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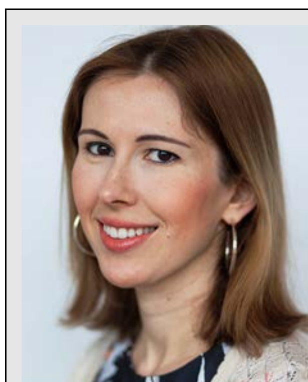
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In this article, the author considers several changes to the EU VAT system that will take effect in 2020. These changes (commonly referred to as "quick fixes") will affect businesses engaged in intra-EU trade. Although the quick fixes seek to simplify and harmonize the EU VAT rules, it is doubtful whether the intended objectives will be attained.

"VAT needs to be modernised and rebooted," announced the European Commission in its April 2016 VAT action plan. The action plan (COM(2016) 148 final) outlines several measures that are needed for the creation of a new single and fraud-proof EU VAT area. The most ambitious item is undoubtedly the introduction of a definitive VAT system for intra-EU business-to-business trade.[1] The definitive VAT system seeks to replace the rules applicable to trade among EU member states with definitive arrangements based on the principle of taxation in the member state of destination of the supply of goods or services. Under the new system, the concepts of intra-Community supply and acquisition will be abolished and replaced by a single intra-Union supply in which the supplier will charge VAT of the member country of destination of the goods but remit this VAT to the local tax administration. The legislative proposals on the definitive VAT system were published on October 4, 2017. They consist of one directive[2] and two regulations.[3] If member states succeed in reaching unanimity and approving the proposals, it will be the largest VAT reform in 25 years.[4]

Realizing that the implementation of the definitive VAT system will be a lengthy undertaking, the European Commission proposed four quick fixes to improve the VAT system's day-to-day functioning until the definitive regime takes effect. The quick fixes seek to:

- provide a simplified and uniform treatment for call-off stock arrangements;
- establish uniform criteria for transport allocation in chain transactions;

[1] Other measures of the VAT action plan include removing VAT obstacles to e-commerce, implementing measures to tackle the VAT gap, simplifying compliance obligations for small and medium-size enterprises, and modernizing the VAT rate policy.

[2] European Commission, 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, COM(2017) 569 final.

[3] European Commission, Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) No 282/2011 as Regards Certain Exemptions for Intra-Community Transactions, COM(2017) 568 final; and European Commission, Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as Regards the Certified Taxable Person, COM(2017) 567 final.

[4] In 1967, when the EU VAT system was adopted, a commitment was made to establish a definitive VAT system operating within the EU in the same way as it would within a single member state. Because the political and technical conditions were not ripe for such a system when the fiscal frontiers between member states were abolished in 1993, transitional VAT arrangements were adopted. Article 402 of the VAT directive provides that these transitional rules must be replaced by definitive arrangements.

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- make the VAT identification number a substantive condition to benefit from the zero rate for intra-Community supplies; and
- provide a common framework for documentary evidence required to apply the zero rate to intra-Community supplies.

The Economic and Financial Affairs Council adopted the four quick fixes on December 4, 2018.[5] They will take effect January 1, 2020.

Call-Off Stock Arrangements

The new rules for call-off stock arrangements were extensively examined in my previous article.[6] This section serves as a follow-up.

Call-off stock arrangements refer to a situation in which the supplier makes goods available to the customer by delivering them to a warehouse located near the customer's business premises. The supplier retains legal ownership of the goods until the customer removes them from the warehouse.

Under VAT rules, the transfer of goods to a call-off stock in another member state gives rise to a deemed zero-rated supply in the member state of departure of the goods and a deemed taxable intra-Community acquisition in the member state of arrival of the goods. This means that the supplier needs to be registered for VAT purposes in the member state where the call-off stock is kept. To lessen the compliance burden, some member states have adopted simplification measures that do not require the supplier to be registered in the member state of the call-off stock. The scope of the simplification measures varies across member states.

The first quick fix intends to create uniform rules for call-off stock arrangements in the EU and to avoid a situation in which the supplier must register in the member state where the stock is located. Under the new rules, the transfer of goods to another member state will be ignored for VAT purposes. When the customer removes goods from the stock, two taxable transactions will take place: an intra-Community supply by the supplier in the member state of departure and an intra-Community acquisition by the customer in the member state where the stock is located. If, within 12 months of their arrival, the goods have not been taken from the stock by the customer, an intra-Community supply shall be deemed to have been made. The supplier may prevent this by returning the goods to the member state from which they were transported.

