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GROUP ON THE FUTURE OF VAT

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VAT special scheme for travel agents

1. INTRODUCTION

When the Sixth VAT Directive[1] was adopted in 1977, a special scheme was introduced for travel agencies and tour operators. This special VAT scheme, now set out in Articles 306 to 310 of the VAT Directive[2], was brought in due to the special nature of the industry. The services offered by travel agents usually consist of a package of services, in particular transport and accommodation obtained from third parties. These packages are then sold by travel agents, in their own name, to their customers. Those are circumstances where it is particularly difficult to apply the normal rules on the place of taxation, the taxable amount and deduction of input tax due to the complexity and location of the services provided.

Under Article 307 of the VAT Directive, all transactions performed by a travel agent in respect of a journey are regarded as a single supply. The taxable amount is the profit margin realised by the travel agent on the supply of a travel package and hence the travel agent is not entitled to deduct input VAT. The place of taxation for the travel agent's supply is where he has established his business or has a fixed establishment from which he provides the service or, failing this, the place where he has his permanent address or usually resides.

The special VAT scheme has two aims:

(a) to simplify the application of EU VAT rules for these supplies, particularly so that a travel agent avoids having to register for VAT purposes in each of the Member States where the services acquired by the agent are performed;

(b) to ensure that VAT revenue goes to the Member State in which final consumption of each individual component of the single supply takes place. VAT revenue on services enjoyed in the course of the journey, such as hotels, restaurants or transport, will go to the Member State in which the traveller receives the service, whereas VAT on the travel agent's margin returns to the Member State where the agent is established.

2. BACKGROUND

In practice, the special scheme for travel agents has never been applied uniformly by Member States and this may well lead to double taxation, distortions of competition and unfair distribution of VAT receipts among Member States.

Therefore, on 8 February 2002 the Commission adopted a proposal with a view to amend the special scheme for travel agents[3]. The objective of this proposal was to:

- allow travel agents to apply VAT to their profit margin for services sold to other travel agents as well as to private individuals,

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1 Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value-added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al31057

3 Proposal for a Council Directive amending Directive 77/388/EEC as regards the special scheme for travel agents (COM(2002) 64 of 8.2.2002).

- include travel agents not established in the EU within the scope of the VAT system, when selling package tours to customers established in the EU,

- entitle travel agents to opt for application of the normal VAT system,

- authorise travel agents to calculate a single profit margin for package tours provided over a certain period.

The Commission did not accept demands to amend its proposal by introducing an exemption for supplies to third-country established clients, as this would be contrary to one of the basic principles of the EU VAT system whereby supplies of goods and services are taxed where the consumption takes place. Therefore, the profit margin generated in the EU should be taxable in the EU, where the supply of the travel agent is realised without it being exempt when the customer is established outside the EU.

To this end, on 21 February 2003 the Commission amended its proposal[4]. The proposal as amended ("the 2002/2003 proposal") aimed at extending the simplified mechanism just adopted for services provided electronically by suppliers not established in the European Union to customers established in the EU (the then VOES) so that it would also cover supplies under the special scheme for travel agents.

No agreement could be reached in the Council and the 2002/2003 proposal was finally withdrawn in 2014, because it had become obsolete after a series of rulings of the Court of Justice of the European Union ("CJEU").

In 2017, DG TAXUD contracted a study analysing the functioning of the special scheme and reviewing all relevant judgments by the CJEU. The study evaluated national VAT laws and in that regard found that on a number of aspects, the vast majority of Member States are not complying with the common EU rules. This was confirmed by rulings handed down by the CJEU after publication of the study in the cases C-380/16 *Commission v Germany*[5] and C-552/17 *Alpenchalets Resorts*[6]. Later rulings in the cases C-422/17 *Skarpa Travel*[7] and C-388/18 *B (Chiffre d'affaires du revendeur de véhicules d'occasion)*[8] established further discrepancies between the common EU rules and national legislation.

Following the results of the study and the evolving case law, Germany in collaboration with DG TAXUD organised a FISCALIS 2020 workshop in Berlin in October 2018. The outcome of that Workshop and the hesitation by Member States in implementing changes to national VAT law, have resulted in the decision being taken to evaluate the special scheme under the better regulation policy[9]. Evaluation is a process that gathers evidence to provide an objective judgement of the performance of existing EU policies, legislation and spending programmes

4 Amended proposal for a Council Directive amending Directive 77/388/EEC as regards the special scheme for travel agents and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative co-operation in the field of indirect taxation (VAT) as regards additional measures regarding supplies of travel services (COM(2003) 78 final of 24.3.2003).

