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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 968

NEW LEGISLATION

MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED EU VAT PROVISIONS

ORIGIN:	**Commission**
REFERENCES:	**Articles 17a, 36a, 138(1) and (1a), 243(3) and 262(2) of the VAT Directive** **Articles 45a and 54a of the VAT Implementing Regulation**
SUBJECT:	**Implementation of the Quick Fixes Package:** **Council Directive (EU) 2018/1910 and Council Implementing Regulation (EU) 2018/1912**

1. INTRODUCTION

On 4 December 2018, the Council adopted the VAT 'quick fixes' legislative package, which consists of:

a) Council Directive (EU) 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States;

b) Council Regulation (EU) 2018/1909 of 4 December 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;

c) Council Implementing Regulation (EU) 2018/1912 of 4 December 2018 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions.

Further to the discussion which took place in the VAT Expert Group (VEG) on 1 April 2019, the Group on the Future of VAT (GFV) on 5 April 2019 discussed the explanations provided by the Commission services on those provisions considered the most pertinent. Working Papers were prepared for that discussion[1].

It was obvious from the discussions in the GFV that in view of ensuring a common interpretation and implementation it would be suitable for the VAT Committee to agree guidelines on the issues listed in section 2 below.

2. SUBJECT MATTER

The issues covered in the present document are the following:

- Call-off stock:
    - how to handle small losses;
    - whether to consider a call-off stock warehouse to be a fixed establishment of the supplier;
- Chain transactions:
    - combined with applying the simplification in Article 141 (triangular transactions);
- Exemption of an intra-Community supply of goods:
    - interaction with the VAT Refund Directive;
    - application of Article 138(1a);
    - combined with the optional reverse charge provided for in Article 194;
    - meaning of the term 'independent' in regard to proof of transport.

[1] See GFV No°084 and GFV No°085.

3. THE COMMISSION SERVICES' OPINION

3.1. Call-off stock

3.1.1. How to handle small losses

The fourth subparagraph of Article 17a(7) of the VAT Directive[2] determines that *'in the event of **destruction**, **loss or theft** of the goods, it shall be deemed that the conditions set out in paragraphs 2 and 6* (namely, the conditions for call-off stock arrangements and for a 'substitution' whereby the transport of the goods is still to be considered a non-transfer, to exist) *cease to be fulfilled on the date that the goods were actually removed or destroyed […]'.* This implies that, because of the destruction, loss or theft of the goods under the call-off stock arrangement, the scheme ceases to exist and a 'transfer' within the meaning of Article 17 of the VAT Directive takes place.

At the VEG meeting of 1 April 2019, businesses expressed their concern as regards this rule since even a minimal quantity of goods being destroyed, lost or stolen would have for effect that the call-off stock simplification would cease to exist. This would lead to an obligatory identification for VAT purposes in the Member State where the goods have been sent initially under the call-off stock arrangement.

Businesses pointed out that small and normal losses may occur in relation to the type of business and goods at stake: perishable products (e.g. tomatoes for soup production), loss of goods owing to their own nature (e.g. normal evaporation of certain alcohol products), bulk goods in general (e.g. inventory shortages at the end of a certain period). From a theoretical point of view, a transfer is deemed to take place (and VAT identification is required) as from e.g. the first transported tomato that has become inconsumable.

While understanding that the EU legislator has found it appropriate to consider destruction, loss or theft of goods a transfer in order to ensure the follow-up of the physical flow of the goods, the Commission services are nevertheless of the opinion that a certain 'tolerance level' should be applied so as to keep the provisions on call-off stock arrangements workable and effective. There is no question that an overall or significant destruction of the goods should be considered as a transfer, even when this was not the choice of the owner of the goods (e.g. loss of perishable goods that have been blocked during a strike) and even when it is certain that the goods could never re-enter the market (e.g. goods entirely destroyed as a result of fire, which unlike stolen goods cannot be sold). However, a certain 'tolerance' level would seem necessary in order to ensure the 'useful effect' of Article 17a of the VAT Directive.

The question is how to determine and consistently apply a 'tolerance level' throughout the EU. Some inspiration could perhaps be found in the EU Customs and Excise legislation concerning total destruction or irretrievable loss of goods. The purpose of that legislation is to determine whether, respectively, customs or excise duties are chargeable (see

[2] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006), as amended by Council Directive (EU) 2018/1910 of 4 December 2018.

Article 124(1)(g) of the Union Customs Code[3] and Articles 7(4) and (5) and 37 of Council Directive 2008/118/EC concerning the general arrangements for excise duty[4]).

Regarding both pieces of legislation, the extinguishment of the customs debt and the non-chargeability of the excise duties respectively occurs in the case of total destruction or irretrievable loss of the goods (i.e. they have become unusable):

- as a result of their actual nature (e.g. normal evaporation, see above); or
- due to unforeseeable circumstances or *force majeure*; or
- as a consequence of authorisation or instruction by the competent authorities.

In light of the above, and with the aim to ensure the useful effect of Article 17a of the VAT Directive, it could be considered that, for the purposes of paragraph 7 of that provision, in the case of limited or minimal destruction or irretrievable loss of goods due to their *actual nature, to unforeseeable circumstances or to force majeure* the conditions laid down in Article 17a(2) and (6) should not be seen to have ceased to exist. The consequence would then be that in those cases no transfer of goods within the meaning of Article 17 is deemed to occur.

