CFE tax advisers europe

OPINION STATEMENT

Opinion Statement FC 7/2018 on a Proposal for a Council Directive amending Directive 2006/112/EC, as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States (2018/0164(CNS))

Prepared by the CFE Fiscal Committee
Submitted to the European Institutions on 23 August 2018

This Opinion Statement concerns the proposal to amend Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States. CFE Tax Advisers Europe welcomes certain aspects of the proposal, however is concerned with the potential consequences of many aspects of the proposals, in particular the practical implications of introducing "Certified Taxable Persons" and the potential impact of the proposed Directive on SMEs. CFE also has practical concerns in relation to call-off stock and chain transactions, reverse charge supplies, and the special schemes extending the one-stop account for VAT.

CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 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, 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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I. General Remarks

This Opinion Statement comments on the European Commission's proposals, published on the 25th May 2018, relating to the amending of Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States (2018/0164(CNS)).

CFE Tax Advisers Europe considers that there are aspects to the proposals that are to be welcomed. However, it remains concerned with the consequences of many aspects of the proposals. CFE understands the wish of the European Commission to tackle fraud and to improve and simplify the VAT system for cross-border transactions within the EU, however it is concerned about the burdens that the proposed system will place on traders.

In particular, it is concerned that small and medium sized businesses may face considerable difficulties and expense in determining what rates to charge in other Member States. CFE fears that rather than facilitating cross-border trade, the proposals will have the reverse effect. It can already be difficult and expensive for businesses to accurately determine their obligations in a purely domestic context. The difficulties are clearly going to be much greater when directed at trying to determine how much VAT should be paid under the laws of a different Member State, where any legislation and guidance is likely to be in a different language. CFE Tax Advisers Europe is concerned that these difficulties will increase as Member States are given greater freedom to fix their VAT rates. The issue will clearly be particularly serious if traders become subject to penalties, particularly significant penalties on account of errors. If the proposals are adopted, the CFE considers that it would be desirable that steps are taken to ideally ensure that innocent errors are not penalised and certainly not unduly penalised.

II. Certified Taxable Persons (CTPs)

One of the main facets of the proposals is a special regime for Certified Taxable Persons (CTPs), a term defined in proposed Article 13a. CFE Tax Advisers Europe has a number of concerns with the proposed definition. In particular:

(i) the vague nature of terms in the proposed Article 13a(2), such as "serious infringement" or "financial solvency", will give Member States significant discretion. Greater harmonisation of the criteria might be helpful and avoid different standards being applied in practice across Member States. In so far as financial solvency is established by the provision of guarantees "provided by insurance or other financial institutions or by other economically reliable third parties", it is also important to observe that such guarantees can be expensive to maintain and can also impact on the availability of funding for other needs of a business. Reliance on expensive guarantees should not be a key ingredient of being a CTP and Member States should not be allowed to default to such guarantees or require them for anything other than the minimum period necessary for that company to establish/meet the financial solvency test;

(ii) when there is a VAT group it is not entirely clear whether it is the entire group or the individual member of the group that the status of CTP applies to, although we consider that the better view is that the status is probably intended to apply to the entire grouping in a Member State.

However, the issue is not without its difficulties given the fact that different Member States take different views about what establishments should be considered to form part of the grouping. Nor is it clear what is to happen when a new business joins the group. If CTP status attaches to the group then presumably by joining the group the new business will automatically obtain CTP status. If CTP status is automatically obtained, joining an existing CTP VAT group will therefore give such new businesses an advantage over ones that are not joining an existing VAT group, although we can see that this can be said to be an automatic consequence of the grouping. However, it does also beg the question of whether CTP status for the entire group should be reassessed each time a new member joins. Obviously, it will be a matter of concern to a group if its status as a CTP is automatically lost each time a new member joins and a fresh application with possible delays has to be made. Member States, however, may not be happy about the prospect of CTP status being automatically maintained even though the companies in a group change, since they may have concerns that this will result in abuse. Additionally, if a business leaves a VAT group and becomes independently registered for VAT, if the relevant entity obtaining CTP status is the group it will presumably need to make a fresh application. It will clearly be disruptive if the application cannot be granted until after it has left the group. If consideration has not already been given to these issues, they are clearly issues that require consideration;