5 CJEU, judgment of 8 February 2018, *Commission v Germany*, C-380/16, EU:C:2018:76.

6 CJEU, judgment of 19 December 2018, *Alpenchalets Resorts*, C-552/17, EU:C:2018:1032.

7 CJEU, judgment of 19 December 2018, *Skarpa Travel*, C-422/17, EU:C:2018:1029.

8 CJEU, judgment of 29 July 2019, *B (Chiffre d'affaires du revendeur de véhicules d'occasion)*, C-388/18, EU:C:2019:642.

9 Better Regulation provides a range of tools to support evidence-based policymaking from initial development of proposals, to transposition, implementation, evaluation and subsequent revision.

(EU interventions or EU activities). It is a tool to help the Commission services learn about the role played by EU interventions and assess their actual performance compared to initial expectations. The evaluation of the special scheme could be followed by an impact assessment of possible options for reform and eventually result in a legal initiative of the new Commission.

The questions to Member States included in this document serve as a consultation of Member States for evaluating the special scheme and for assessing certain general options for reform.

3. INTERPRETATION OF THE COMMON EU RULES BY THE CJEU

The special scheme derogates from normal VAT principles only in terms of place of supply, taxable amount and deduction of input tax. Otherwise, the normal VAT rules must be applied:

- The supply of travel services is not included in Annex III of the VAT Directive and can therefore not benefit from a reduced rate of VAT (C-74/91 *Commission v Germany*[10] and C-552/17 *Alpenchalets*).

- The value of the margin must be considered in a manner consistent with normal valuation provisions (C-149/01 *First Choice Holidays*[11]).

- VAT payable must be calculated separately for each supply. Using a global or aggregated basis is not permitted (C-189/11 et al. *Commission v Spain*[12] and C-380/16 *Commission v Germany*)[13].

- When a travel agent, subject to the special scheme receives a payment on account, VAT is chargeable, in accordance with Article 65, on receipt of that payment on account (C-422/17 *Skarpa Travel*).

- The turnover of a travel agent (and not his margin) must be taken into account, when the travel agent wants to benefit from exemption as a small business (C-388/18 *B (Chiffre d'affaires du revendeur de véhicules d'occasion)*).

As the special scheme is an exception to the normal rules, it must be applied only to the extent required to achieve its objectives:

- Services supplied by the travel agent himself cannot fall within the special scheme (C-557/11 *Kozak*[14]).

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10 CJEU, judgment of 27 October 1992, *Commission v Germany*, C-74/91, EU:C:1992:409.

11 CJEU, judgment of 19 June 2003, *First Choice Holidays*, C-149/01, EU:C:2003:358.

12 CJEU, judgment of 26 September 2013, *Commission v Spain*, C-189/11, EU:C:2013:587.

13 In case C-380/16 (Commission v. Germany), the CJEU highlighted that the fact that the calculation of the margin, as provided for in this Article 308, for sales in the B2C area may give rise to difficulties, as claimed by Germany and the Netherlands, is not an exclusion criterion for this interpretation. Member States must also apply the VAT Directive, even if they deem it to be improved (see, to that effect, judgment of 6 October 2005, *Commission v Spain*, C-204/03, EU:C:2005:588, paragraph 28), until the Union legislature decides, where appropriate, to amend the content of the special scheme.

14 CJEU, judgment of 25 October 2012, *Kozak*, C-557/11, EU:C:2012:672

- Bought-in services should not be included in the special scheme where they are merely ancillary to in-house services (C-308/96 and C-94/97 *Madgett and Baldwin*[15]).

- A supply in isolation, which does not relate to a journey, is taxed under the normal rules (C-31/10 *Minerva Kulturreisen*[16]).

The special scheme must be applied in a consistent manner in order to achieve its objectives:

- The special scheme is not limited to travel agents and tour operators but must apply equally to any person supplying travel under the circumstances envisaged (C-308/96 and C-94/97 *Madgett and Baldwin* and C-200/04 *iSt*[17])

- The status of the customer is not relevant in determining if the special scheme applies. B2B and B2C supplies are therefore treated equally (C-189/11 et al. *Commission v Spain* and C-380/16 *Commission v Germany*[18]).

- The special scheme applies both to single items and packages (C-163/91 *Van Ginkel*[19] and C-552/17 *Alpenchalets*[20]).

Whereas, after a series of rulings, the CJEU has arrived at a clear interpretation about supplies by travel agents of accommodation or passenger transport in isolation, there might still be some controversy about the possibility for travel agents to opt for taxation of B2B supplies under the normal rules (opting-out possibility).