While total or significant destruction/loss will, according to the literal wording of the VAT Directive, inevitably lead to a transfer taking place, the question remains, however, what can or should be accepted as 'limited or small losses' under which the call-off stock arrangements can be maintained (provided losses are caused by the *actual nature of the goods,* the result of *unforeseeable circumstances* or due *to force majeure).*

The excise legislation stipulates that it is for the Member States to lay down their own rules and conditions to determine losses. It would be recommendable to base any possible future guidance regarding the call-off stock arrangements on the experience of Member States in that regard. The Member States are therefore asked to share their practices regarding the establishment of shortages.

3.1.2. Whether to consider a call-off stock warehouse to be a fixed establishment of the supplier

During the GFV meeting of 5 April 2019, the delegates raised the issue whether for the purposes of Article 17a of the VAT Directive the supplier[5] could be the stock keeper in the Member State of arrival of the goods without necessarily being seen as having a fixed establishment there. This problem had also been flagged by businesses at the VEG meeting on 1 April 2019.

One of the conditions for the call-off stock arrangements simplification to apply is that the supplier has not established his business nor has he a fixed establishment in the Member State to which the goods are dispatched or transported (Article 17a(2)(b) of the VAT Directive). Therefore it is important to know whether the supplier having a warehouse to

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[3] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

[4] Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12).

[5] The word 'supplier' refers here to the taxable person dispatching or transporting the goods, himself or by a third party on his behalf, according to Article 17a(2)(a) of the VAT Directive.

which he moves his own goods would automatically be excluded from the call-off stock arrangements simplification because of him being seen as having a fixed establishment in the Member State of the arrival of goods.

In general, in order to decide whether or not a fixed establishment of the supplier exists in the Member State where the goods are stored, the assessment of the particular circumstances of each case is necessary. Nevertheless, certain elements should be taken into account when such an assessment is made.

The Court of Justice of the European Union (CJEU) has dealt on various occasions with the issue of fixed establishment[6]. In accordance with the CJEU's case law several factors are relevant in order to correctly identify whether a business has a fixed establishment in a Member State. Any such an establishment must be characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to supply services or to receive and use the services supplied to it for its own needs. It is important to underline that the CJEU has focused on the notion of fixed establishment only in relation to the rules on place of supply of services. In this context the CJEU held that the application of the rules should lead to a rational result, avoiding conflicts between Member States.

The definition of the notion of fixed establishment included in the VAT Implementing Regulation[7] also refers to the rules on place of supply of services. According to Article 11 of the VAT Implementing Regulation for the application of the place of supply rules, a 'fixed establishment' shall be any establishment other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs or to provide the services specified.

As the notion of fixed establishment is a very broad and complex subject, this document will only focus on the aspects relevant for the purposes of Article 17a of the VAT Directive. The analysis should be done also taking into account the need for the EU concept of fixed establishment to be applied in a uniform manner for the purposes of the whole VAT Directive. The elements already developed for the fixed establishment in the context of the rules on place of supply of services should be used unless they lead to results that are not rational.

It is important to note from the outset that if a supplier already has a fixed establishment in the Member State of arrival of the goods for any reason other than the application of the call-off stock arrangements, then the simplification does not apply. If that is the case, there will be no need to decide whether the warehouse used for the purposes of the call-off is a fixed establishment or otherwise, since Article 17a of the VAT Directive would not apply in any event.

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[6] See the judgments of 4 July 1985 in Case C-168/84, *Berkholz*; of 2 May 1996 in Case C-231/94, *Faaborg-Gelting Linien*; of 20 February 1997 in Case C-260/95, *DFDS*; of 17 July 1997 in Case C-190/95, *ARO Lease*; of 28 June 2007 in Case C-73/06, *Planzer*; of 16 October 2014 in Case C-605/12, *Welmory*.

[7] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1), as amended by Council Implementing Regulation (EU) 2018/1912 of 4 December 2018.

The question as to whether or not a call-off stock warehouse is to be seen as a fixed establishment of the supplier in the Member State of the arrival of goods should be decided taking into account the following situations:

1) The warehouse is owned and run by the acquirer[8].

In this case the supplier does not own the warehouse, nor is he responsible for running it. He does not have any link with the warehouse (apart from having his own goods stored there). Therefore the warehouse cannot be considered, as far as the supplier is concerned, to be an establishment characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources.

The conclusion is that this call-off stock warehouse <u>is not</u> a fixed establishment of the supplier.

2) The warehouse is owned and run by a third person, different from the supplier and the acquirer.

In this case the situation is entirely similar to the one referred to under point 1). The supplier does not own the warehouse, nor is he responsible for running it (other possible interactions between the supplier and a third person are dealt with under points 3) and 4)). Again he does not have any link with the warehouse (apart from having his own goods stored there).

Therefore, as set out above, this call-off stock warehouse <u>is not</u> a fixed establishment of the supplier.

3) The warehouse is owned by the supplier.

In this case the situation is different to the ones referred to under points 1) and 2). Here the supplier owns the warehouse and therefore, in the Commission services' opinion, he does have a sufficient degree of permanence/material link with the warehouse to see it as creating a fixed establishment for him. This would be so regardless of whether he is running the warehouse himself or rents it out to another person.

