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VAT EXPERT GROUP

VEG N^o 042

**Sub-Group on the topics for discussion
Proof of Evidence of Intra-EU Supplies**

1. BACKGROUND

1.1. Context

Since the introduction of the transitional regime, the exemption of intra-EU supplies of goods dispatched to taxable persons is not based on uniform customs documents and/or physical checks, but on a diversity of documentation.

It might be argued that the objective of eliminating checks at the European Union internal borders, which was a precondition for completion of the single market, has been achieved by means of the transitional system. However, this cannot be dissociated from two other fundamental objectives of the European Union: (i) ensuring the neutrality of taxation alongside the general development of EU integration and (ii) establishing a well-functioning internal market characterized by the abolition of obstacles to the free movement of goods (see, e.g., COM(96) 328, 22.07.96).

One has to recognize that the VAT Directive gave Member States wide discretion to ask for documents to support the right to exempt intra-EU supplies. There is, however, a perception from tax authorities increasing the level of demands to the suppliers to document intra-EU transactions, often for opportunistic reasons (including but not limited to the lack of success to tackle fraudsters effectively and in a coordinated way), resulting in impairing neutrality, proportionality and free movement of goods. This is causing increased burden on legitimate businesses, which is problematic as the case law of the Court of justice of the European Union demonstrated.

1.2. Legal framework

Article 138(1) of the VAT Directive states that Member States shall exempt the supply of goods dispatched or transported to a destination outside their 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.

From the definition, it is clear that evidence of the taxation of the intra-EU acquisition is not something the supplier can be required to provide its tax authorities as a condition for the application of the exemption; evidence of the taxable person status cannot be limited to the provision of a VAT identification number (see, e.g., *VSTR*, C-587/10, 27 September 2012).

The Member States' discretion on documentary evidence is provided in Article 131 of the VAT Directive and states that the exemptions shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

Finally, reference can be made to Article 273 of the VAT Directive stating that Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member

States, give rise to formalities connected with the crossing of frontiers. Hence, intra-EU supplies, like domestic ones, are taxed exclusively on the basis of the economic transaction and not upon the physical crossing of a frontier and the presentation of customs documentation.

1.3. CJEU case law

In recent years, many case laws of the Court of justice of the European Union have dealt with intra-EU supplies in general, proof of evidence in particular. One can refer to *Teleos* (C-409/04, 27 September 2007), *Collée* (C146/05, 27 September 2007), *Twoh* (C-184/05, 27 September 2007), *Euro Tyre* (C-430/09, 16 December 2010), *Meilike* (C262/09, 30 June 2011), *VSTR* (C-587/10, 27 September 2012), etc.

In *Teleos*, the Court of justice of the European Union held that apart from the requirements relating to (i) the capacities of the taxable persons (supply is made to another taxable person operating in another Member State rather than the Member State where transport started), (ii) the transfer of the right to dispose of the goods as owner and (iii) the physical movement of the goods from one Member State to another, no other conditions can be placed on the classification of a transaction as an intra-EU supply.

Further, after acknowledging that the regime governing intra-EU trade has become more open to fraud, the Court held that the requirements for proof established by the Member States must comply with the fundamental freedoms established by the EC Treaty, such as, in particular, the free movement of goods. The obligations imposed by Member States cannot give rise to formalities connected with the crossing of frontiers (form over substance). The position of economic operators should not be less favorable than it was prior to the abolition of frontier checks between the Member States because such a result would run counter to the purposes of the internal market which is intended to facilitate trade between them.

Any requirements on the proof of intra-EU supply may not be used in such a way as to have the effect of undermining the neutrality and proportionality of VAT for legitimate taxpayers. This is particularly relevant, even if, as in *Teleos*, the Court confirmed that according to the Court's settled case-law, it shouldn't be contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion.

2. PREVIOUS WORK ON THE MATTER & RELEVANCE OF THE TOPIC

The EU VAT Forum set up a specific working group aimed at analyzing best practices and possible improvements for the functioning of the current VAT system with a focus on one specific aspect of proof of evidence of intra-EU supplies, namely the proof of dispatch or transport to another EU Member State.