However, in case C-380/16 *Commission v Germany*, the CJEU made clear that it is important to ensure that the interpretation that best matches the objectives of the special scheme, which is that B2B supplies are also covered, must be applied in a uniform manner by the Member States. The CJEU also repeated that the two objectives of the special scheme, namely

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15 CJEU, judgment of 22 October 1998, *Madgett and Baldwin*, C-308/96 and C-94/97, EU:C:1998:496.

16 CJEU, judgment of 9 December 2010, *Minerva Kulturreisen*, C-31/10, EU:C:2010:762

17 CJEU, judgment of 13 October 2005, *iSt*, C-200/04, EU:C:2005:608.

18 In case C-380/16 *Commission v Germany*, the CJEU refused all arguments brought forward by Germany. Germany took the view that the inclusion of B2B sales in the scope of the special scheme would lead to considerable practical difficulties, affects the principle of neutrality of VAT for operators, distorts competition and infringes the Charter of Fundamental Rights.
With regard to practical difficulties the CJEU recalled that the European Union legislature has just set up the special scheme in order to deal with major practical difficulties for travel agents and that these difficulties arise in relation to sales in both B2C and B2B. The CJEU added that it is important to ensure that the interpretation that best matches the objective of the VAT Directive as set out in its judgments of 26 September 2013, in particular in the judgment in C-189/11 et al. *Commission v Spain*, EU:C:2013:587, is applied in a uniform manner by the Member States.

19 CJEU, judgment of 12 November 1992, *Van Ginkel Waddinxveen*, C-163/91, EU:C:1992:435.

20 In case C-552/17 *Alpenchalets* the CJEU stated that the exclusion from the field of application of Article 306 of the VAT Directive of services supplied by a travel agent on the sole ground that they cover accommodation only would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller. Such a tax system would fail to comply with the aims of the Directive.
The mere supply of holiday accommodation by the travel agent is sufficient for the special scheme under Articles 306 to 310 of the VAT Directive to apply and the importance of other supplies of goods or services, which may be combined with the supply of accommodation, cannot have a bearing on the legal classification of the situation at issue.
It was particularly important for the CJEU to clarify that the order of 1 March 2012, C-220/11 *Star Coaches*, EU:C:2012:120, does not allow reaching a different conclusion.

simplification of the VAT rules for travel agents and the balanced distribution of revenue from the collection of VAT between Member States, are better achieved with the customer principle. An opt-out option would clearly contradict the uniform application of the common rules resulting in the objectives of the special scheme no longer being achieved.

Moreover, the CJEU saw no distortion of competition caused by including all B2B supplies under the special scheme. On the other hand, there could well be a distortion of competition, if businesses were granted the possibility to opt out. This was highlighted when the Council discussed the 2002/2003 proposal. Furthermore, allowing for an opt-out clause with a limited field of application (services sold and enjoyed inside one Member State only) was rejected, because it was regarded as contrary to the Treaty. A territorial limitation would introduce discrimination against non-established operators compared to established operators and would be inappropriate for the establishment of the internal market. Such discrimination would not stand up to examination by the CJEU unless it was justified by overriding reasons relating to the public interest, and only if the exclusion of providers established in other Member States could be considered as a measure which was strictly necessary to attain the objectives being pursued.

A case brought to the German Federal Fiscal Court illustrates the undesired result of a possible opt-out clause for businesses in case of intra-Community supplies[21]. The highest German Court ruled that travel agents could opt for taxation under the special scheme (opt in) for supplies between travel agents, because the German law (taxing these supplies under the normal rules) would infringe the VAT Directive.

In the case referred to the German Court, an Austrian travel agent bought travel facilities in Germany under the normal rules and asked for a VAT refund. Subsequently, it supplied the travel facilities to a German travel agent without VAT under the reverse-charge procedure. The German travel agent then declared a supply under the special scheme and supplied the travel facilities located in Germany to German travellers as a B2C supply under the special scheme. As a result, Germany did not collected any VAT on the travel facilities, only VAT on the margin of the German travel agent was declared under the special scheme.

Finally, the various discussion of the special scheme in the VAT Committee, mainly between 1984 and 1989, and the 13 guidelines agreed by the Committee over the years exemplify that despite the many cases already brought up to the CJEU, other issues, e.g. the VAT treatment of vouchers, could trigger further litigation.

4. STUDY ON THE REVIEW OF THE VAT SPECIAL SCHEME FOR TRAVEL AGENTS AND OPTIONS FOR REFORM

DG TAXUD commissioned KPMG with a study in December 2016 after the majority of Member States requested so during the 105th meeting of the VAT Committee in October 2015.