If the supplier, apart from owning the call-off stock warehouse, is also running it (directly or through his own employees) with the aim of supplying the goods to his clients then he should be seen as having a suitable, sufficiently permanent, structure not only in terms of technical resources but also in terms of human resources, which allows to consider the warehouse as his fixed establishment in the Member State where it is located.

If the supplier is renting the warehouse to a third person (who still allows the supplier to store his own goods there) then the supplier is providing a rental service, the warehouse being the object of that rental service. It seems that the warehouse should be seen as an establishment characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable the supplier to provide the rental

8 The word 'acquirer' means here the taxable person to whom the goods are intended to be supplied referred to in Article 17a(2)(c) of the VAT Directive.

service. The warehouse would therefore have to be seen as his fixed establishment in the Member State of arrival of the goods.

It might happen that a supplier entrusts an independent third party (therefore not an employee of the supplier) with running the call-off stock warehouse for him. It might be thought that because the supplier is not actively involved in running the call-off stock warehouse the conclusion would be different than in the previous cases. However, it should be borne in mind that in this case the supplier is buying a service for his own establishment *characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs*, i.e. performing a business activity in order to supply the goods to his clients.

Therefore the conclusion should be that also in this case the supplier <u>has</u> a fixed establishment. This would be so regardless of whether the obligations linked to running the warehouse are shared between the supplier and a third person or whether they are entirely performed by the third person.

4) The warehouse is owned by a third party who has rented it to the supplier.

In this case the supplier does not own the warehouse but he rents it. He may do so in order to further sub-rent the call-off stock warehouse (with the person sub-renting the warehouse still allowing the supplier to store his own goods), to run it himself or with a view to hiring an independent third party that will run the warehouse for the supplier. We will deal with these three situations below.

First, when the supplier is sub-renting the call-off stock warehouse he is providing a service. Therefore, it seems correct to see him as having an establishment characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources enabling him to supply the rental service.

Second, if the supplier is actively involved in running the call-off stock warehouse it is rather difficult to see this warehouse as not being in fact his fixed establishment. Owning the immovable property is not the only commercial way of exercising a business activity. Renting is also a common practice. Therefore there is no sufficient reason to differentiate those two situations in such a way that it would lead to a different outcome when it comes to assessing the status of the warehouse as a fixed establishment. As the supplier is running the warehouse in order to supply the goods to his clients then he should be seen as having a suitable, sufficiently permanent, structure not only in terms of technical resources but also in terms of human resources, which allows to consider the warehouse to be his fixed establishment in the Member State where it is located.

Third and last, if the supplier is renting the call-off stock warehouse and also hiring an independent third party that will run it for him, it might be thought that because the supplier is not actively involved in running the call-off stock warehouse the conclusion could differ. However, he is buying a service in order to be able to perform a business activity consisting in supplying the goods to his clients. As already mentioned, owning immovable property is as common as renting it in order to exercise a business activity.

Therefore both situations should be treated equally as far as the identification of a fixed establishment is concerned. As a consequence, if the supplier rents a call-off stock warehouse and hires an independent third person to run it he should be seen as having a fixed establishment in the Member State concerned.

Finally, a couple of clarifications seem appropriate in this context. The first one relates to the difference there is between a 'registered' taxable person and an 'established' taxable person in regard to the call-off stock arrangements. In accordance with Article 17a(2)(b) of the VAT Directive, a VAT registration by the supplier in the Member State of the stock when he has not established a business there nor has a fixed establishment would not exclude the application of the simplification.