The first quick fix was silent on some important matters regarding the call-off simplification. Luckily, the European Commission realized that several practical issues still needed to be clarified and provided some guidance. A meeting of commission officials with the Group on the Future of VAT clarified the following points:

- A call-off stock arrangement concerning one type of bulk good can exist in relation to several intended acquirers if an expected volume per customer has been determined at the time of the transport of goods to the call-off warehouse.
- The supplier can be the warehouse keeper of the call-off stock, and this would not mean that the keeper automatically has a fixed establishment in the member state where the warehouse is located. A case-by-case analysis is necessary to decide whether a fixed establishment of the supplier exists in the member state of the stock.
- The term "ownership" in new article 17a of the VAT directive (2006/112/EC) is to be understood within the meaning of the VAT directive (article 14) rather than on the basis of national civil law.
- VAT registration by the supplier in the member state of the stock does not exclude the application of the simplification unless the supplier has established a business or has a fixed establishment in the member state where the call-off stock is kept.
- A substitution of the customer is possible under the simplification measure if the new intended acquirer is already known at the

[5] The quick fixes legislative package consists of Council Directive (EU) 2018/1910 of December 4, 2018, amending Directive 2006/112/EC as regards the harmonization and simplification of certain rules in the value added tax system for the taxation of trade between Member States; Council Regulation (EU) 2018/1909 of December 4, 2018, amending Regulation (EU) No 904/2010 as regards the exchange of information for the purpose of monitoring the correct application of call-off stock arrangements; and Council Implementing Regulation (EU) 2018/1912 of December 4, 2018, amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions.

[6] Aleksandra Bal, "EU VAT and Procurement: New Rules for Call-Off Stock Contracts," *Tax Notes Int'l*, July 22, 2019, p. 323.

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end of the contract with the first intended acquirer.
- In the case of non-identifiable goods (for example, bulk goods), the first-in, first-out method is the most suitable one to determine the 12-month period for the application of the simplification.[7]

Furthermore, the European Commission explained that when the simplification measure takes effect on January 1, 2020, all national arrangements on call-off stock that deviate from the new rules will have to disappear. It is unclear how the commission will achieve this objective. As the new legislation does not explicitly preclude more generous national rules, it could be understood as the minimum standard (that is, every member state needs a simplification measure for call-off stock), giving the member states the discretion to introduce rules with a broader scope.

The minutes of the May 16, 2019, meeting provide useful guidance; however, they do not have the status of law. Thus, national authorities may have different views on the practical issues that the minutes sought to resolve. As businesses cannot rely on EU soft law in disputes with domestic tax authorities, they are still facing significant legal uncertainty.

Chain Transactions

Current Rules

Chain transactions refer to successive supplies of goods by various businesses in which the goods are transported only once from the first supplier to the final purchaser. The simplest version of a chain involves three participants (A, B, and C) and consists of two supplies: A to B and B to C. The goods are shipped directly from A to C.

According to the established case law of the Court of Justice of the European Union, the movement of the goods may only be ascribed to one of the supplies.[8] In other words, in the A-B-C chain, there is one supply with transport and one local supply in the member state of A or C. This means that if goods are transported to another member state as a result of the chain transactions, the intra-Community movement of the goods may only be ascribed to one of the supplies, and only that supply may benefit from the zero rate for intra-Community supplies. The other supplies in the chain that precede or succeed the intra-Community supply must be taxed as local supplies.

The VAT directive is silent on the issue of attributing transport in chain transactions, making the CJEU decisions the only legal source addressing this matter. The guidance provided by the CJEU is rather complex and requires a case-by-case analysis, thereby leading to significant legal uncertainty.

New Rules

To increase legal certainty for all parties involved in the chain, the second quick fix adds a new article 36a to the VAT directive. This article provides uniform rules to determine to which supply in the chain the intra-Community transport must be attributed and applies if the following conditions are met:

- The goods are supplied successively. This means that at least three persons must be involved in a chain transaction.
- The goods are dispatched or transported from one member state to another member state, meaning that transactions involving imports, exports, or domestic supplies are excluded from the provision.
- The goods are transported or dispatched directly from the first supplier to the last customer in the chain.