The final report of the study was published in December 2017[22]. The study aimed at providing an overview of the functioning of the special scheme. It reviewed the history of the special

[21] Bundesfinanzhof ruling of 13.12.2017 in case XI R 4/16.
[22] https://ec.europa.eu/taxation_customs/sites/taxation/files/travel_agents_special_vat_scheme_en.pdf

scheme and how it had been influenced by various CJEU judgments. Options for reform were also addressed.

The objectives of the study according to the call for tender were to:

a) analyse the implementation and application of Articles 306 to 310 of the VAT Directive,

b) provide an in-depth economic analysis of the travel industry,

c) evaluate the functioning of the current VAT rules provided for under the special scheme for travel agents, notably taking into account a digital environment and a VAT regime based on the destination principle, identifying and quantifying potential distortions of competition,

d) identify, assess and compare options for reform both under the current place of supply rules and under place of supply rules based on the destination principle.

In its executive summary, the report states:

> "The Special Scheme has now been in place for over 40 years and must function in a world that has changed significantly since its inception. These years have seen enormous growth in international travel, changes in technology, widespread deregulation (particularly in the airline industry) and disruptive business models that have led to ways of conducting business that would not have been in the mind of the original drafters of the law. The combination of these factors, coupled with evolving CJEU case law, have led us to conclude that modernisation is needed.
>
> Competitive neutrality means that tax-driven price differences should be eliminated irrespective of how a transaction occurs. The report identifies two principal distortions of competition that should be addressed in order to ensure this happens. The first involves varying definitions of what constitute "travel facilities" applied in Member States and secondly, the treatment of B2B transactions. This latter distortion is of particular concern to those sectors of the industry whose activities, by their very nature, are focused on corporate clients.
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> The report also identifies material issues where a level playing field is not assured. Differences in VAT treatment in practice occur between EU-established and non-established suppliers. In addition, the requirement for the margin to be calculated on a transaction-by-transaction basis is outdated and unsuited to the complexities of actual business. Non-deductibility of input tax by a travel agent is also a significant drawback of the scheme when providing services to a business client.
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> As with any tax system, any critical review will always revert to its role in the raising of revenue. Our indicative estimate of the amount of VAT actually collected under the Special Scheme amounts to circa €1.9bn whilst associated irrecoverable VAT is indicatively estimated at circa €5.6bn. In aggregate, these are significant figures but should be read in the context of an EU VAT system that raises almost €1tn annually.
>
> We have concluded that the underlying concepts and the general manner in which the scheme functions are still fit for purpose, meeting the objectives of providing simplicity and raising revenue, particularly where B2C transactions are concerned. The scheme however was conceived to deliver these objectives in a significantly different

environment. It now needs to be modernised to ensure that it continues to deliver for another 40 years."

Obviously, the information and views set out in the final report of the study are those of the author and do not necessarily reflect the official opinion of the Commission.

In particular, it should be noted that the definition of distortion of competition applied in the study is different to what would be a distortion of competition within the internal market. For the study "distortion of competition" is taken to arise where an unequal treatment of travel agents under the special scheme rules in force in Member States was considered leading in practice to significant changes in the behaviour of a travel agent.

The definition used in the study has its merits, because only such a wide definition can demonstrate the practical difficulties of the travel industry in applying the common rules and evaluate the level playing field between operators based in the EU and operators located outside. However, with such a general definition, the study ends up comparing travel agents taxed under the special scheme with those taxed under the normal rules.

Again, a wide definition is not as such problematic, but the study leaves the impression that treating differently for VAT purposes intermediaries and travel agents acting in their own name, who benefit from simplified rules, could potentially result in distortion of competition. While from a business perspective such a view might seem justified, the VAT perspective does not allow for such a view: a distortion of competition under the origin-based taxation of the special scheme can only manifest itself, if differing rules in the Member States lead to double taxation or non-taxation or to the relocation of businesses.

The study succeeds in delivering a comprehensive analysis of:

1) CJEU case law,

2) the application and implementation of the common rules by Member States,

3) the multi-layered and complex travel industry.

In particular, the study consulted the entire industry in a comprehensive manner including through a questionnaire sent to businesses resulting in responses from 105 businesses located in 18 Member States.

The main shortcomings of the study are:

1) Lack of quantification (simplification benefits of the special scheme, impacts of possible reform options).

2) No evidence provided for relocation of operators to third countries or a growing market share of operators located in third countries.

3) Matters raised by the travel industry dominate the study. Member States were not consulted.

4) Lack of a consistent analysis of reform options from a VAT perspective.

