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OPINION STATEMENT

Opinion Statement FC 6/2020 on the EU Consultation on the EU TOMS VAT Regime

Prepared by the CFE Fiscal Committee
Submitted to the EU institutions on 14 September 2020

This Opinion Statement responds to the EU Consultation evaluating the special EU VAT scheme for travel agents and tour operators.

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 33 national organisations from 26 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Ms. Stella Raventós-Calvo, Chair of the CFE Fiscal Committee or Brodie McIntosh, Tax Technical Officer, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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CFE Tax Advisers Europe welcomes the opportunity to provide input on the EU consultation evaluating the EU VAT rules for travel agents and tour operators.

Although the one stop shop and improved input tax procedures have reduced the benefits of the scheme, we can still see some merits and benefit in having a special scheme, especially if it is optional. However, we have considerable reservations about the form of the current scheme. In particular, we consider its mandatory application especially to business customers distorts the neutrality of the tax and the fact that VAT should typically not represent an irrecoverable cost for businesses. We are also concerned that the special scheme may not be being uniformly applied across all EU Member States, and reservations have been expressed by EU Member States, practitioners and operators about the broad scope that the CJEU has given to the scheme. We also consider that requiring the margin to be determined on a transaction by transaction basis also reduces the neutrality of the tax. We can also see merit in enabling an apportionment of the margin between different components, which is already required when the package consists of both bought-in and in-house supplies.

There are aspects of the current special VAT rules for travel agents and tour operators that can simplify the position for business, in particular by minimising the need to register in multiple jurisdictions and avoiding the need to recover input tax in other jurisdictions, although these benefits may be less significant than they were in the past. For these reasons, we would be in favour of retaining a scheme, which we consider can be beneficial for smaller operators, especially if they are not selling to business customers and the package contains items bought in other states. However, we also consider that the scheme is in urgent need of reform.

In particular:

(i) we consider that the current rules are made unduly complex by the need to calculate the margin on a transaction by transaction basis, which is also inconsistent with the neutrality of the tax, by providing no machinery to reduce claims on account of losses, and causes difficulties on payments on account;

(ii) we are also concerned about distortions caused by business customers being unable to deduct input tax and the entire margin being taxed at the standard rate when the components would otherwise be taxed at lower rates. This can in turn requires operators to use other business models to avoid these disadvantages, for example by seeking to supply components of the packages as “in-house” supplies or by making supplies on the basis of an Article 79 agency relationship, so the scheme does not apply to the whole or parts of the package for one or other of these reasons. In this regard it is to be noted that the United Kingdom accepted that regularly chartered flights could be considered inhouse if the charterer provided its own catering or obtained the catering from a separate provider: see paragraph 7.2 of HMRC VAT Notice 709/5.

In some cases we understand that businesses have been established outside the European Union to avoid the commercial disadvantages caused by these distortions. In this regard CFE observe that accommodation often has multiple sellers with bed banks, online merchant retailers selling access to other travel providers on an undisclosed agency basis. Some non EU providers may characterise their

margin as a marketing service or other non-property related activity. This then raises the issue of how any updated TOMS arrangements should apply to such complex arrangements.

We consider that the main benefits of the TOMS scheme are avoiding the need for multiple registrations, although the significance of that benefit is reduced by extensions of the one stop shop, and also minimising any need to recover input tax in other jurisdictions, the benefit of which has been reduced by improvements in the claims procedure. The other identified aspects may be consequences of the current system, but we would not view them as clear benefits of the scheme. Treating the supply as one supply taxed at the standard rate can place tour operators at a competitive disadvantage when compared with businesses making similar in-house supplies which are taxed at lower rates or operators who are accounting for tax as agents to whom Article 79 of the Directive applies, which can equally benefit from lower rates.

CFE consider that there is a need to reform the TOMS scheme, although we do not see the need for reform as being purely due to the fact that we are now in a digital age. The problems, as we see it, are more due to the complexities and rigidities of the current rules. We can also see that the one stop shop and improvements to the procedures for recovering input tax incurred in other member states may also reduce the benefits of the scheme. We can also see that the move to the digital age is one reason why the destination principle is generally considered appropriate when taxing supplies. However, the underlying supplies made by tour operators are ones that generally fall within exceptions to general rule in Article 45 of the Directive, which at least brings into question whether there is any need to make changes for that reason. However, as we observe below, we can see that altering the place of supply rules, so that they focus on the place of residence of the consumer, does have some policy merit. If the consumer is based outside the Union, it would mean that no VAT is charged, thereby encouraging visitors to visit the Union. Requiring VAT to be charged by all operators selling packages to EU nationals may also reduce incentives to use offshore operators and may also reduce any VAT incentives in travelling outside the Union.

We are aware of businesses altering the basis and place where they make supplies to try and avoid the lack of neutrality of the current rules. To the extent that different Member States consider the scope of application of the scheme differently, there could also be distortions of competitions e.g. are organisers of international meetings, incentives, conferences and exhibitions (MICE) subject to the special scheme? Travel can be a low margin business for many tour operators and cash flow is critical. As with any distortion of competition, the risk is the undue development of competitors to the detriment of travel agencies subject to less advantageous rules. Furthermore, to mitigate this distortion of competition, travel agencies need to use other business models to avoid the disadvantages of the TOMS scheme which adds complexity and can result in additional costs being incurred to take advantage of the revised structure which would be avoided if there was no need to take such actions. In this regard it is to be observed that it now more common for “products” to pass through more than one seller (who can be located anywhere in the world) before being sold to the final consumer.

We consider that the disadvantages of the scheme could be minimised by making the scheme optional. This, in particular, applies when the customer is a business customer. However, we consider that any option should ideally be more general. For example, if VAT is accounted where the operator is established, there are unlikely to be any benefits to the scheme when the entire package relates to

items acquired in the state where the operator is established. All the benefits of the scheme in our view currently arise in relation to cross-border packages. Allowing the margin to be taxed at different rates reflecting the components of the package may also help avoid distortions (the scheme as originally drafted in the United Kingdom permitted this and the scheme in any event requires an apportionment between in-house and bought-in supplies). We also consider that it would be beneficial to alter the scheme so that the margin no longer has to be calculated on a transaction by transaction basis. In cases where there is a loss it should be possible to carry it forward (this was previously allowed in France: see now repealed Instruction 3L-1-81 of 24 June 1981, Documentation de Base 3 L-6142 of 1st January 1984, §8)). In this regard it is interesting to observe that the Court of Justice envisaged that average values could be used for the purposes of apportioning consideration in C-291/03 *MyTravel plc v Customs and Excise Commissioners*. We have difficulty in seeing why the same approach should not be taken when calculating the margin. We consider that any amendments should seek to secure: (i) clear and precise VAT rules, (ii) simplified VAT reporting systems and (iii) harmonised application of the rules in this respect across the EU.

There is a real economic paradox in the TOMS margin VAT system as the supply is exempted when tourists go outside the EU and subject to VAT when we they are brought into the EU. However, the EU's interest in services, particularly in tourism, is diametrically opposed to the prevailing interest in goods. In the case of goods, it is in interest of EU to export and to facilitate exports, whereas in the case of tourism, the interest is to bring in final consumers who will pay VAT on the underlying services, which is definitively acquired by the States. Thus, the real fundamental reform would be to encourage operators established in the EU (the receptive ones) to bring in tourists from outside Europe to the European market. This would mean exempting their margin in this case or granting them refund of VAT on the margin to their principals, who are often non-EU travel agencies.