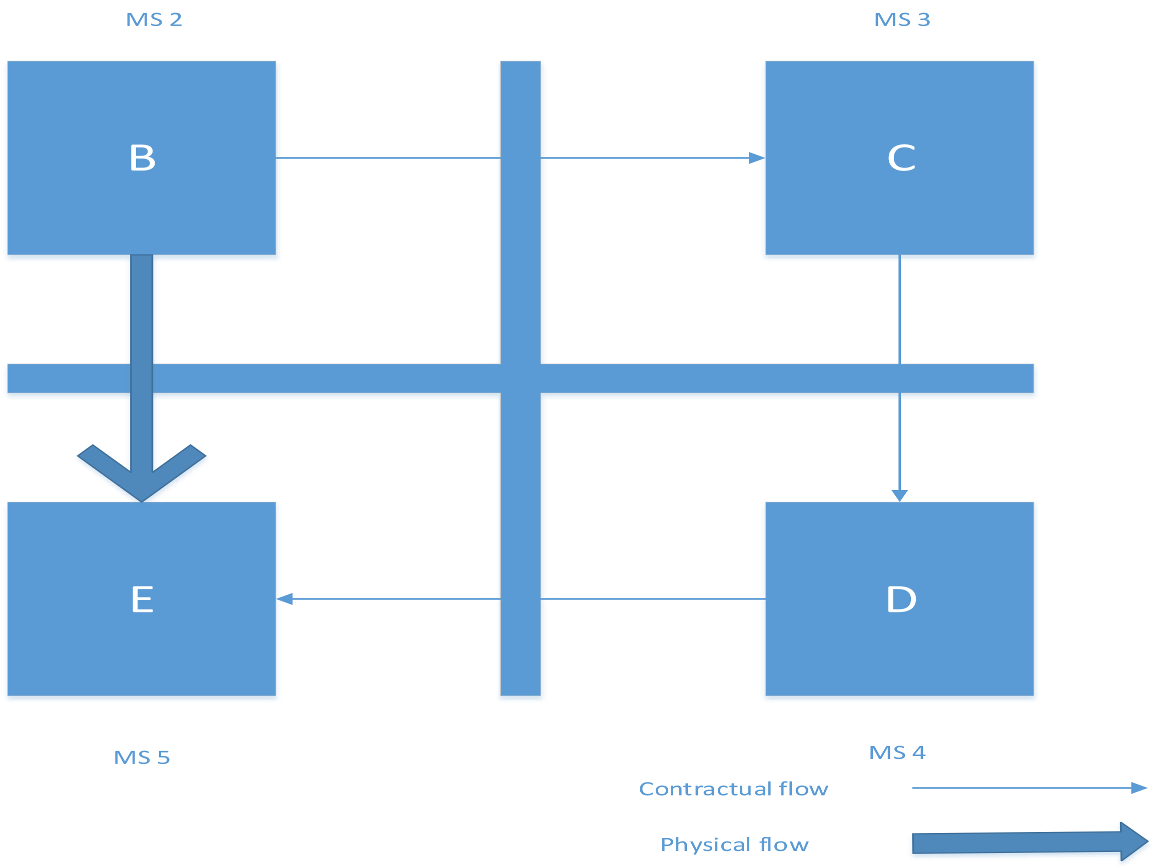
The second clarification refers to the relationship between Articles 17a and 192a of the VAT Directive. The simplification for call-off stock arrangements should not apply, according to the wording of Article 17a(2)(b), where the supplier has established his business, or has a fixed establishment in the Member State of arrival of the goods. This is so irrespective of whether that establishment intervenes in the actual supplies of goods made by the supplier in that Member State or otherwise. However, assuming the simplification in Article 17a does not apply, the criterion in Article 192a would be relevant in order to ascertain the VAT liability regarding the domestic supplies of goods made in that Member State by the supplier.

3.2. Chain transactions

3.2.1. Combined with applying the simplification in Article 141 (triangular transactions)

Delegates at the GFV of 5 April 2019 discussed an example whereby the rule for chain transactions could be combined with the simplification for triangular transactions, where more than three parties were involved in the chain. During these discussions doubts were expressed about whether the simplification in Article 141 of the VAT Directive could be applied to such situations.

The example was included under section 2.3.2 of Working Paper GFV No 085. The situation described in the document was as follows:



C is the intermediary operator. C communicates to B his VAT identification number in Member State 3, so the transport will be assigned to the supply made by B to C. C will be making an intra-Community acquisition taxable in Member State 5.

Article 141 of the VAT Directive includes a simplification for triangular transactions, requiring Member States to ensure that VAT will not be charged on an intra-Community acquisition of goods within their territory when certain conditions are met.

We will analyse whether in the situation described in the example all the requirements in Article 141 of the VAT Directive are fulfilled in order to apply the simplification for triangular transactions:

a) The acquisition of the goods is made by a taxable person (C) not established in the Member State where the intra-Community acquisition takes place (Member State 5), but who is identified for VAT purposes in another Member State (Member State 3).

b) The acquisition of goods is made for the purposes of a subsequent supply of those goods to another person (D), in the Member State of arrival of the goods (Member State 5).

c) D is a taxable person identified for VAT purposes in the Member State of arrival of the goods (Member State 5).

d) D has been designated in accordance with Article 197 of the VAT Directive as the person liable for the VAT due in Member State 5 on the supply carried out by C.

e) The goods are directly dispatched or transported from Member State 2, which is a Member State other than that where C is identified for VAT purposes (Member State 3).

f) The goods are directly sent from Member State 2 to E, and not to the taxable person for whom the subsequent supply is carried out (D).

In view of the literal wording of Article 141 of the VAT Directive, it might be thought that the element mentioned in point f) above renders the exemption inapplicable to the intra-Community acquisition by C. This is because Article 141(c) requires for the exemption to apply that the goods are sent to the person for whom C makes the subsequent supply, namely D. However, in the given example the goods are not dispatched or transported to the person for whom C carries out his supply, D, but to another person, E, who is further down the chain. It might therefore be concluded that C would need to register in Member State 5 and account for the VAT on the intra-Community acquisition in Member State 5[9].

However, the Commission services consider that the exemption in Article 141 could still be applied to this situation.

In that regard, it should be noted that for C, the intermediary operator when selling the goods to D, it is irrelevant what D intends to do with the goods.

C fulfils his obligations with D by sending the goods to the place agreed by C and D. This place could be the premises of D, a warehouse managed by a third party, or the premises of E, followed by a transaction between D and E of which C is not necessarily aware.

Thus, C is complying with the requirements in Article 141 of the VAT Directive as he is sending the goods to the place D has designated, therefore sending the goods directly to D. The fact that there has been a sale from D to E of which C may or may not be aware, does not affect the fulfilment by C of the requirements to apply the exemption.