The lack of quantifications can mostly be explained by a lack of available data. Tax data is confidential and the tourism statistics published by Eurostat[23] are incomplete when it comes to travel agents and tour operators. To compensate for the absence of data, the study relied on data provided directly by businesses. The answers to the questionnaire allowed for rough estimates of VAT liabilities of businesses, but they could not deliver any insight concerning the distribution of VAT revenues between Member States.

5. FISCALIS 2020 WORKSHOP

The FISCALIS 2020 Workshop in Berlin was an opportunity to discuss the study with Member States and to consult them on the functioning of the special scheme and possible reform options.

The objectives of the Workshop in terms of evaluation of the VAT travel agents margin scheme and consultation on reform options were to:

- Confirm the need for a special scheme in a definitive VAT system based on taxation at destination,
- Improve the understanding of the current EU rules in light of the rulings handed down by the CJEU,
- Exchange experience between Member States,
- Identify areas where current EU rules could merit a reform, taking into account the unanimity requirement in Council and the concerns of the travel industry, and assess options for margin taxation at destination.

All Member States and three candidate countries took part in the Workshop. During the three working group sessions, the following four topics were discussed:

a) Margin calculation under the current rules and possible reform options,

b) B2B supplies (principals versus intermediaries, benefits and costs of being taxed under the special scheme) and possibility/consequences of abolishing the special scheme for only B2B or entirely (B2B and B2C),

c) The scope of the special scheme,

d) Non-EU travel agents and destination-based taxation.

The participants nearly unanimously confirmed the need for a special scheme and a great majority of participants identified the same options for reform as those already included in the since then withdrawn 2002/2003 proposal. Moreover, the Workshop confirmed that, apart from covering the aspects already included in that proposal, a comprehensive future solution should also require Member States to harmonise the scope of the special scheme.

[23] That is data on tourism industries and trips of EU residents based on Regulation (EU) No 692/2011 of the European Parliament and of the Council of 6 July 2011 concerning European statistics on tourism and repealing Council Directive 95/57/EC (OJ L 192, 22.7.2011, p. 17).

The most important technical conclusions drawn by participants were the following:

- Allowing a global margin could represent a way forward, but would also require clarification of further details.

- All participants would be open to discuss an opt-out option for B2B supplies, but there would be multiple challenges related to such an opt-out provision.

- All participants agreed that there is a lack of harmonisation with regard to the scope of the special scheme as it stands and a large majority advocated for a definition of travel facilities. All agreed that the scope of the special scheme was a basic principle and therefore had to be defined in the VAT Directive. Most agreed that for single travel facilities, that are not transport or accommodation, the special scheme should not apply. The large majority also agreed that ancillary services should be included when supplied together with transport or accommodation. There was unanimous agreement that apportioning and valuation in the case of mixed packages create complex problems and that better methods should be identified and evaluated.

- All participants agreed that non-EU travel agents should be included under the special scheme, but that common rules would be required as well as an agreement on the place of supply rules.

- All participants agreed that the study could only serve as a starting point for further discussion and some expressed disappointment that tax authorities had not been consulted by KPMG when drafting the study.

6. EVALUATION OF THE SPECIAL SCHEME

6.1. What is an evaluation?

Evaluation is a process that gathers evidence to provide an objective judgement of the performance of existing EU policies, legislation and spending programmes (EU interventions or EU activities). It is a tool to help the Commission services learn about the role played by EU interventions and assess their actual performance compared to initial expectations. Evaluations should be undertaken periodically and particularly before a revision of the policy is anticipated ("evaluate-first"). Evaluation goes beyond an assessment of what has happened; it considers why something has occurred (and what links, if any, can be made to the role of the EU intervention) and, if possible, how much has changed as a consequence.

Each evaluation assesses the performance of the EU intervention against a minimum of five key criteria:

- Effectiveness (the extent to which the EU intervention has been successful in achieving or progressing towards its objectives;

- Efficiency (the costs and benefits associated with the EU intervention and whether they are proportionate);

- Relevancy (the extent to which the EU intervention (still) addresses (current) needs and problems);

- Coherence (to what extent the elements of the EU intervention work well together i) between themselves (i.e. internally) and ii) with other EU interventions);

- EU added-value (the added value delivered by the EU intervention, over and above what could reasonably have been expected from national and regional policies in the Member States).

The preparation of an evaluation or fitness check involves the following steps:

- an evaluation roadmap is prepared and published;

- an inter-service group is established to steer the collective preparation of the evaluation;

- stakeholder consultation activities are undertaken and must include a 12-week open public consultation;

- the results of the evaluation or fitness check are presented in a self-standing staff working document (SWD).