(iii) in the case of a company with fixed establishments in a number of countries, it is not completely clear what entity is expected to apply for CTP status and in what country. The uncertainty is increased by the fact that Article 13a makes it clear that making an application is not dependent on having a fixed establishment in a state, and that an address may be sufficient. We assume it is probably envisaged the establishments in different Member States should apply for separate CTP status in each Member State, a view that is supported by the reference to "tax authorities" in Article 13a(1). However, it would be helpful if the article could be amended to make the position clearer. This could possibly be done by inserting in Article 13a 7 "(but the status shall only apply to the place of business or fixed establishments of permanent or usual addresses in the Member State granting the status as certified taxable person)";

(iv) the CTP is analogous to the Authorised Economic Operator ("AEO") 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. We are therefore very concerned about the practicalities and capacity of the tax authorities to handle a large number of CTP applications in a short time frame. If such delays are likely the application process will need to be open some time before the new system comes into effect;

(v) 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. The current VIES system already causes difficulties when checking VAT numbers particularly with groups or when large numbers of searches are required. Problems are also caused by the fact that in some countries, for example Spain and Germany, the VIES will only confirm that there is a valid VAT number, but not who is the correct owner of that number. Particularly given the decision to make the correct identification of customer VAT number a substantive requirement, changes to the system are already required for that reason. 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 when using the system;

(vi) we are concerned that, particularly as currently drafted, Member States will implement the proposals in a manner that results in many reputable smaller and even medium sized businesses being unlikely in practice to be able to satisfy the requirements set out in Article 13a(2) that require "a high level of control of his operations" and evidence of "financial solvency", requiring proof of good financial standing or the provision of guarantees. Without further clarification of these requirements or an express declaration that when formulating these requirements as a matter of national law they must be framed so that the requirements are tailored by reference to the size and nature of the business, we are concerned that in practice it will only be very large businesses that will ever qualify. This in turn will mean that other businesses will be placed at a cash flow disadvantage, because they will not be able to obtain the cash flow benefits of being a CTP (i.e. having the ability to account for VAT and to recover it as input tax at the same time). If the requirement of CTP status is maintained, it will also prevent them from benefiting from the proposals in Article 17a, relating to call-off stock, or Article 36a, relating to chain transactions. It could also have reputational implications: see (vii) below;

(vii) businesses that cannot secure CTP status may suffer reputational damage and it is possible that both customers and suppliers may be more reluctant to have dealings with them for that reason;

(viii) we also consider that it would be better if exempt traders could benefit from the CTP regime. We appreciate that Article 13a(3) envisages that a person can be a partial CTP when it carries on "other economic activities". However, we are concerned that the current proposed wording may conceivably give rise to disputes about whether an "activity" can be considered sufficiently distinct to be considered an "other" activity that is eligible for partial CTP status. This is particularly true when the taxable and exempt activities are closely integrated, for example when a supplier, possibly a financial institution, sells a package of supplies some of which are taxable and some exempt and the supply being acquired is used in both activities. In such circumstances, we are concerned that the current proposed wording may conceivably give rise to disputes about whether an "activity" can be considered sufficiently distinct to be considered an "other" activity that is eligible for partial CTP status. It may also give rise to disputes about to what extent a recipient of a supply should be considered a CTP when the supply is being used for both taxable and exempt purposes. It is not clear what rules apply for the purposes of determining to what extent a customer is a CTP, and this is something that any supplier is going to need to know at the time he makes the supply. National rules for claiming deductions vary, and the rights to claim deduction can alter over time. If these rules are to be applied in determining to what extent a customer is a CTP, that will clearly cause potential problems for suppliers. We consider that it is unsatisfactory and undermines commercial confidentiality if a supplier has to ask detailed questions about the precise use that his customer will be going to make of the supplies made by the supplier. Under proposed Article 194a, a CTP is liable to account for VAT on supplies made to it. Rather than restricting its eligibility to be a CTP, for a combination of these reasons we consider that such businesses should be able to apply for full