Under the new article 36a, the intra-Community transport will, by default, be assigned to the supply made to the intermediary operator. This supply may benefit from the zero rate for intra-Community transactions. The VAT directive defines an intermediary operator as a supplier within the chain, other than the first supplier, who dispatches or transports the goods either itself or through a third party acting on its behalf (article 36a(3)). The first supplier is explicitly excluded from the concept of intermediary operator. Therefore, if the first supplier arranges for the transport of goods, the

[7] European Commission, Group on the Future of VAT, GFV No 088, Minutes from the 26th meeting on April 5 (May 16, 2019).

[8] *EMAG Handel Eder OHG v. Finanzlandesdirektion für Kärnten*, C-245/04 (CJEU 2006).

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transport can only be attributed to that supply (in line with the established CJEU case law). This transaction may benefit from the zero rate for intra-Community supplies. The last customer in the chain cannot be an intermediary operator either because the customer can never meet the condition of being a "supplier in the chain." If the last customer organizes the transport of goods, such transport can only be ascribed to the supply made to the last customer. The new rule defines the intermediary operator as someone who "dispatches or transports the goods," but it is not clear what this means in practice (bearing the transport costs or concluding contracts with the freight forwarder).

Article 36a(2) of the VAT directive sets a derogation to the general rule. If the intermediary operator communicates to the supplier the VAT identification number issued by the member state from which the goods are transported, the transport will be ascribed to the supply of goods made by this intermediary operator. In other words, the quick fix will allow the intermediary operator to both determine to which transaction the transport will be attributed and influence how the VAT number is communicated.

To apply the derogation rule, the intermediary operator must communicate its VAT number to the supplier. No form is prescribed for the communication — it is sufficient if the number is mentioned on an invoice. However, "communicate to the supplier" implies that the intermediary operator must take some active steps to make the number known to the supplier in the context of a specific supply, and it is not enough if the number is displayed on the operator's website. The intermediary operator must keep evidence of having communicated the VAT number to the supplier. If the operator is not able to provide such evidence to the tax authorities, it will be presumed that the conditions for the derogation are not met and the general rule will apply.

While all suppliers in the chain must be taxable persons (that is, entrepreneurs registered for VAT purposes), the last customer in the chain can be a private individual. Consider the following situation: Company A sells goods to company B, which resells the same goods to an individual C. The goods are transported directly from A (in member state 1) to C (in member state 3).

If the general rule of article 36a applies, and the transport will be assigned to the first supply, A will perform a zero-rated intra-Community supply in member state 1, followed by an intra-Community acquisition by B in member state 3. The supply from B to C will be a domestic transaction in member state 3.

However, if B as the intermediary operator communicates its member-state-1-issued VAT identification number to A, the transport will be ascribed to the supply from B to C. The supply from A to B will be a domestic transaction taxable in member state 1. The supply from B to C will follow the rules for distance sales (article 34 of the VAT directive).

It is not clear whether the quick fix will apply if the goods are transported from the first to the last party in the chain but the transport is arranged by or on behalf of multiple parties (for example, goods are transported from Spain to the Netherlands by party B and from the Netherlands to Germany by party C in an A-B-C-D chain). In such a case, more than one party could qualify as the intermediary operator.

The scope of the new article 36a of the VAT directive is limited to clarifying to which transaction in the chain the transport is assigned. These rules affect neither the VAT liability of the parties in the chain nor the possibility of applying the simplification for triangular transactions (article 141 of the VAT directive).

To sum up, the quick fix will provide simplification and certainty in a limited set of circumstances. It will apply only to intra-Community chain transactions, meaning that chain transactions involving third countries will continue to rely on complex guidance provided by CJEU case law. Also, chain transactions in which the first supplier or the last customer arranges for the transport remain outside of scope.