6.2. The roadmap and content of the evaluation

Roadmaps aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

The roadmap on the evaluation of the special scheme for travel agents is expected to be published by the end of November 2019. In this roadmap, the Commission will be informing of its intentions to evaluate the application and implementation of the special scheme in each Member State. The evaluation will assess impacts and consequences that may have materialized and possibly affected the level playing field within the European Union and vis-à-vis economic operators located in third countries with a view to determine to what extent the special VAT scheme for travel agents is fit for purpose and has delivered the desired impacts at minimum costs.

Developments in the regulatory framework, like the introduction of the "One Stop Shop" in 2021 (a solution enabling all businesses which supply to final consumers to avoid multiple registrations and declarations) and the shift to destination-based taxation (in the current VAT Directive and in a definitive VAT system), will be important aspects to consider when assessing the continued relevance of the special VAT scheme for travel agents.

The evaluation shall cover the five evaluation criteria according to the Better Regulation Guidelines:

- How successful has the VAT Directive been in achieving the objectives of simplification and allocation of revenues to the Member State of consumption? Are the current rules still effective in a digital environment? (Effectiveness)

- Seen from the perspective of the internal market and that of businesses, how do the benefits of a special scheme compare to related costs in terms of deviating from the

normal VAT rules and potential distortions of competition? Could the same results have been achieved in a less costly way? What regulatory costs, benefits and savings can be identified and quantified? What is the simplification and burden reduction potential in quantitative terms? (Efficiency)

- To what extent does the special VAT scheme for travel agents still respond to the needs and problems of stakeholders (businesses as well as Member State authorities), in particular considering developments in the regulatory framework? To what extent have the needs of stakeholders evolved since the special scheme was first implemented? (Relevance)

- To what extent is the special scheme coherent with the wider VAT system and rules? (Coherence)

- What has been achieved through the special scheme, which could not equally well have been achieved by Member States acting at national level? (EU added value)

The five criteria are mandatory. They all have to be addressed, although they might not perfectly fit to the evaluation of the special scheme.

Subject to the findings and recommendations, the Commission may follow up the evaluation with an impact assessment. The evaluation should be completed in the first half of 2020.

6.3. Consultation of Member States and stakeholders

The consultation strategy consists of consulting Member States during a FISCALIS 2020 workshop (achieved in 2018) and in this meeting of the Group on the Future of VAT. If an answer to some of the questions at the end of this document require more time in answering or further research, Member States will have the possibility to provide written answers after the meeting. For all other stakeholders, including the industry and VAT experts, an open public consultation with a duration of 12 weeks will be launched in December 2019.

Advocate General Bobek comments on the current situation regarding the special scheme in his opinion in case C-552/17 *Alpenchalets*: "All in all, it is perhaps fair to admit that, despite the heralded objective of simplification, the implementation of that ideal in the specific context of the special scheme for travel agents remains rather remote from that stated ideal. That particular scheme has become one of the most complex areas of VAT.".

7. POSSIBLE REFORM OPTIONS

7.1. Commission's 2002/2003 proposal

The 2002/2003 proposal suggested that the following four major changes should be made to the special scheme for travel agents:

- Taxation of the margin should cover cases where travel packages are sold to a travel agent, which in turn sells them on to travellers or other businesses.

- Supplies of travel packages by travel agents from outside the EU to EU-residents should be taxed within the EU; in order to simplify compliance with EU VAT rules, a one-stop scheme should be introduced.

- As an option, taxation of the margin could be based on the margin realised over each tax period.

- An opt-out clause should be introduced, on the basis of which the travel agent may apply the normal VAT rules for supplies to other taxable persons.

The proposal was discussed during the Spanish and Italian Presidencies in 2002 and 2003. Discussion made reasonable progress initially but stalled in 2003. In early 2010, the Spanish Presidency attempted a fresh start, building on earlier discussions. These renewed discussions were not fruitful however and discussions up to and including the Hungarian Presidency in 2011 could not deliver progress towards unanimity.

A progress report from the Hungarian Presidency concluded that there was "no possibility in reaching any progress in this dossier without a new, detailed assessment of the current situation and the eventual changes to the special scheme on travel agents".

The Council discussions concluded by a request for the Commission to undertake a survey of Member States so as to compile an up-to-date overview of how the special scheme was applied. Broadly speaking, the replies received confirmed that the lack of uniform application identified at the time of the 2002 proposal had only become even more pronounced.

7.2. Reform options by the study

The study recommended keeping the special scheme as a simplification measure, but allowing for the possibility of calculating a global margin.

Furthermore, the study identified a need to include single travel facilities under the special scheme and a need to define travel facilities, because differing approaches to the meaning of travel facilities lead to supplies being subject to non-taxation or double taxation.

