 138 to 142 of Directive 2006/112/EEC)

Article 45a

1. For the purposes of applying the exemptions laid down in Article 138 of Directive 2006/112/EC, it shall be presumed that goods have been dispatched or transported to a destination outside their respective territory but within the Community in either of the following circumstances:

- (a) the vendor is a certified taxable person within the meaning of Article 13a of Directive 2006/112/EC, he indicates that the goods have been transported or dispatched by him or by a third party on his behalf, and he is in possession of at least two items of non-contradictory evidence listed in paragraph 3 confirming the transport or dispatch;
- (b) the person acquiring the goods is a certified taxable person within the meaning of Article 13a of Directive 2006/112/EC and the vendor is in possession of the following:
 - (i) a written statement from the person acquiring the goods stating that the goods have been transported or dispatched by him, or by a third party on his behalf, and referring to the Member State of destination of the goods;
 - (ii) two items of non-contradictory evidence listed in paragraph 3 confirming the transport or dispatch.

⁴ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

⁵ Council Directive [...] /EU of [...] amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States (OJ L [...])

The person acquiring the goods must furnish the written statement, referred to in point (b)(i), to the vendor by no later than the tenth day of the month following the supply.

2. A tax authority may rebut a presumption that has been made under paragraph 1 where there are indications of misuse or abuse by the vendor or the person acquiring the goods.
3. For the purposes of paragraph 1, the following shall be accepted as evidence of the transport or dispatch:
 - (a) a document signed by the person acquiring the goods, or by a person authorised on his behalf, acknowledging receipt of the goods in the Member State of destination;
 - (b) documents relating to the transport or dispatch of the goods such as a signed CMR document or note, a bill of lading, an airfreight invoice, an invoice from the carrier of the goods, an insurance policy with regard to the transport or dispatch of the goods or bank documents proving payment of the transport or dispatch of the goods;
 - (c) official documents issued by a public authority, such as a notary, confirming the arrival of the goods in the Member State of destination;
 - (d) a receipt issued in the Member State of destination confirming the storage of the goods in that Member State;
 - (e) a certificate issued in the Member State of destination by a professional body in that Member State such as by a chamber of commerce or industry confirming the destination of the goods;
 - (f) a contract between the vendor and the person acquiring the goods or a purchase order indicating the destination of the goods;
 - (g) correspondence between the parties involved in the transaction indicating the destination of the goods;
 - (h) the VAT return of the person acquiring the goods declaring the intra-Community acquisition of the goods.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Council
The President*