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VAT EXPERT GROUP

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Proof of Evidence of Intra-Community Supplies

1. BACKGROUND

1.1. Context

Since the introduction of the transitional regime, the exemption of intra-Community supplies of goods dispatched to taxable persons is not based on uniform documentary evidence and/or physical border 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, but at high price for business. It is moving bureaucracy and burden (of checks and documentation) from the border authorities to business. It also created new risks and cost for them. At the same time, however, this elimination of border controls 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 final, 22 July 1996).

The EU VAT Directive gave Member States wide discretion to require documents to support the right to exempt intra-Community supplies. The absence of a standard is concerning, but what is even more worrying is that the level of documentary evidence required to enable the exemption of intra-Community transactions have been constantly raised in many Member States, often in order to tackle fraudsters more effectively. This frequently leads to disproportionate compliance burdens for legitimate businesses and impairs the fundamental principle of fiscal neutrality as well as the free movements of goods within the internal market. This causes increased burden on legitimate businesses, who do business across EU Member States and who have to apply a variety of different approaches by Member States. That is problematic as the case law of the Court of Justice of the European Union demonstrated. Therefore, a common and consistent framework across the Member States regarding documentation and proof for intra-Community transactions is vital both for business and tax authorities and should be worked on taking into consideration already existing best practices.

1.2. Legal framework

Article 138(1) of the EU 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 provision of the EU VAT Directive itself, it is clear that evidence of the taxation of the intra-Community acquisition is not something the supplier can be required to provide its tax authorities as a condition for the application of the exemption; in addition, 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 they may require is provided in Article 131 of the EU VAT Directive. That provision 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 EU 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.

1.3. CJEU case law

In recent years, case law of the Court of Justice of the European Union has dealt with intra-Community supplies in general, proof of evidence in particular. In many of such cases, fraud was involved.[1]

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-Community supply.

Further, after acknowledging that the regime governing intra-Community 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 (e.g., because of legal uncertainty or unreasonable requests from tax authorities) 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-Community 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 CJEU's settled case law, it should not 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.

[1] See, e.g., *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* (C-262/09, 30 June 2011), *VSTR* (C-587/10, 27 September 2012).

2. PREVIOUS WORK ON THE MATTER & IMPORTANCE 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 the evidence required to exempt intra-Community supplies.

Its findings can be found in the VEG No. 27 dated 13 January 2014 and the following conclusions are particularly relevant to this paper, namely: (i) available commercial documentation related to a transaction should be sufficient as evidence; tax authorities should not ask for additional documents beyond existing documents available for commercial purposes; (ii) alternative evidence should always be allowed; (iii) "ex works" supplies' situations are flagged as causing the highest concern; (iv) experience shows that fraudsters typically 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) should be adopted as a solution only in very specific cases and is not something which functions or can be required on a broad basis. Practice shows that a supplier who charges VAT where sufficient proof is not provided suffers costs since he has to declare and pay the VAT charged to his tax authorities without getting paid for it by the customer.

The VEG acknowledged the value and benefits of the work already undertaken and considered that further examination of this matter would be beneficial. In first instance, focus was given to deriving 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 businesses' call for reforms and review of tax authorities practices.

3. ISSUES

The business representatives have stated in the VEG No. 27 (in the context of Option 1b) that the three following elements should be considered to determine whether the VAT exemption should be applied to intra-Community 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.

The VEG considers that item (ii) requires further consideration approach by all stakeholders as the calling into question of reasonable business practices *a posteriori* by tax authorities, even where some elements of fraud or evasion appears risking the creation of disproportionate burdens for business. In reassessing items (i) and (iii) below, the following issues were considered particularly relevant as they hinder, or potentially hinder, cross-border economic activity.

3.1. Diversity of required documentary evidence

As VEG No. 27 evidenced, most Member States' tax authorities rely 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 require a particular piece of documentary evidence that the taxable person cannot reasonably procure, and as a consequence deny the application of the exemption.