The study also compared taxation of the margin under the current scheme (place of establishment of the travel agents) with taxation of the margin according to the usual residence of the customer and taxation of the margin in the Member State, where the travel services are enjoyed. Both options would assist in the equalisation in treatment of EU-based travel agents and travel agents located in third countries.

Finally, a specific section was devoted to supplies by travel agents to taxable persons. The sectors mainly dealing with business clients were each analysed separately, namely:

- Travel Management Companies (TMC), which are able to compare different itineraries and costs in real-time, allowing users to access fares for air tickets, hotel rooms and rental cars simultaneously and to prepare bespoke travel plans for clients,

- MICE (Meeting, Incentives, Conferences and Events) organisers, and

- Destination Management Companies (DMC) / wholesale tour operators, which focus on inbound tourism and cater services for both tour operators focusing on leisure tourism and for MICE organisers, and sometimes for TMCs.

The analysis illustrated the complexity of taxing these businesses under the normal rules and this raised doubts about a total exclusion of B2B supplies from the special scheme. Therefore, the study suggested keeping B2B under the special scheme, whilst considering an opt-out

possibility for businesses as the most business-friendly approach. On the other hand, the study did not elaborate further on the impact of such a possibility, in particular for the internal market and on the allocation of VAT revenues between Member States.

With regard to TMC / MICE and reform options, the study highlighted that not being able to deduct input VAT and irrecoverable VAT on the travel agent's margin make the industry uncompetitive. As a result, TMCs and MICEs often adopted the intermediary status. Nonetheless, acting as intermediary and providing clients with the documentation needed to evidence their purchase of services from primary suppliers such as hotels often presented them with difficulties.

7.3. Reflections by the Commission services with regard to a potential follow-up of the evaluation by an impact assessment

The main take away from the study is that the travel industry is highly complex. While parts of the industry need simplified rules, other businesses sacrifice simplification for lowering VAT liability to be more competitive. The same is true for a global margin calculation. Part of the industry is not concerned, but some operators do encounter difficulties in accounting for payments on account, kickbacks, bonus-malus payments, complaints, etc. and all those operators would appreciate the possibility to offset negative margins.

Distortions of competition appear to result from different rules to be found in Member States, a situation which is due to shortcomings of the current legislation (lack of definition of travel facilities) and non-compliance with the current rules (single travel facilities, B2B supplies). Moreover, a level playing field within the European Union is not sufficient, because EU-based operators compete with third country operators that are not being taxed under the special scheme when they are supplying travel in Europe to European customers.

It is important to recall that the special scheme provides simplification through origin-based taxation (avoiding multiple registrations) and by not requiring travel agents to account for VAT under the normal rules (complex in case of packages) or having to claim back input VAT. A similar scheme is only available for taxable dealers supplying goods falling under the second-hand scheme and certain farmers falling under the flat-rate scheme.

The difference compared to the other two schemes is that travel agents do not have the possibility to opt for taxation under the normal rules. While the study focussed on B2B supplies and deduction of input VAT when referring to such a possibility for travel agents, there is a similar issue with regard to B2C supplies. When supplying a single travel facility like accommodation only, which is subject to a reduced rate in nearly all Member States if supplied by a hotel, the margin of a travel agent must be taxed at the standard rate of VAT. This is necessary since the origin-based taxation of the margin requires a certain level of harmonisation in order to avoid potential distortion of competition. A simple solution, offered by certain Member States, is to tax the supply of a single travel facility, like accommodation only, under the normal rules. Such a treatment however ignores the interpretation of the common rules by the CJEU and again leads to unequal treatment of similar supplies, because if the travel agent supplies accommodation together with in-house or ancillary supplies, that supply must be taxed under the special scheme.

We can summarise that the existence of a special scheme requires

- clarification of its scope, and
- clarification in how far normal rules can be applied.

However, since 1977 these tasks have been left for the CJEU to handle.

This is a point also made by Advocate General Sharpston who in her opinion in case C-189/11 et al. *Commission v Spain* said that: "It is hard to avoid the impression that the Court is being called upon to decide a matter of VAT policy (and of legislative drafting) which has proved beyond the capabilities or the willingness of the Member States and the legislature.".

If Member States disagree with certain decisions taken by the CJEU or see the need for improving current rules, the only way forward would be an impact assessment as that would allow for possible options for reform to be assessed. It could cover all the aspects already raised in the Commission's 2002/2003 proposal and the study, but also the possibility for travel agents to opt for taxation under the special scheme in case of a supply in isolation, which is not related to a journey (C-31/10 *Minerva Kulturreisen*).