CTP status, so that they account for VAT on the entirety of the supplies made to them but with a corresponding restriction on their rights of deduction, to reflect their partly exempt status. Not only will this avoid any possibility about disputes about whether the activity is sufficiently distinct to be an "other" activity, but administratively it is also likely to be far simpler for any adjustment to be done by the CTP restricting its entitlement to recover input tax, rather than having two different persons accounting for part of the tax on a supply and, particularly in the case of the supplier, having to make an assessment of the extent to which the customer should be considered to be acting as a CTP;

(ix) if the CTP status is time limited (we understand it may just apply until 2027) and the process for complying with it is expensive and arduous, that in itself may discourage applicants. Clarification of how long the system is intended to apply may therefore be significant;

(x) presumably rules will also need to be put in place for reassessing whether a person should continue to benefit from CTP status.

III. Impact on SMEs

CFE Tax Advisers Europe is concerned that the proposals will place particularly onerous burdens on smaller businesses who may have difficulties in determining what rates should be applied to supplies in different Member States. Difficulties can arise in determining whether there is one composite supply or multiple supplies for VAT purposes or whether supplies are closely linked to supplies that are exempt under Article 132(1) b, g, h, i, l, m, n, of Directive 2006/112/EC. While such difficulties may arise with supplies of goods, they are particularly likely to arise with supplies of services. CFE Tax Advisers Europe therefore welcomes the decision to focus the current changes on supplies of goods. However, it remains concerned about the burdens that the changes will impose on such businesses. Because of these difficulties CFE suggested in its Opinion Statement FC 6/2018 that small enterprises should be given a 25,000 Euro threshold where small enterprises can use national rules. Proposed Article 59c of Directive 2006/112/EC in Directive 2017/2455 contains a 10,000 Euro threshold but it is not only directed at small enterprises. Given the particular difficulties that the proposals are likely to entail for them, CFE Tax Advisers Europe continues to believe that a more generous provision targeted at small enterprises would also be appropriate.

IV. Call-off Stock and Chain Transactions

CFE Tax Advisers Europe considers that it is unfortunate that proposed Articles 17a and 36a are only directed at transactions with CTPs. Particularly in the case of Article 36a, we cannot see any clear reason why the provisions should be so limited. We therefore welcome the fact that the draft directive approved at the ECOFIN meeting on 20 June 2018 has deleted such a requirement in the equivalent provisions providing "quick fixes" pending the definitive regime[1]. We consider that similar changes should be made to the proposed articles for the definitive regime. As we understand it, the only change being made by Article 36a is a clarification of which supply should be ascribed to a supply of transport.

[1] See Doc 10335/18 Fisc 266 ECOFIN 638 at p 14 and p 16

We have particular difficulties in seeing why this should be limited to CTPs. In both cases, the limitation has the inevitable consequence that there will be two sets of rules governing the same transactions.

It would also appear to be particularly unfair and unfortunate that any simplification measures are not available to reputable small businesses because, as we have indicated, we fear that the proposed definition of a CTP and, equally importantly, how it is to be implemented by the Member States, is such that many reputable small traders will find that they cannot realistically qualify.