You will find examples of such diversity gathered by VEG members in the tables provided in Appendix 1. National practices do not reconcile easily with principles established by the CJEU (although the level of data collected isn't representative enough to draw final conclusions).

In addition, authorities tend to focus on certain specific formalities/documentary evidence and don't allow alternative evidence; case law of the Court of Justice has demonstrated that narrowly refusing to award an exemption regarding only form (rather than substance) shouldn't be elevated to standard practice; it is not because, and this is a real-life example faced by businesses, a CMR is not signed, that it is worthless as evidence and couldn't be used by the taxpayer.

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

Based on Article 131 of the EU 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.

For example, Hungary has introduced a real-time tracking system (EKAER) regarding road shipments of goods over a certain weight from and to EU countries and within Hungary; this based on Article 273 of the EU 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 EU VAT Directive and this is investigated by the infringement unit of the European Commission. Germany has introduced comparable measures. One may question the legal grounds here as well, even if the possibility for the supplier to provide alternative evidence softens the burden on business.

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.

4. HOW TO PROGRESS ON THE ISSUE?

The above-mentioned issues prejudice 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 by EU institutions.

These issues should be addressed in parallel to the future developments on the destination principle, which may be a medium to long term solution. Immediate and short term action is required to offer satisfactory solutions to both tax authorities and businesses. The short term solutions might even prove to remain helpful upon implementation of the definitive regime, unless drastic changes occur.

The VEG recognizes that the correct implementation of the VAT exemption in intra-Community supplies is a step-by-step process:

- It should first be established by the supplier whether a particular transaction is falling within the concept of intra-Community supply as laid down in Article 138 of the VAT Directive;

- Then, a supplier could be expected to provide its tax authorities with reasonable evidence demonstrating reasonable customer assessment, i.e., in line and proportionate to its structure, organization and factual circumstances of the case;

- Finally, if and when required, the supplier should be in a position to provide its tax authorities with the documentary evidence, as established under Article 131 of the VAT Directive.

However, the VEG favors an approach where the substantive conditions imposed pursuant to Article 138 of the VAT Directive would take precedent over the requirements of Article 131. For example, if a supplier can demonstrate he has taken reasonable steps, i.e., in line and proportionate to its structure, organization and factual circumstances of the case to be in a position to show the transaction he enters into does not result in his participation in tax evasion; then any evidence that establishes the substantive conditions of Article 138 of the VAT Directive should be used and prevail on the conditions imposed by tax authorities under Article 131 of the VAT Directive. That approach is based on certain assumptions.

4.1. Working assumptions

The VEG has considered two working assumptions to be particularly relevant in the context of the discussions: (i) that the monitoring of the status of a customer should be something that can be easily done by the supplier, using VIES (as provided under Art. 17 of Regulation No. 904/10) and (ii) that tax authorities engage in appropriate controls to ascertain the accuracy of the data made available in VIES; the good standing of the customers should appear in results given by VIES.

Hence, evidence of the taxable status of the customer obtained through VIES at the time of the transaction or, ultimately at the time of audit should be conclusive. For situations that cannot be addressed through VIES, a pragmatic approach would be required, for

example allowing alternative evidence which demonstrates the business status of the customer, such as, for example, by providing a copy of the certificate of incorporation in the commercial register.

4.2. Tax authorities have to recognize the diversity of situations

The level of possible documentary evidence required to support the transport or dispatch to another Member State should take into account the diversity of situations taxpayers are facing. This has to deal, amongst others, with the way they are organizing themselves; one cannot expect the same level of evidence in a situation where the supplier or the customer is taking care of the transport or dispatch; the same apply whether they are organizing the transport themselves or relying on a third party (freight forward, etc.). This would also apply when taxpayers are engaged into self-billing arrangements or electronic invoicing or when the transactions are taking place within the same corporate group or through what would be considered as certified operators, for example.