We would like to stress that the application of the simplification for triangular transactions in this case does not lead to less control by tax administrations than in the case where the goods are sent to the premises of D and there is not a subsequent supply to E.

In both cases, the intra-Community acquisition of the goods by C in Member State 5 should be exempt and C will not need to register there. D would in those cases need to be registered in Member State 5 and would be liable for payment of the VAT on the domestic supply that C is making to him in that Member State.

Further, Article 42(b) of the VAT Directive must be taken into account. This means that in both cases C will have to satisfy ‘the obligations laid down in Article 265 relating to submission of the recapitulative statement’, so that the subsequent supply to D, and the VAT identification number of D, will have to be included by C in his recapitulative statement submitted in Member State 3. Otherwise in both cases C would be liable in

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9 However, if the exemption in Article 140(c) of the VAT Directive applies to the intra-Community acquisition made by C in Member State 5 (which would be the case if Member State 5 applies the optional reverse charge provided for by Article 194 to the subsequent supply between C and D) then C would be obliged to register in Member State 5 owing to the intra-Community acquisition made but would not be obliged to account for VAT on that intra-Community acquisition since the acquisition would be exempt.

Member State 3 for the intra-Community acquisition made, given that for that acquisition he has used the VAT number issued by Member State 3 (Article 41 of the VAT Directive).

The supply from D to E would in any case be a domestic supply taxed in Member State 5.

Therefore, the Commission services consider that the simplification for triangular transactions should be applied to a situation such as the one in the example above, as all requirements in Article 141 of the VAT Directive are fulfilled.

To sum up, the rules for chain transactions apply independently of the number of parties involved. However, the simplification for triangular transactions is applicable only when for the transactions involving 3 parties in that chain, all the conditions for that triangular simplification are met. In practice, only one of the taxable persons involved in the chain of transactions, that is the one in that chain making the intra-Community acquisition, can potentially benefit from the triangular simplification. In the example above, this will be C whilst D cannot benefit from it.

3.3. Exemption of an intra-Community supply of goods

3.3.1. Interaction with the VAT Refund Directive

As explained in section 3 of Working Paper GFV No 085, the amendment to Article 138(1) of the VAT Directive consists in adding a substantive condition for the exemption of an intra-Community supply of goods to apply. This condition can be found in point (b).

The addition of this substantive condition implies that in case the acquirer does not indicate his VAT identification number to the supplier, or if the VAT identification number indicated has been issued by the Member State from which the goods are dispatched or transported, then the conditions for applying the exemption of Article 138 are not fulfilled and the supplier has no other choice than to charge VAT.

On the other hand, Article 4 of the VAT Refund Directive[10] states that the Directive shall not apply to amounts of VAT which have been invoiced in respect of supplies which are, or may be, exempt under Article 138.

It results from the discussions at the GFV meeting that Article 4 of the VAT Refund Directive covers cases where the initial invoice can still be corrected. This is notably the case when the acquirer initially, by negligence or ignorance, did not provide his VAT identification number to the supplier who therefore had no choice but to invoice VAT.

On the other hand, when the supplier has invoiced VAT on an intra-Community supply of goods since the acquirer has not indicated a VAT identification number to him, and there is no possibility for a correction of that invoice afterwards, or the correction of the invoice becomes excessively difficult, then Article 4 of the VAT Refund Directive is not applicable.

[10] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ L 44, 20.2.2008, p. 23).

An acquirer who is not established in the Member State where the tax is due could then claim the refund of the VAT paid to the supplier when the conditions set out in the VAT Refund Directive are fulfilled[11]. Applying the exclusion of Article 4 of that Directive in such cases would affect the neutrality of the tax.

3.3.2. Application of Article 138(1a)

Article 138(1) of the VAT Directive sets out the conditions under which an intra-Community supply of goods shall be exempted from VAT. When these conditions are met, the supplier has the obligation to apply the exemption by not charging VAT to the acquirer.

A new paragraph 1a is added to Article 138, according to which the exemption provided for in paragraph 1 shall not apply where the supplier has not complied with the obligation provided for in Articles 262 and 263 of the VAT Directive to submit a recapitulative statement or the recapitulative statement already submitted by him does not set out the correct information concerning the supply in question as required under Article 264, unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities.

Inevitably there is a time span between the moment the supply is made and invoiced to the acquirer and the moment when the supplier has to comply with the obligation provided for in Articles 262 and 263 of submitting a recapitulative statement. Moreover, there is inevitably also a time span between the moment when the supplier had to submit the recapitulative statement and the moment where the tax authorities take action because either the recapitulative statement was not submitted or they have detected that the submitted recapitulative statement does not contain the correct information.

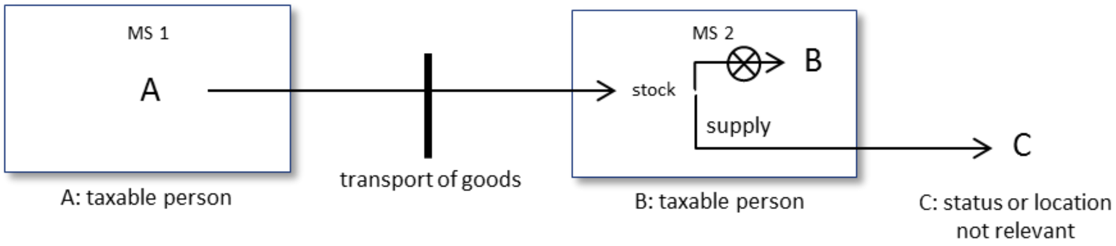
Establishing that the exemption of Article 138 may not apply because of non-compliance as set out in Article 138(1a) can *de facto* only happen a certain period after the moment the supply was made and invoiced.

