TZA CONSULTANȚĂ FISCALĂ
TAX ENTITY OF ȚUCA ZBÂRCEA & ASOCIAȚII

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Article

Quick fixes to the current European VAT system: New rules to become applicable as of 1 January 2020

Intro

Ever since they were made public, at the beginning of 2018, Council Implementing Regulation (EU) 2018/1912 and Council Directive (EU) 2018/1910 remained high on the agenda of each local tax conference. It's no wonder, as the two enactments introduce significant changes to intra-Community transactions - the so-called '*quick fixes*' to change the rules of the game as regards VAT exemptions for intra-Community supplies of goods, chain transactions and call off stock arrangements.

In this context, with less than 3 months until enforcement, there is a growing interest of the business environment in relation to the quick fixes introduced by these enactments. This is good, as the changes are meant to render consistent and to streamline those rules which, due to a deficient harmonization among Member States, are now a cause for uncertainty. Nevertheless, as it almost always happens with tax changes, be it amendments of national or EU laws, quick fixes raise various questions particularly for the taxpayers.

Background

To understand why the quick fixes were introduced, we should outline the background against which such amendments were introduced. Without going too much into detail, it should be underlined that the quick fixes are merely a part of a major change of the European VAT system, intended to be implemented as of 1 July 2022. This change of paradigm consists in the so-called '*definitive VAT system*'. Thus, starting from the premise that the current VAT system applicable to intra-Community transactions, although in force since 1993, is transitional, a definitive VAT system is intended to be implemented, mainly based on the principle of taxation of goods in the Member State of destination.

However, it remains to be seen whether the deadline of 1 July 2022 is feasible, given that the current EU VAT system needs to undergo a radical change for the definitive VAT system to be implemented.

Quick fixes

Given the importance of the quick fixes in the context of intra-Community trade, two questions often come up in the business environment:

- What exactly are the quick fixes and which practical issues they address?
- What can the companies dealing with intra-Community trade do to comply with the changes which shall to be enforced soon?

VAT exemption for intra-Community supplies

As we know, intra-Community supplies of goods are exempted from VAT, and intra-Community acquisitions are taxable (*i.e.,* the reverse charge mechanism is applicable). However, VAT exemption must be proved by the supplier, and the procedure and documents required for this purpose are generally to be decided by the Member States (in Romania, they are provided in Order No. 103/2016 of the Ministry of Finance).

In this context, amendments related to the VAT exemption for intra-Community supplies aim to create a common framework in terms of documents required for justifying the VAT exemption, with a view to further consolidating intra-Community trade and reducing VAT fraud.

What is the situation now and what will change after 1 January 2020?

Now, in order for the intra-Community supplies to be exempted from VAT, the supplier must hold the invoice containing the VAT identification number issued to the buyer by another Member State, a document confirming the transport of goods from Romania to the other Member State and any other document such as the agreement between the parties, order or insurance document. Therefore, in order to be exempted from VAT, the supplier must hold the said three documents and know the buyer’s valid VAT identification number issued by another Member State.

As of 1 January 2020, the conditions for VAT exemption will change radically: it becomes mandatory at Community level - not just under national law - for the buyer to communicate to the supplier a valid VAT identification number issued by another Member State.

Another significant requirement for granting the VAT exemption will be for the supplier to provide accurate details on the intra-Community supply in statement D390. There is, however, an exception to this rule: the VAT exemption is granted even when the supplier does not declare / provides inaccurate details on the supply, if it justifies this shortcoming "*to the satisfaction of the competent authorities*". This concept is not defined in Council Directive (EU) 2018/1910, but it is somehow clarified in the draft explanatory notes recently issued by the European Commission. Therefore, issues such as non-inclusion of the intra-Community supply in statement D390 related to another period than the one in which the supply occurred, or the unintentional mentioning of an erroneous amount for the supply in the statement should be viewed as cases where the supplier is deemed to have complied with the requirement of accurately declaring the supply in the recapitulative statement. However, I consider that, as long as such cases lie with the tax authorities that can tilt the scales one way or the other, there will soon be aggressive interpretations. Furthermore, I can only wonder what will happen if, for example, the supplier accurately declares the intra-Community supply in its recapitulative statement, but the buyer does not. What will happen then? Will the tax authorities consider that the supplier is right and therefore grant the VAT exemption if the other requirements are met as well? This question will be answered most probably after 1 January 2020.

In addition to the two conditions provided above, according to Council Implementing Regulation (EU) 2018/1912, the supplier must prove the transport of goods to the other Member State, and in this respect substantial amendments have been made. Thus, it is <u>presumed</u> - a very important word, as I will show below - that the goods were dispatched/transported to another Member State if:

- The supplier indicates that the goods have been dispatched/transported by him or by a third party on his behalf, **<u>or</u>**, if the supplier does not make the dispatch/transport, he holds a written statement from the buyer, containing specific elements and stating that the goods have been dispatched/transported by the buyer, or by a third party on behalf of the buyer, **<u>and</u>**
- The supplier has at least two documents, at his discretion, from the following: (i) a signed CMR document, (ii) an airfreight invoice, (iii) a bill of lading or (iv) an invoice from the carrier of the goods, **<u>or</u>**, it holds one of the aforementioned documents and another document, at his discretion, from: (i) an insurance policy with regard to the dispatch/transport of the goods, or bank documents proving payment for the dispatch/transport of the goods, (ii) an official document issued by a public authority (e.g., a notary), confirming the arrival of the goods in the Member State of destination, or (iii) a receipt on the storage of goods in the Member State of destination.

