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# Opinion Statement FC 4/2024 on the term “the Supplied Goods Dispatched or Transported to a Destination Outside the Respective Territory but within the Community, by or on behalf of vendor or the Person Acquiring the Goods” for the Purpose of Article 138(1) of the VAT Directive

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers’ chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU 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 Bruno Gouthière, Chair of the CFE Fiscal Committee, Jeremy Woolf, Chair of the CFE Indirect Taxes Subcommittee, or Aleksandar Ivanovski, Director of Tax Policy at [info@taxadviserseurope.org](mailto:info@taxadviserseurope.org). For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

## 1. Introduction

Chain transactions occur when multiple parties agree to buy and sell the same goods and the goods are transported directly from the first participant in the chain transaction to the ultimate participant in the chain transaction.

Article 138 of the Principal VAT Directive exempts the supply of goods dispatched or transported to a destination outside a respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

It is important to note that this requires proof of two issues. The first is proof of the transport of the goods and the second is proof of on whose behalf the transport has been organised.

It is generally relatively easy for a supplier who organises for the goods to be transported to a different Member State to prove that fact. However, the exemption also extends to cases where the goods are dispatched or transported to a different Member State by or on behalf of the person acquiring the goods. Particularly when there are chain transactions, in these circumstances there is no clear and comprehensive guidance as to how a vendor is to establish his entitlement to exempt the supply and in practice it can be very difficult to establish what evidence is required. The supplier in these circumstances is also inevitably at the mercy of his customer. Especially since there are no harmonised rules about what evidence is required, the customer may, by ignorance or inadvertence, fail to retain all the evidence that a particular member state may require.

We accept that Article 45a of the Council Implementing Regulation does provide a limited rebuttable presumption that goods have been dispatched or transported. The evidential requirements that need to be satisfied in order to benefit from that article will frequently in practice be difficult for a supplier to obtain when the transport has been organised by his customer and in any event it only provides a rebuttable presumption. That article is also only directed at the issue of proving the transport of the goods and does not also address the issue of how a supplier is to also prove the crucial issue of on whose behalf the transport has been organised, so the article is also only of limited assistance for that reason.

There is also some limited non-binding guidance provided by the Commission in their Explanatory Notes on the 2020 Quick Fixes<sup>1</sup>. At para 3.6.5 these refer to the fact that Advocate General Kokott in her Opinion in the *Herst* case<sup>2</sup> considered that the cross-border supply should be ascribed to the person bearing the risk of loss. However, it correctly observed that this causes problems when the risk of loss is split. In such cases the guidance suggests it should be the person who transports the goods or who makes contractual arrangements for their transport who the cross-border supply should be ascribed to. It notes that merely paying for the transport is not sufficient to establish the necessary linkage.

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<sup>1</sup> [VAT - Explanatory notes on "2020 quick fixes" published - European Commission \(europa.eu\)](#)

<sup>2</sup> C-401/18.

After the adoption of the Quick Fixes, this issue was considered by the VAT Forum in its sub-group on the Quick Fixes. The Report that was produced observed<sup>3</sup> that different Member States took different approaches when determining to which supply the transport should be ascribed to and which in consequence was eligible for the exemption. It also observed that: *“It could be very difficult for an intermediary to know which evidence to keep as different Member States have different views on what is important for deciding who is organising the transport”*<sup>4</sup>. Despite these difficulties it unfortunately concluded that<sup>5</sup>:

“As long as Member States have different views on which criteria are decisive to determine which party is the one by or on behalf of which the dispatching or transporting of the goods takes place, it is very difficult for businesses to know what proof they shall have to prove that the transport has been made “by or on behalf” of a certain taxable person.

Without an agreement between Member States on which criteria to use when deciding who is the party that dispatches or transports the goods, either himself or through a third party acting on his behalf, it is difficult for the EU VAT Forum to provide any best practices on what proof could be used for this”.

## 2. CFE Comments

We consider that it is unfortunate that, despite the VAT Forum highlighting the difficulties that uncertainty on these issues is causing business, no steps have so far been taken to provide further guidance or clarification on this important issue.

Given these difficulties we consider that it would be highly desirable to produce clear and transparent rules and guidance for suppliers in order:

- to secure greater legal certainty;
- avoid unduly complicating intra-EU trade in goods;
- to fight against VAT fraud.

In order to secure the unified cross-EU interpretation:

- the term “the transport on behalf” should be more clearly defined in either the part of the VAT Directive or the Implementing Regulation;
- the list of the potential evidence to provide to prove the term “the transport on behalf” should also be defined in the Implementing Regulation.

## 3. Conclusions

CFE hopes that these comments are of assistance and stand ready to assist the Commission in considering the issues raised above in our Statement in the course of policy dialogue.

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<sup>3</sup> <https://taxation-customs.ec.europa.eu/system/files/2022-09/EU> at para 7.2.1.3

<sup>4</sup> See para 7.2.3.2.

<sup>5</sup> See para 7.2.3.3