VAT Number and Zero Rating

The customer's VAT number is a formal but not a substantive condition to apply the zero rate to intra-Community supplies. According to established CJEU case law, the zero rate may be applied if the VAT number is missing but the following substantive conditions are met:

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- the goods have been transported from one member state to another by or on behalf of a taxable person; and
- the transfer of goods has been effected for another taxable person or a nontaxable legal person acting as such in a member state other than that of the departure of the dispatch or transport of the goods.[9]

The third quick fix adds a new substantive condition for the application of the zero rate: The taxable person for whom the supply is made is identified for VAT purposes in a member state other than that in which the transport begins and has indicated its VAT identification number to the supplier (new article 138(1) of the VAT directive). If the acquirer does not give any indication of its VAT number to the supplier, or if the VAT number indicated has been issued by the member state from which the goods are transported, the conditions for the application of the zero rate are not met and the supplier must charge VAT. This will be the case even if all other conditions for applying the zero rate are met and the supplier has reason to believe that the customer is a taxable person.

The VAT number of the acquirer of the goods does not necessarily have to be a VAT identification number issued by the member state to which the goods are transported. It is acceptable that it is a VAT number assigned by a member state other than that in which the transport begins. Also, no form is prescribed for the communication of the VAT number. It is sufficient if the supplier has mentioned the VAT number of his customer in the invoice.

The third quick fix also introduces another rule: The zero rate will not apply if the supplier has not complied with the obligation to submit an EC sales list (recapitulative statement) or an EC sales list already submitted does not provide the correct information, unless the supplier can duly justify the shortcoming to the satisfaction of the competent authorities (new article 138(1a) of the VAT directive). An example of a shortcoming that could be duly justified could be that the supplier has not included the intra-Community supply in the EC sales list covering the period in which the supply took place but has included it in a recapitulative statement covering the subsequent period.

This new article 138(1a) rule gives rise to significant legal uncertainty. The vague wording ("duly justify") implies a case-by-case handling of noncompliance situations and might give rise to disputes with tax authorities. Would an unintentional typo in the customer's VAT number serve as a "due justification"? Would only some incorrect elements of the EC sales list amount to noncompliance and deny the zero rate? In the absence of uniform EU guidance, divergent national practices may apply.

Documentary Evidence for Intra-EU Transport

Member states apply diverging requirements regarding the documents that serve as evidence that the substantive conditions for the zero-rating of intra-Community supplies have been met. Because this significantly increases the compliance burden placed upon intra-EU traders, the fourth quick fix proposes a standardization of the rules on the documentary evidence required to apply the zero rate to intra-Community supplies.

The fourth quick fix introduces three categories of documentary evidence:

- A-items. These include documents relating to the dispatch or transport of goods (a signed CMR document (Convention Relative au Contrat de Transport International de Marchandises par la Route, an international agreement required for road transport), a bill of lading, an airfreight invoice, or an invoice from the carrier of the goods).
- B-items. These may include the following documents: an insurance policy with regard to the dispatch or transport of the goods, or bank documents proving payment for the dispatch or transport of the goods; official documents issued by a public authority, such as a notary, confirming the arrival of the goods in the member state of destination; or a receipt issued by a warehouse keeper in the member state of destination, confirming the storage of the goods in that member state.

[9] *Josef Plöckl v. Germany*, C-24/15 (CJEU 2016).

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- A written statement from the acquirer, stating that the goods have been dispatched or transported and identifying the member state of destination of the goods.

The new article 45a of the VAT Implementing Regulation introduces a presumption that goods have been transported to another member state if the following conditions are met:

- the supplier is in possession of at least two A-items of noncontradictory evidence which were issued by two different parties that are independent of each other, of the supplier, and of the acquirer;
- the supplier is in possession of any A-item and B-item of noncontradictory evidence, both of which were issued by two different parties that are independent of each other, of the vendor, and of the acquirer; or
- the supplier is in possession of the following: (i) a written statement from the acquirer, stating that the goods have been dispatched or transported and identifying the member state of destination of the goods (the statement must be provided by the 10th day of the month following the supply); and (ii) at least two A-items of noncontradictory evidence that were issued by two independent parties, or any combination of A-item and B-item, both of which were issued by two independent parties.

From the presumption it is clear that providing one or two B-items of evidence is not sufficient. An item related to the transport of goods (A-item) must always be provided for the presumption to apply. This seems to be justified because B-items (bank statements, insurance policies) do not provide any evidence of cross-border movement of goods.