4.3. Taxpayers have to take reasonable steps under customer assessment

Even if the substantive conditions of Article 138 of the VAT Directive are met, taxpayers should expect tax authorities to audit whether the transactions are taking place in the context of fraud and/or abuse (using, for instance, sector-based approach or considering scale of trading and type of goods or services traded). This does not impose new obligations on taxpayers but merely recognizes the consequences of the fact that the objective conditions required for obtaining the VAT exemption should be satisfied (see the *Italmoda* case, C.J.E.U, C-131/13, Italmoda, 18 December 2014, paragraph 57). However, even then, taxpayers should not be required to adopt practices beyond normal business practices (see also C.J.E.U., C-277/14, *Stehcemp*, 22 October 2015, paragraph 52). Whether or not the requirements for exemption are met should be based on objective elements and commercial documentation available for a taxpayer in the course of a transaction so that the burden on business is proportionate.

Member States should recognize that taxpayers face various market practices which affect their ability or the way to assess the veracity of their customers and the transactions they are entering into.

Some taxpayers are active in multiple jurisdictions, or have large operations and even if they may have direct contacts with their customers, they are likely to have audit trails or control in place. Smaller and medium-sized taxpayers may in many instances have more direct contacts with customers but may have less systemic control in place. Some data or assessment would apply to all categories; as an example, and assuming that VIES would be providing real-time reliable data, a supplier applying the VAT exemption without having checked the VAT number of a client it is engaging with for the first time could reasonably anticipate questions from its tax authorities and must be prepared to answer them (e.g., group context or third-party, certified operator, new business, etc.).

Additionally it needs to be also considered that for other than tax reasons (i.e. credit check, safety, environmental, human rights, etc.), in order to manage their commercial and other legal risks, suppliers quite often do specific checks on their customers, particularly new customers, which tax authorities can also have a look at when they come and audit the suppliers.

Furthermore, as part of managing their own risks, also tax authorities are required to do specific checks particularly when it comes to registering new taxpayers for VAT or deregistering taxpayers. Tax authorities also need to know their taxpayers, in the same way as the supplier needs to know their customers.

Managing the risks inherent in the VAT system is a two-way street both businesses and tax authorities need to do that on their own but also need to share information and cooperate with each other. In this respect, attention to the EU VAT Forum, particularly the work TABECFAF sub-group is spending thoughts on how this information exchange and cooperation between business and tax authorities can be improved. The outcome of this work should be monitored as it could provide useful input on what could be reasonably expected from taxpayers and authorities in the matter at stake here.

4.4. What kind of proof to be provided?

The VEG considers it is of critical importance that tax authorities recognize that there should be no one-size-fits-all approach and, hence, that none of the documentation available to the taxpayer should be disregarded *prima facie* or, on the other end of the spectrum, that there shouldn't be specific documentation established solely for complying with the rules. Preference should be given to commercial documentation that taxpayers use in the normal course of their business.

A survey conducted with the tax authorities in the course of the work of the EU VAT Forum subgroup demonstrated that most tax authorities consider that a number of different elements could be invoked to support the dispatch or transport to another Member States. This is also the case in the case law of the Court of Justice of the European Union and, to a certain extent, national case laws (see Appendix 1 for a high level review of some of the domestic cases).

The VEG analyzed some of the recent cases from the Court of Justice of the European Union in this area and noted the aspects that were highlighted to support such dispatch or transport. The table below provide for a summary of that analysis.

Table 1. Summary of the appearance of commonly-used evidence to proof the transport or dispatch to another Member State

