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EUROPEENNE

## **Opinion Statement FC 9/2017**

**on**

### **European Commission Proposals on the way towards a single European VAT area**

**Prepared by the CFE Fiscal Committee**

**Submitted to the European Institutions on 1 December 2017**

*The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 27 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.*

*The CFE is registered in the EU Transparency Register (no. 3543183647-05).*

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## 1. Introduction

This Opinion Statement comments on the European Commission proposals on the follow-up to the Action Plan on VAT towards a single EU VAT area published on 4 October 2017. It examines the proposed cornerstones of the definitive VAT system and the introduction of the concept of a Certified Taxable Person (“CTP”)<sup>1</sup>. Given the lack of substantial detail currently available on the cornerstones, the comments will be preliminary and high level comments and will be supplemented by an additional Opinion Statement once more detailed proposals are published in 2018.

The Opinion Statement also looks at the proposals in relation to the short-term “quick fixes”, namely:

- Call-Off stock arrangements - Simplification and harmonisation of rules regarding call-off stock arrangements
- VAT identification number – recognition of VAT identification number of the customer as a substantive condition in order to exempt from VAT an intra-Community supply of goods;
- Chain transactions - Simplification of rules in order to ensure legal certainty regarding chain transactions<sup>2</sup>
- Proof of intra-Community supply – Common frame work of recommended criteria for the documentary evidence required to claim an exemption for intra-Community supplies<sup>3</sup>

## 2. General remarks

The CFE understands the wishes of the European Commission to tackle fraud and to improve and simplify the VAT system for cross-border transactions within the EU. However, the question arises as to whether the proposed definitive regime will actually fight fraud or, instead, possibly create new means of perpetrating fraud.

The European Commission has presented proposals which are a combination of a number of quick fixes relating to the current VAT system, and cornerstones of a new definitive VAT system. However, in the context of the introduction of the definitive VAT system the proposals merely present general cornerstones, the CFE is concerned that this combination is not a solid enough basis for proper

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<sup>1</sup> [Proposal for a Council Regulation amending Regulation \(EU\) No 904/2010 as regards the certified taxable person](#)

<sup>2</sup> [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](#)

<sup>3</sup> [Council Implementing Regulation amending Implementing Regulation \(EU\) No 282/2011 as regards certain exemptions for intra-Community transactions](#)

consideration prior to reaching such a drastic decision as an agreement on a definitive system. Appropriate consideration cannot be given until the more detailed rules are worked out at the next stage in 2018. Therefore, the CFE believes that the better approach at this stage of events, is to consider making adjustments to the current system in order to minimize fraud and improve the system by implementing quick fixes.

### **3. Certified Taxable Person**

The proposed new concept of a certified taxable person ("CTP") is a key element of the new proposals regarding a definitive VAT regime. A business with this certification will be considered a reliable VAT taxpayer throughout the EU and therefore be subject to lesser administrative constraints and eligible to apply some of the so-called quick fixes. In order to receive the classification, businesses must apply to the national tax authority of the Member State of establishment and demonstrate that they have satisfied the 3 criteria contained in the proposed Article 13a (2) of Directive 2006/112/EC. The 3 criteria focus on compliance record, procedures and financial solvency.

#### **Comments**

##### **Necessity / appropriateness**

- From the outset, the CFE questions the necessity for a CTP on the basis that it may just another layer of bureaucracy and uncertainty in circumstances whereby it will not be a universally applicable concept.
- If the rationale for the introduction of CTP is to fight against missing trader fraud, it may have been useful to consider other measures that would impact less on business organisations.

##### **Applications process**

- The CTP concept is one of the cornerstones, in any case during the first step, and thus should be fraud proof. From that perspective, it is essential that the procedure of obtaining the status is fully harmonized and that all member states apply the same strict procedure. In order to minimize the risk of fraud, the CTP should be monitored after being recognized as CTP. Such monitoring process should also take into account change of ownership of the CTP. Otherwise we see dangers that the CTP status will distort where businesses establish (because they will move to where it is easiest to obtain it) and also being used as a vehicle to continue committing fraud.