The supplier shall therefore exempt the supply, at the time the supply is made, taking into account the conditions of Article 138(1). As stated above, these are the only conditions relevant at the time of the supply to determine whether the exemption applies or otherwise. However, the exemption will be revoked at a later stage if and when the tax authorities establish non-compliance of the supplier with the obligation provided for in Articles 262 and 263 to submit a recapitulative statement or where the recapitulative statement already submitted by him does not set out the correct information concerning the supply in question as required under Article 264, unless that supplier can duly justify his shortcoming to the satisfaction of the competent authorities.

[11] Provided, of course, that the right to deduct has not been exercised fraudulently by the acquirer and that he neither knew nor could have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. See the ruling of the CJEU of 6 July 2006 in joined cases C-439/04 and C-440/04, *Kittel*.

3.3.3. Combined with the optional reverse charge provided for in Article 194

Under section 3.3 of Working Paper GFV No 084, prepared for the meeting of the GFV on 5 April 2019 the following example was analysed:



In this example, goods placed by a taxable person (A) under a call-off stock arrangement, which were intended to be supplied to another taxable person (B), are finally supplied to yet another taxable person (C). For the following analysis, we are going to consider that A is only identified in Member State 1 and the goods remain in Member State 2, so the place of the supply of goods from A to C is Member State 2.

When A supplies the goods to C instead of B, the conditions for the call-off stock arrangement cease to be fulfilled in relation to these goods. Since A and C agreed a sale of goods and not a call-off stock contract, the provisions governing substitution of the customer under call-off stock arrangements do not apply in relation to those goods.

Therefore, according to Article 17 of the VAT Directive, a transfer of goods made by A is deemed to take place from Member State 1 to Member State 2 for the goods supplied to C. A is deemed to make an exempt intra-Community supply in Member State 1 and an intra-Community acquisition in Member State 2. A will have to declare the intra-Community supply in his VAT return in Member State 1 and include the transaction in his recapitulative statement in that Member State by indicating his VAT identification number in Member State 2, as well as the taxable amount for the intra-Community supply according to Article 76 of the VAT Directive.

The supply from A to C is a domestic supply in Member State 2. According to Article 194 of the VAT Directive, Member State 2 may provide that the person liable for payment of VAT in respect of that supply is C instead of A, as A is not established in Member State 2. In that case, the intra-Community acquisition made by A in Member State 2 would be exempt according to Article 140(c) of the VAT Directive if the conditions in that provision are met (which would normally be the case).

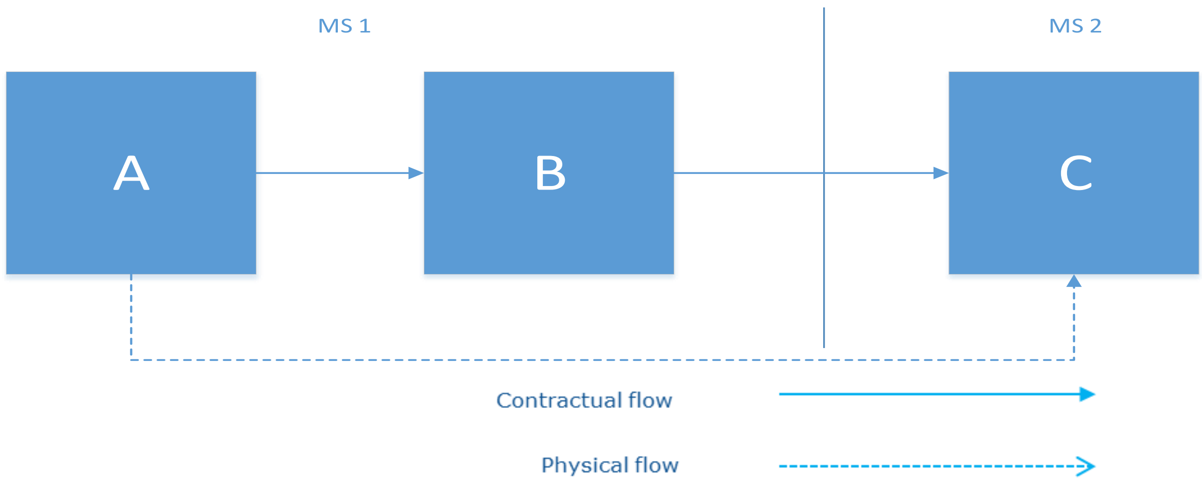
Therefore, if Member State 2 has opted for the application of the reverse charge in these situations, A would not need to register in it for the supply of goods to C. However, A would need to register in Member State 2 for the intra-Community acquisition of those goods, even if that intra-Community acquisition is exempt.

Member State 2 cannot deny to A the right (and obligation) to register there, even if A is not carrying out any taxed transactions there for which he is liable for VAT. A has made an intra-Community acquisition in Member State 2, even if exempted, and for that reason he should be registered in Member State 2, according to Article 214(1)(b) of the VAT Directive.