	Invoice	VAT ID	International consignment notes (CMR)	Certificate of receipt of the goods	Contractual documents	Payment	Evidence	Registration in the bookkeeping
C-492/13 (*Traum*)	-	X	X	X	-	X	X	-
C-107/13 (*Firin*)	-	X	-	-	-	X	-	-
C-33/13 (*Jagiello*)	X	X	-	-	-	-	X	-
C-424/12 (*Fatorie*)	X	-	-	-	-	X	X	X
C-18/13 (*Maks Pen*)	X	-	-	-	X	X	-	X
C-444/12 (*Hardimpex*)	X	-	X	-	X	-	-	-
C-271/12 (*Petroma*)	X	-	-	-	X	X	-	-
C-409/04 (*Teleos*)	X	X	X	-	X	-	X	X
C-146/05 (*Collée*)	X	-	-	-	X	-	-	X
C-184/05 (*Twoh*)	X	-	-	-	-	X	-	X
C-273/11 (*Gabona*)	X	X	X	-	X	X	-	-
C-587/10 (*VSTR*)	X	X	-	-	-	-	-	-
Hit time	**10**	**6**	**4**	**1**	**6**	**7**	**4**	**5**

Although many different conclusions might be drawn based on the limited set of recent case law reviewed, the above seems to confirm that alternative evidence should always be possible for taxpayers.

It should also be pointed out that the VAT identification number of the customer often serves for a dual purposes; i.e., first as evidence of the fact the customer is a taxable person and, second, that the transaction has a cross-border component. As some items of evidence used by taxpayers are self-generated (or sometimes, not directly linked to the transport), they can be expected to hold a number of such evidences. The type of

documents available may turn on who arranges transport or dispatch (supplier, with or without a third party, or customer (Ex Works) with or without a third party) and the type of business (SMEs or large businesses). Any of the following items of evidence could serve for that purpose:

i. The contractual arrangements;

ii. The correspondence with the customer;

iii. The purchase order;

iv. The invoice;

v. The receipt of the goods;

vi. The bill of lading;

vii. The delivery docket;

viii. The drivers logs (tachograph);

ix. The International Consignment note (CMR)

x. The tolls and fuel bills;

xi. The carrier's invoice;

xii. The insurance policy with regard to the international transport of the goods;

xiii. The payment details, the bank details such as the location of the bank account used for payment or the billing address of the customer held by that bank;

xiv. The VAT return of the customer mentioning the intra-EU acquisition;

xv. The validation of the VAT identification number of the customer in another member state at the time of the supply;

xvi. Declaration of honor by the customer that goods will be leaving the country (e.g., for low-value supplies);

xvii. Other associated relevant information, such as but not limited to, GBS information or similar.

The VEG considers that where the supplier makes available two non-contradictory items of evidence (of ones listed above), it should be presumed that the goods have been dispatched or transported outside the Member State territory but within the EU. Tax authorities may rebut the presumption only in specific cases.

5. CONCLUSIONS AND POSSIBLE WAY FORWARD

The VEG considers that the benefit of the VAT exemption provided under Article 138 of the VAT Directive should be granted to the supplier when:

i. it demonstrates that the transaction meets the substantive criteria of that provision, namely that it is entered into with another taxable person (which would happen through VIES in most instances or alternative evidence such as certificate of incorporation as business) in a Member State other than the one in which dispatch or transport of the goods begins. Evidence of transport to another Member States than the one in which dispatch or transport begins would be done with the supplier choice of two non-contradictory documents or elements listed in 4.4 above and the supplier making them available to his tax authorities.

ii. in this context, a reasonable customer assessment could be expected from taxpayers when tax authorities audit whether the transactions are taking place in the context of fraud and/or abuse.

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Subject to a satisfactory analysis on its feasibility from a legal point of view, the VEG considers that the recommendation above should be adopted in an Implementing Regulation as this would ensure consistency in the approach across Member States. In this respect, the VEG would like to draw attention on the Council Implementing Regulation (EU) No. 1042/2013 dated 7 October 2013, in which presumptions for the location of the customer (articles 24a – 24c) and evidence for the identification of the location of the customer (articles 24e and 24f) are determined. The VEG considers similar approach could be followed *in casu*.Finally, the VEG recognises that the time at which the supplier must hold the required documents (e.g., when the invoice is issued, when the VAT declaration is submitted or when a tax audit takes place etc.) will have to be examined. However, at this stage, one has to recognize that the case law of the Court of Justice of the European Union, allows such evidence at any stage during or even after the tax audit.

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