- The vague nature of the terms in the proposed Art 13a(2) of Directive 2006/112/EC such as “serious infringement” or financial solvency” will give Member States significant discretion. It is noted that increased harmonisation of the criteria might be helpful and avoid different standards being applied in practice across Member States. For example, if all Member States do not apply the same standard on subjective criteria when granting the CTP classification, business refused will experience adverse impacts on their trading relations although that company may have been granted by another Member State given the subjective nature of the tests.
- The CTP is analogous to the Authorised Economic Operator (“AEO”) number in the customs context (although the AEO contains 5 eligibility criteria). It is a point of great practical concern that it currently takes approximately 1 year to get an application for AEO approved – it will be essential that a CTP classification be obtained in a much shorter time frame if it is to have practical applicability, e.g. allow business to avail of the “quick fixes”. In this regard, the capacity of the tax authorities to handle a large number of CTP applications in a short time frame will be essential.
- It is not certain that the tax authorities of all Member States will be able to review thousands of taxable persons within a short period of time. It is technically impossible that hundreds of thousands of taxable persons could qualify as a CTP at a given moment in time. Any difference in time of taxable persons qualifying for the CTP, even of one day, may cause commercial damage to eligible persons and therefore could constitute an infringement to the general principle of non-discrimination.
- In terms of communicating / verifying the CPT status, it should be noted that the VAT number as such cannot be used as this number is linked to many other national legislations.
- It should be clear that the purchaser to a non-CTP would have an immediate right to deduct input VAT, as is currently the case in pure national transactions.

#### **Impact on Start-Ups and SMEs**

- There is an issue for both SMEs and new companies. New companies will not be eligible to apply for CTP status as they will not be in a position to satisfy the requirement of a history of tax compliance. An exemption for new companies should be included in light of this, although this could be a route for fraudulent business to obtain CTP status. SME’s will generally have neither sufficient structures nor staffing to satisfy the requirements.

- Because they in practice will not be eligible for CTP states, the new proposals will result in cash-flow problems for SMEs and new businesses and will also mean that SME's will be penalised with disproportionate costs on professional advice and training resources.
- Businesses not able to meet the criteria for genuine reasons would be in the same uncertified category as fraudulent businesses. A business that has had a period of resourcing or cash flow difficulties impacting its compliance history may not meet the criteria, but there is no inference that it is committing fraud. Customers will not see any difference, only know that their supplier is uncertified, which could create problems for 'fit and proper' tests carried out in the supply chain.
- The conditions required to obtain CTP status may change pursuant to a change in shareholders or simply due to changes in economic conditions.
- The wording of the Explanatory Memorandum to the proposal seems to suggest that the CTP concept will only be in place during the period until 2027, as it would allow for a gradual implementation of the definitive system. However, the fact that some business are not eligible to be a CTP or did not apply could result in a commercial disadvantage, for example in the case of businesses performing occasional intra-community supplies.

#### **VAT Groups**

- The question arises as to whether a VAT group can apply for CTP status or whether the individual member of a VAT group should apply.
- There is a further question around whether one business in a VAT group that is not able to meet the criteria would prevent the whole group from being a CTP. What would happen where new businesses join a group? If they can gain CTP status by means of joining an existing CTP VAT group, this gives the new business an advantage over new businesses that are not joining an existing VAT group.
- In case of a fixed establishment it is unclear whether it should separately apply or obtain CTP status through the head office, and which tax administration should be competent.

#### **The VIES system**

- The VIES system will be pivotal to the operation of the CTP. Therefore, the VIES system will need to be reviewed and updated in order to effectively facilitate the new system. A concern exists that the operation of the current VIES system already causes difficulties when checking VAT numbers particularly with groups or when large numbers of searches are required. If the CTP must apply to individual businesses in VAT groups, VIES would need to be adapted to

accommodate this search, as it currently only shows the representative member of the VAT group when a search is carried out on the VAT number. These new proposals will complicate the system further and could lead to further administrative difficulties with using the system.

#### **4. Destination principle / One Stop Shop**

The change to a destination-principled VAT system will substantially impact all businesses trading in the EU Single Market. The Commission have now proposed the first step in implementing the definitive VAT system. Under a destination-based VAT system, the supplier shall be liable for VAT at a rate applicable in the Member State of destination. Goods traded cross-border will be subject to the rate of VAT applicable in the destination country. Whilst tax will be collected by the country of origin it will ultimately be transferred to the destination country. The mechanism for allowing this new destination system to operate a One Stop Shop.