The subgroup met three times in 2013 and received input both from business and tax authorities' representatives. Its findings can be found in the VEG No. 27 dated 13 January 2014 and the following takeaways are particularly relevant to point out: (i) available commercial documentation related to a transaction should be sufficient as evidence; it

should not be asked for additional documents than those already existing and available for commercial purposes, (ii) alternative evidence should always be allowed, (iii) "ex works" supplies' situations are flagged as being the most at risk, (iv) experience shows that fraudsters fulfill all the formalities and have all the required documents; formalities increase bureaucracy for business and their practical success on fight against fraud remains untested, and (v) the safety net provision (i.e., requiring the supplier to charge VAT to a customer in another Member State in case the supplier does not have the relevant documents at hand when he issues his invoice) shall be adhered to as a solution only in specific cases.

The Sub-Group, in consultation with the Commission services, acknowledged the value and benefits of the work already undertaken and considered that further examination of this matter could be beneficial with the aim of: (i) discussing and analyzing aspects that have not yet been reviewed under VEG No. 27 (such as, but not limited to, how to evidence the customer's status as a taxable person in general but also, amongst others, in the absence of a VAT identification number) and (ii) derive guidance and/or best practices from, amongst others, the case law of the Court of justice of the European Union and EU Member States to assess the businesses' call for reforms and tax authorities practices.

3. ISSUES

The business representatives in the EU VAT Forum have stated that the three following elements should be considered to determine whether the VAT exemption should be applied to intra-EU supplies of goods (see VEG No. 27, section 3.1.): (i) that the transaction falls within the scope of the legislation, (ii) that the supplier has carried out all reasonable steps to verify the good faith / standing of its customer and (iii) that the supplier holds the required proof that the goods have left the Member State of dispatch to be delivered/transported to another EU Member State.

In assessing items under (i) and (iii) below, the following issues could be considered particularly relevant as they hinder, or potentially hinder, cross-border economic activity.

3.1. Diversity of documentation

As the VEG No. 27 evidenced, most Member States' tax authorities are relying on a number of documents which may or may not be listed in national legislation or alternatively used in practice. Such diversity is problematic especially when tax authorities are chasing legitimate taxpayers with the one piece of documentary evidence they are not in a position to provide to claim the non-application of the exemption. Further, this trend does not reconcile easily with principles provided by the Court of justice of the European Union.

3.2. Local initiatives questionable on the grounds of Article 131 of the VAT Directive

Based on Article 131 of the VAT Directive, and often in light of the fight against fraud, tax authorities are introducing local initiatives, the compatibility of which with the EU framework may be questioned. This is causing increasing burdens and costs on legitimate taxpayers.

As an example, Hungary has introduced a real-time tracking system (EKAER) regarding shipments of goods over a certain weight from and to EU countries and within Hungary; this based on Article 273 of the VAT Directive. That system introduces burdens and costs for honest business. It gives rise to the scope of appreciable margin permitted under Article 273 of the VAT Directive.

3.3. Importance given by authorities to the "knowledge test"

The level of demand from tax authorities to document intra-EU trade should not be upgraded because of fraud cases. Documentary evidence is of a type fraudsters would typically meet and provide. The wide margin of interpretation left to tax authorities and judges regarding concepts such as "good faith" means that further guidance may be required. This should not extend up to a requirement for suppliers to show evidence to authorities that their customers acted in good faith.

3.4. Diversity of practices; timing versus legal certainty

The diversity of approaches across EU Member States generates costs and increase risks for businesses operating in different Member States.

The above-mentioned issues impact the efficient operation of the internal market which, in its turn, affects growth and employment. Hence, they should be monitored, reviewed, and, where possible, addressed (e.g., through Commission guidelines).

These issues shall be addressed regardless of the future developments on the destination principle, as they are casting wrenches in the well-functioning machinery of the single market as well as increasing burdens on legitimate taxpayers.

Members of the VEG are invited to comment, especially on those issues raised in Section 3, and to address any points/questions which they feel are not yet covered. In addition, the view of VEG members on how best to deal with these issues would be welcomed.