It should be noted that if Member State 2 does not provide A with a VAT identification number, the intra-Community supply of goods (transfer) made by A in Member State 1 cannot be exempted. The exemption in Article 138 of the VAT Directive requires, as a substantive requirement, from 1 January 2020, that the taxable person for whom the supply is made is identified for VAT purposes in a Member State other than that in which dispatch or transport of the goods begins. In addition, that information (the VAT identification number issued to A by a Member State other than Member State 1) has to be included in the recapitulative statement that A has to submit in Member State 1. It has to be recalled that owing to the new Article 138(1a) of the VAT Directive, as of 1 January 2020 this recapitulative statement also has an impact regarding the exemption of the intra-Community supply made by A in Member State 1.

Therefore, if A does not have or obtains a VAT identification number in Member State 2, Member State 1 cannot grant the exemption to A for the intra-Community supply of goods that takes place in Member State 1.

The same issue appears in a situation as follows, where goods are successively transmitted from A to B and from B to C. A is the one organising the transport of the goods and both A and B are only established and identified for VAT purposes in Member State 1:



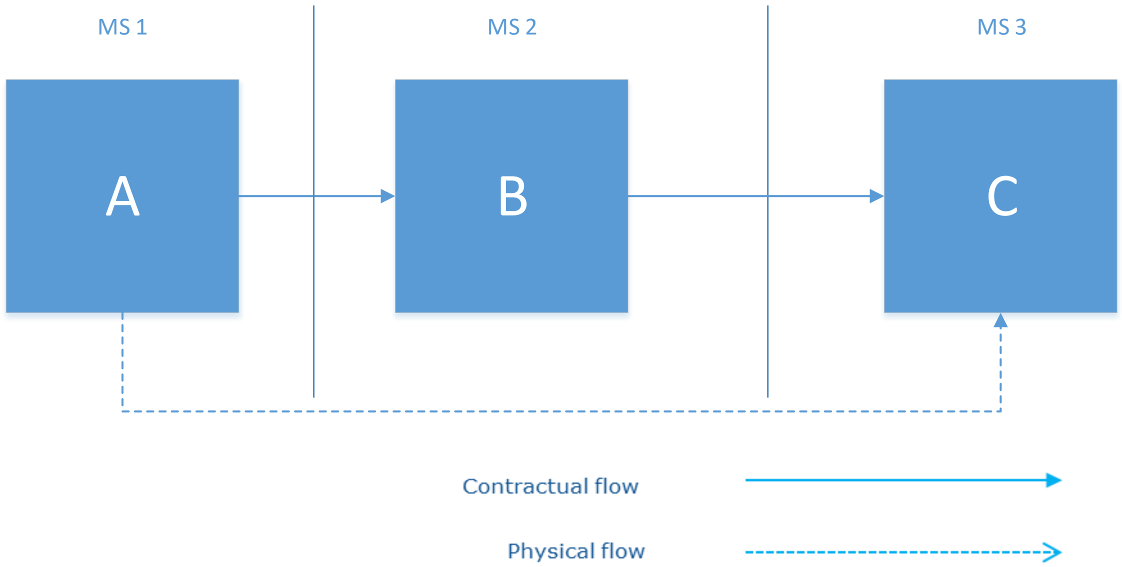
As A is organising the transport of the goods and he is the first supplier in the chain, the intra-Community supply is ascribed to the supply of goods from A to B. B will make an intra-Community acquisition of goods in Member State 2. The simplification for triangular transactions cannot be applied to this situation as B is not identified for VAT purposes in a Member State other than that from which the goods are transported.

If Member State 2 is applying the option in Article 194 of the VAT Directive, C would be liable for the VAT in the domestic supply from B to C, as B is not established in Member State 2. The intra-Community acquisition by B in Member State 2 would in that case benefit from exemption according to Article 140(c) of the VAT Directive if the conditions in that provision are met (which would normally be the case).

As in the previous case and for the same reasons, Member State 2 cannot deny to B the right (and obligation) to register there, even if B is not carrying out any taxed transactions for which he is liable for VAT in Member State 2. If B is not able to provide to A a VAT identification number issued to him by Member State 2 then the intra-Community supply carried out by A could not be exempted as the conditions imposed in Article 138 of the VAT Directive from 1 January 2020 would not be met.

Therefore, in both cases Member State 2 must attribute a VAT identification number to the operator making an exempt intra-Community acquisition of goods there.

That would not, however, be the case when we have the following situation:



Contrary to the previous case, in this case B is identified for VAT purposes in Member State 2, and not in Member State 1. A is organising the transport of the goods. Therefore, the intra-Community supply is ascribed to the supply of goods from A to B. As a result, B will be making an intra-Community acquisition of goods in Member State 3. However, in this situation the simplification for triangular transactions in Article 141 of the VAT Directive would apply, as all conditions are fulfilled, namely:

a) the intra-Community acquisition of goods is made by a taxable person (B) not established in the Member State concerned (Member State 3) but who is identified for VAT purposes in another Member State (Member State 2);

b) the acquisition of goods is made for the purposes of the subsequent supply of those goods in the Member State concerned (Member State 3), by B;

c) the goods are directly dispatched or transported from a Member State (Member State 1) other than that in which B is identified for VAT purposes (Member State 2) to the person for whom the subsequent supply is carried out (C);

d) the person to whom the subsequent supply is to be made (C) is identified for VAT purposes in the Member State concerned (Member State 3);

e) C has been designated in accordance with Article 197 as liable for the payment of the VAT due on the supply carried out by the taxable person (B) not established in the Member State in which the tax is due (Member State 3).