The suppliers will not be required to register in the destination Member State for purposes of VAT, but can avail of the 'one stop shop' digital portal. By means of the 'one stop shop' portal businesses will be able to file declarations and declare VAT on cross-border transactions in a single return and the same rules and the language of their state of establishment. Member states will accordingly settle their VAT that is due directly.

#### **Comments**

- The European Commission has been very positive about the success of the Mini One Stop Shop (MOSS). However, it is not clear how far Member States are checking whether tax should be being paid in another member state (rather than domestically).
- The Commission states that changing over to OSS will cut fraud by 80% however clarification must be given on how this figure was reached.
- Given that fighting fraud is a fundamental reason for the new system, it must be certain that the new system will in fact achieve this aim but also work effectively in practice.
- The logistics of actually transferring the money between Member States must be examined. There will be substantial sums of money involved with the new scheme – much more so than under the current MOSS so the mechanism by which funds will be transferred between Member States is very important.
- Although the problems may be lessened by the initial proposals to limit the application to supplies of goods, in the event they are extended to services we consider that the proposals will cause classification problems. In countries that have a variety of rates,

classification of supplies particularly of services has generated a lot of litigation. It is likely to be particularly difficult for an SME based in one state to be aware of the practice of classification in another country. One of the attractions of the current system is that these issues do not need to be considered when cross-border supplies are made between businesses. These problems will be increased by the Commissions' proposals to give Member States greater freedom to fix rates.

- Unless they are CTPs, the proposals have the disadvantage of increasing the cash flow costs of making cross-border supplies. In addition, further discussion and clarity is required in relation to the question of tax offset at cross border level.

## **5. Quick fixes**

Three of the so called "quick fixes" will only apply to CTPs – therefore much more clarity is needed on the concept and criteria for certification as a CTP.

### **5.1 Chain Transactions**

- It is questionable as to why this quick fix should only be applicable to CTPs.
- The CFE is concerned that the proposals do not address the implications of the *Facet Trading* decision<sup>4</sup>. By requiring businesses to account for VAT without any right of recovery this decision can frequently drive businesses into insolvency. Given the increasing co-operation between tax authorities we would question whether there is any need for the provisions to operate in such a draconian manner.

### **5.2 Proof of intra-Community supply – Common frame work of recommended criteria for the documentary evidence required to claim an exemption for intra-Community supplies**

- In relation to the documentation required for proof that the goods were transferred, it should be noted that the requirements are in fact more onerous than those which already exist in some Member States, for example Slovenia. However, other Member

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<sup>4</sup> Case C 536/08

States do require more proof than that proposed so for those member states it would be a simplification.

- The CFE seeks clarity on whether the purchaser will also need 2 documents as proof.
- This only applies to CTP's, which means that two systems would be in place: the general rules with no specific documentation requirements for non-CTPs and specific documentation requirements for CTPs. This gives rise to the increased chance of genuine mistakes occurring, increasing risks of penalties and administrative burden which disproportionately affects smaller businesses.

### **5.3 Call-Off stock arrangements - Simplification and harmonisation of rules regarding call-off stock arrangements**

- It is questionable as to why this quick fix should only be applicable to CTPs, it means that two systems will be in operation, leading to uncertainty and additional administrative burden for tax authorities which will need to operate two concurrent systems. This gives rise to the increased chance of genuine mistakes occurring, increasing risks of penalties and administrative burden which disproportionately affects smaller businesses.
- A potential issue may arise in Italy, on the basis that the proposal for Call-off stock in Document 569 is already in force for all taxpayers.

### **5.4 VAT identification number – recognition of VAT identification number of the customer as a substantive condition in order to exempt from VAT an intra-Community supply of goods**

- This proposal is introducing a concept that the CJEU has held on a number of occasions to be disproportionate, for example in the *Plöckl case*<sup>5</sup> where the Court held that a supply could not lose the benefit of exemption simply because of the failure to provide a VAT number.
- There is a risk that the proposal will create double taxation on the basis that one will not be in a position to exempt cross-border supplies unless they have a VAT number. However, issues could arise if the customer is not in a position to give a valid VAT number or mistakenly gives an incorrect number.

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<sup>5</sup> Case C 24/15

- Given the central role to be played by the VIES operational system it will be essential that the system is fully functional and easy to use. For example, CFE members have experienced problems with the current VIES system of ascertaining VAT numbers for an entity which is within a VAT group, or large companies are currently experiencing difficulty with doing bulk checks on the VIES system.