With regard to transaction-based calculation of the margin, which is a source of complexity, and its interaction with the normal VAT rules, the study shows that nearly all Member States provide for certain simplification measures (despite the fact that they are bound by the VAT Directive, even if they may deem it to be in need of improvement, until the Union legislature decides, where appropriate, to amend the special scheme[24]). An impact assessment would require a comprehensive analysis of a variety of solutions for simplification. This could include analysing the scope of a simplification option for Member States similar to what is available under Article 318 of the VAT Directive in relation to supplies made by taxable dealers under the second-hand scheme and the impact of using a fixed margin such as applied by Belgium based on a derogation. Furthermore, the impact of enabling negative margins being offset could be discussed.

In his opinion in case C-422/17 *Skarpa Travel* Advocate General Bobek commented on this issue, stating that: "It is also not without a certain dose of irony that, as almost all the parties and interested persons suggested at the hearing, the special schemes were put in place in order to simplify the operation of the system, while arriving at strikingly different opinions as to what such simplification should mean in the specific context of the special scheme for travel agents. Also in view of such notable diversity in simplification, I assume it would be advisable to leave further simplification steps in this regard to the EU legislature and/or, within the bounds set by the EU law, to the national legislatures.".

Another reason for an impact assessment could be to clarify areas, which were (not yet) brought up to the CJEU. This could include looking at a definition of travel facilities, e.g. the short-term hiring of means of transport, the treatment of mixed packages, the taxation of certain supplies by intermediaries under the special scheme or invoicing requirements and recovery of VAT on the margin by business receiving special scheme supplies.

[24] Paragraph 93 of CJEU ruling in case C-380/16 *Commission v Germany*.

The impact assessment could even go so far as to assess the abolition of the special scheme in the light of the One-Stop-Shop entering into force in 2021.

8. QUESTIONS TO THE DELEGATES

Regarding the evaluation of the special scheme, delegates are invited to inform about:

1. The availability of tax data as regards the special scheme,

2. Evidence of distortions of competition in the internal market, evidence of distortions of competition between local and third country operators and evidence of material issues for the industry such as observed by the study.

Regarding the consultation of Member States in the context of the evaluation, delegates are invited to indicate if they agree or disagree to the following statements:

1. The special scheme achieves its objective of simplification.

2. The travel industry continues to need special VAT rules.

3. The common rules, although interpreted by the CJEU, still lack clarity.

4. There is a need for amending the current rules as interpreted by the CJEU and consequently a need for an impact assessment, which could be followed by a Commission proposal.

In case an impact assessment would follow the evaluation, delegates are invited to comment on the reflections by the Commission services. In addition, delegates should have the possibility to answer to the same questions as those asked by the Spanish Presidency in Council in 2010:

1. Do the Member States consider it desirable for the special scheme to be applied to businesses that purchase goods or services from third parties with the aim of reselling them as "travel packages" or should application of the scheme be restricted to travel products sold directly to travellers?

2. Should services provided by non-EU travel agents to customers established in the EU and relating to trips within the EU be subject to VAT in the EU?

3. Would an option scheme be needed and, if so, what would be its scope?

4. Should travel agents subject to the special scheme be offered the option of the calculation of their taxable base being fixed, on the basis of the profit margin, for each tax period taken as a whole?

Furthermore, delegates have the possibility to comment on the reform options discussed in the study, notably:

1. Taxation of the margin at the place of usual residence of the customer or in the Member States in which the travel services provided are enjoyed.

2. Consequences when accounting for VAT under the normal rules for a package of travel facilities supplied by TM and DM companies and for events combining travel facilities with non-travel services supplied by MICE organisers.

Finally, if concerned, delegates are invited to respond to the following questions:

1. Why do certain Member States allow travel agents the possibility of a global or fixed margin calculation?

2. Why do certain Member States tax B2B wholesale supplies by a travel agent acting in his own name under the normal rules?

3. Why do certain Member States allow travel agents acting in their own name to opt for taxation under the normal rules for B2B supplies of packages consisting of accommodation (e.g. events)?

4. Why do certain Member States tax under the normal rules the supply of accommodation only by a travel agent acting in his own name:

   and indicate the most appropriate answer:

   a) Legislative procedure is on-going (awaiting adoption of amended national VAT legislation / a change of the national VAT legislation will be proposed in the future).

   b) Agreement with the interpretation of case law as put forward by the Commission services, but action can only be taken if all Member States concerned adapt national VAT legislation or if infringement procedure are launched by the Commission.

   c) Agreement with the interpretation of case law as put forward by the Commission services, but implementation would be to the detriment of the industry. Awaiting a legal initiative by the Commission.

   d) Disagreement with the interpretation of case law as put forward by the Commission services. No need to amend national VAT legislation.

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