Both pieces of evidence required for the presumption to apply must be issued by independent parties. Unfortunately, it is not clear what "independent" means. Does independence refer to financial, organizational, and economic links, such as those required for forming VAT groups (article 11 of the VAT directive)? Will any company belonging to the same group automatically be considered "dependent"? What if the supplier is not aware of any dependencies between the freight forwarder and acquirer and applies the presumption? It can well happen that companies will have to collect more pieces of evidence to ensure that at least two items come from independent parties. Also, as all A-items are typically issued by the freight forwarder, it may be impossible to obtain two A-item pieces of evidence from independent parties if goods are transported by one means of transport.

A written statement by the recipient cannot serve as evidence if it is issued after the 10th day of the month following the supply. The presumption contains a very strict deadline, which can be difficult to meet in practice. A written statement from the acquirer is generally requested to "repair" the lack of or bad quality of other transport documents. This generally occurs after the 10th of the following month. It would be more appropriate if the day of the arrival of the goods were used as the starting day of the 10-day period or if the deadline were based on the rules on invoicing (according to article 222 of the VAT directive, an invoice should be issued no later than the 15th day of the month following the supply).

In situations where the customer picks up the goods, the supplier cannot rely on A-items of documentary evidence because these are issued by the freight forwarder. The supplier would have to rely solely on B-items and a written statement. However, this combination does not satisfy the presumption. It seems that the new rule excludes ex works intragroup transactions from its scope.

Article 45a of the VAT Implementing Regulation stipulates that tax authorities may rebut the presumption. Rebutting the presumption means that tax authorities can demonstrate that the goods have not been dispatched or transported to another member state. This is different from a situation in which a tax authority can demonstrate that one of the evidence items contains incorrect information or is fake. In such a case, the supplier can no longer use his documents to rely on the presumption that the goods have been transported to another member state. However, he may still provide other documents that would enable him to benefit from the presumption or prove in a different way that the transport of goods to another member state has taken place.

Because article 45a of the VAT Implementing Regulation merely introduces a presumption,

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suppliers are permitted to use different pieces of evidence to demonstrate that a transport of goods to another member state has taken place. Applying the presumption in the reverse way is not possible. In other words, the fact that the conditions of the presumption are not met does not mean automatically that the zero rate cannot apply. Also, in situations not covered by article 45a (for example, the customer picks up the goods), the supplier must use other pieces of evidence to prove that the transport took place.

Finally, it's worth mentioning that the fourth quick fix has been included in a regulation that will become directly applicable in the member states. In contrast, the other quick fixes need to be transposed into domestic legislation.

Comments

The growing complexity of the VAT system and its vulnerability to fraud urged the EU to propose definitive rules for business-to-business intra-Community trade in goods. Because the new rules will not apply until July 1, 2022, the EU enacted four quick fixes that seek to counter some drawbacks in the short term. The main objective of the quick fixes is to simplify the VAT system and to ensure a consistent application of the VAT rules across the EU.

The first quick fix seeks to provide a uniform treatment for call-off stock arrangements across the EU. This objective will be achieved if the new call-off stock simplification puts an end to the patchwork of divergent national arrangements. It is unclear whether this will happen. The lack of proper guidance on several practical matters leaves businesses with significant legal uncertainty.

The second quick fix establishes uniform criteria for transport allocation in intra-Community chain transactions. It resolves a long-standing controversial issue. The drawback is that it only applies in a limited set of circumstances.

The third quick fix makes the VAT identification number a substantive condition to benefit from the zero rate for intra-Community supplies. In other words, suppliers will need to check their customers' VAT numbers transaction by transaction to satisfy the new rule. This will undoubtedly increase their compliance burden.

The fourth quick fix establishes a presumption that the goods have been transported to another member state if certain evidence items are provided. The practical value of the fourth quick fix is reduced by its extensive formal requirements. Companies may have difficulty obtaining documentary evidence from two independent parties or receiving a written statement within a 10-day deadline.

To conclude, to ensure that quick fixes serve their purpose of providing simplification and consistency, they still require some "fixing." This could occur by means of some explanatory notes or by guidelines from the European Commission. ■

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