In relation to the proposed Article 36a we also observe that:

(i) we assume that there is intended to be only one supply in the chain that the transport is ascribed to and the article is intended only to help identify that supply. This in turn means that any chain will have only one "provider". This could be made even clearer if the definition of provider in Article 36a(3)(c) were altered so that it referred to the "first supplier" referred to in Paragraph 36(3)(b). Otherwise the definition of "provider", on first reading, possibly suggests that any intermediate operator can be a "provider" in relation to the supplies that it is making. We note in this regard that the draft directive approved at the ECOFIN meeting on 20 June 2018[2], directed at "quick fixes", in our view more helpfully focuses on the "first supplier" rather than the "provider";

(ii) if we are correct that Article 36a is only intended to ascribe which chain supply should be attributed to a transport or dispatch, we are also surprised that the article has no application when the intermediary operator is identified for VAT purposes in a Member State in which the dispatch or transport of goods begins. We consider that it would also be helpful to have a clearer rule ascribing the transport or dispatch when there are intermediaries in the Member State in which the dispatch or transport of goods begins. This would of course only apply when the supply between them is an intra-Union supply of goods for the purposes of Article 14 and not to supplies that clearly take place in the Member State where they are both established. Alternatively, the directive should be altered to make it clearer that those supplies should be considered to be made in the country where both traders are established (it is not clear which article in the directive clearly ensures this);

(iii) another possible drafting ambiguity relates to Article 36a 1(b), which states that Article 36a only applies if "the intermediary operator is identified for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins". This wording may arguably suggest that the article does not apply if a company has an establishment and is registered in the country of dispatch even though it also has an establishment in a different Member State and it is the establishment in the different Member State that places the order. We assume that it is probably intended that Article 36a should apply in such circumstances and it should be amended to make the position clearer, possibly by amending Article 36a 1(b) so that it also includes the following additional words in italics and reads "the intermediary operator is identified *in relation to the supply* for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins".

[2] See Doc 10335/18 Fisc 266 ECOFIN 638 at p 16.

On a more general note, we also observe that the need to identify which supplies in chain transactions is attributable to transport or dispatch has frequently been a cause of difficulty. We are therefore disappointed that the proposed reforms are so limited.

V. Article 194 and Reverse Charge Supplies

Under the proposals, Article 194 is altered so that a reserve charge only applies to supplies of services carried out by a taxable person who is not established in the Members State. The fact that the article no longer applies to supplies of goods means that traders who are not currently registered or established in any Member State will in future have to account for VAT on supplies made to taxable persons established in the European Union unless they are certified taxable persons. In such cases, we can see that there may be merit in retaining a reverse charge. We would have thought that tax authorities would prefer to have the ability to recover tax in such cases from the customer who is a business established in the Union, rather than from a business that has no such establishment. Such a limited reverse charge will also simplify the position for businesses that are not established in the Union.

VI. Special Schemes Extending the One-Stop Account for VAT

The proposed special schemes are to be welcomed. They at least reduce the administrative difficulties that the reforms are likely to cause, although, as we have observed above, they have no impact on the difficulties that the proposals will cause suppliers in determining what rate to apply to cross border supplies. We particularly welcome the proposals in Article 369a-369za to enable input tax to be recovered using the one-stop procedure. However, there are two eligibility requirements for this scheme that appear to us to be unduly restrictive:

(i) we have some difficulty in understanding why non-established traders who are only making supplies within Section 2 of Chapter 6 should be excluded from participating, as provided by Article 369b 2;

(ii) we would also question whether there is any need to impose an obligation on non-established traders to appoint an intermediary, as currently proposed by Article 169b 1(b), if the non-established person is established in a country and has agreed to provide similar levels of administrative cooperation and mutual enforcement to those provided by other Member States. We note in this regard the recent VAT Agreement reached between Norway and the European Union. This requirement to appoint an intermediary may prove to be onerous, and we can see no reason why an exception should not be made for businesses established in states that have entered into such agreements, so the mutual enforcement rights are similar to those between Member States. It may also have the benefit to the Union of encouraging countries to enter into such agreements.

(iii) with traders who are established in a different Member State and who have a right to recover input tax under Council Directive 2008/9/EC, we also have difficulties in seeing why they should only have a right to carry forward input tax claims when their deductions exceed the VAT due

from them in the Member State. In such cases, it should surely be possible to integrate the two systems.