The consequence of the application of the rule in Article 141, according to its literal wording, is that VAT 'is not charged' on the intra-Community acquisition made by B. Further, the rationale of the provision, and of the whole simplification for triangular transactions, is to avoid that B (a taxable person not identified in the Member State where the intra-Community acquisition is made, but identified in another Member State, different also from the Member State from where the goods are transported) has to fulfil any VAT obligations in Member State 3. Thus, B is not supposed to register in Member State 3 in relation to the intra-Community acquisition. As C, and not B, is liable for the VAT in the subsequent supply according to Article 197 of the VAT Directive, B does not have to register either in Member State 3 for the domestic supply.

Thus, if the simplification for triangular transactions is applicable, B does not have to register in Member State 3.

3.3.4. Meaning of the term 'independent' in regard to proof of transport

For the purpose of applying the exemptions laid down in Article 138 of the VAT Directive, Article 45a(1) of the VAT Implementing Regulation puts in place two rebuttable presumptions for when goods are seen to have been dispatched or transported from a Member State to a destination outside its territory but within the Community. In particular, this will be the case when the conditions laid down in points (a) or (b) of Article 45a(1) are fulfilled.

In that regard, points (a) and (b)(ii) of Article 45a(1) provide that the items of non-contradictory evidence referred to in paragraph 3 of Article 45a have to be issued by 'two different parties that are *independent* of each other, of the vendor and of the acquirer'.

During the VEG meeting of 1 April 2019 and in their written comments[12], business representatives raised questions about the meaning of the term 'independent' and the need to clarify this provision.

Indeed, there is no existing guidance as to the meaning of 'independent' in the context of that provision. The explanatory memorandum does not provide any explanation as the provision was inserted during the negotiations of the Commission's proposal in the Council.

Given these circumstances, the Commission services are of the view that it may be useful to look for guidance in other provisions of the VAT Directive, in particular Article 11 on VAT grouping and Article 80 on the open market value[13].

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[12] Comments received from VEG members on documents:
VEG No 079 – VAT "quick fixes" legislative package – Call-off stock
VEG No 080 – VAT "quick fixes" legislative package – Chain transactions – Exemption of an intra-Community supply of goods: conditions and proof.

[13] It is worth pointing out that Article 9 of the OECD Model Tax Convention, which defines the notion of 'associated enterprises', that is, non-independent parties, used in the area of transfer pricing, could also be thought of as a valid source of guidance. However, for the sake of simplification and given that the criteria in Article 80 of the VAT Directive are similar to those in the OECD Model Tax Convention, it seems reasonable to focus on that provision of the VAT Directive, rather than looking for guidance in the direct tax legislation.

- *Article 11 ('financial, economic and organisational links')*

Article 11 of the VAT Directive provides Member States with an option to introduce VAT grouping schemes into their national legislation. A Member State may regard two or more persons established in that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links, as a single taxable person. The essential effect of implementing the VAT grouping option is to allow taxable persons who are bound to one another by financial, economic and organisational links to be treated no longer as separate taxable persons for VAT purposes, but rather as one single taxable person.

In this regard, the Commission services consider that the 'financial, economic and organisational links' requirement might be a relevant criterion. In particular, the following definitions of the three links, as laid down in the 2009 Commission Communication on VAT grouping[14], could serve as useful guidance:

- The *financial link*: Defined by reference to a percentage of participation in the capital or in voting rights (over 50%), or defined by reference to a franchise contract. This guarantees that one company has the actual control of another.

- The *economic link*: Defined by reference to the existence of at least one of the following situations of economic cooperation: the principal activity of the group members is of the same nature, or the activities of the group members are complementary or interdependent, or one member of the group carries out activities which are wholly or substantially to the benefit of the other members.

- The *organisational link*: Defined by reference to the existence of a shared, or at least partially shared, management structure.

Thus, members of a VAT group within the meaning of Article 11 would not be 'independent' of each other for the purposes of Article 45a of the VAT Implementing Regulation. Moreover, entities bound by 'financial, economic and organisational links' would not be independent of each other, even if they do not constitute a VAT group (for instance because the Member State does not apply Article 11 or because they are established in different Member States).

- *Article 80 criteria ('family or other close personal ties, management, ownership, membership, financial or legal ties')*

Article 80 of the VAT Directive allows Member States to consider the taxable amount of supplies of goods and services to be the open market value of those goods or services in case of transactions between entities involving '*family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State*'.

Further, Article 80 provides that '*legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons*'.

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[14] Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325 final of 2.7.2009).

Thus, entities in respect of which 'family or other close personal ties, management, ownership, membership, financial or legal ties' exist would not be independent of each other for the purposes of Article 45a of the VAT Implementing Regulation.

4. DELEGATIONS' OPINION

Delegations are invited to give their opinion on each of the topics raised in this document.

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