Noteworthy, according to Council Implementing Regulation (EU) 2018/1912, the aforementioned documents should not be contradictory and should be issued by two different parties "*that are independent of each other, of the vendor and of the acquirer*". This wording makes us wonder

if, as of 1 January 2020, suppliers with their own transport fleets or resorting to affiliates which hold transport fleets can still benefit from the VAT exemption for intra-Community supplies made by using their own means or the affiliates' means. In this context, the draft explanatory notes of the European Commission, mentioned above, provides that the wording "*it is presumed*", used by reference to transport documents, actually means that, when the supplier does not prove the transport as per Council Implementing Regulation (EU) 2018/1912, this does not necessarily mean that the supplier cannot benefit from the VAT exemption, because it is up to the Member States to determine what other documents could be submitted as proof of transport.

What can the companies do to comply with the new amendments?

It follows from the above that there are certain actions that the companies could take to make sure that they comply with the new rules and avoid any disruptions in their day-to-day operations. Thus, as obligations will change in terms of the necessary documentation to justify VAT exemption, companies should consider mapping the transactional flows and revising their internal procedures concerning the collection and storage of information/documents related to intra-Community supplies. In this respect, in the contracts entered into with their suppliers and customers, companies could formalise/update the need to provide/obtain documents to justify VAT exemption.

Finally, despite the clarifications made by the European Commission in relation to the presumption of transport, companies with transport fleets or having affiliates which hold such fleets should wait for clarifications from the Romanian tax authorities. Such clarifications are likely to be made public after approval of the European Commission's explanatory notes.

Chain transactions

Chain transactions, widely known as "*triangular transactions*", are those transactions involving three taxable persons. Let's call them '*supplier*', '*intermediary operator*' and '*customer*'. Such persons are established in three different Member States, which requires two successive transactions and a single transport of goods, for instance, from the supplier to the customer. In these transactions, intra-Community transport of goods must be ascribed to one of the two transactions, and the consequence is that, if the transport is ascribed to the first transaction, special simplification measures may be applied.

In this context, the correct allocation of transport to one of the transactions is a key issue to determine their type and implicitly the applicable VAT treatment, as they are sometimes approached differently by Member States.

Thus, the amendments concerning chain transactions seek to render consistent the rules on the allocation of transport, so that the Member States would have a uniform approach to this type of transactions.

What is the situation now and what will change after 1 January 2020?

Now, the VAT treatment is somewhat clear when the supplier makes the transport, meaning that the transport is ascribed to the first transaction, and simplification measures for triangular transactions should be applied. Also, the VAT treatment is quite clear when the customer makes the transport, meaning that the transport is ascribed to the second transaction, in which case the simplification measures will no longer be applicable. However, things get complicated when the transport is made by the intermediary operator, according to contractual terms (i.e., the INCOTERMS clauses). More precisely, when the transport is made by the intermediary operator, the transport would be ascribed to the first transaction, in which case the simplification measures are applicable; however, problems may occur at EU level, as the Member States may interpret such structures differently.

As of 1 January 2020, the approach of the Member States in relation to these transactions is rendered consistent by introduction of a common rule which provides that, if the transport is made by the intermediary operator, the transport is ascribed to the first transaction (i.e., the simplification measures are applicable), except for the case when the intermediary operator communicates to the supplier its VAT identification number issued to him by the Member State from which the goods are dispatched. In such case, the transport will be ascribed to this second transaction.

What can the companies do to comply with the new amendments?

In the context of the new rules, companies which are part of a transactional chain should analyse their level of involvement and thus determine the applicable VAT treatment. Also, companies which are part of a chain transaction should revise their ongoing contractual arrangements so as to make sure that they comply with the amendments to become effective starting from 2020.

Call-off stock arrangements

These structures involve the transport of goods by the supplier to a warehouse located in another Member State, followed by the subsequent sale of such goods to the customer. These structures rely on the fact that, upon transport, the supplier knows the identity of his customer from the other Member State.

Within these structures, as I will detail below, moving the products to the warehouse from the Member State of the customer could trigger supplier's obligation to register for VAT purposes in the Member State of the customer. To avoid this shortcoming, some Member States, including Romania, implemented simplification measures at a local level (as laid down in Order No. 4120/2015 of the Ministry of Finance). Nevertheless, since only 18 Member States currently apply the simplification measures - under different conditions - situations occur where the supplier can

no longer avoid the said registration for VAT purposes, which creates a higher administrative burden for the supplier.

Against this background, the new rules to become effective as of 1 January 2020 seek to harmonize the legal provisions on the VAT treatment applicable to call-off stock arrangements.

What is the situation now and what will change after 1 January 2020?

Now, the main condition for the applicability of simplification measures - and implicitly for avoiding registration for VAT purposes in the Member State of destination of the goods - is that the legislation of both Member States in question would provide for similar simplification measures. If the other Member State does not allow the application of such simplification measures, then the registration for VAT purposes becomes mandatory:

- In Romania, for the supplier from another Member State who moves its own goods to a stock in Romania;
- In another Member State, for the Romanian supplier who moves its own goods to a stock from such Member State.

As of 1 January 2020, it will be possible to apply the simplification measures in the entire European Union, and the suppliers will no longer have the obligation to register for VAT purposes in the Member State of destination of the goods.

For the simplification measures to be applicable, the following conditions (as provided in Council Directive (EU) 2018/1910) must be met:

- Goods are dispatched to another Member State with a view to those goods being supplied there, at a later stage and after arrival, to another taxable person who is entitled to take possession of those goods in accordance with an existing agreement between both taxable persons;
- The supplier dispatching the goods has not established his business nor has a fixed establishment in the Member State to which the goods are dispatched;
- The supplier knows the identity of the customer to whom the goods were dispatched, and such customer is a taxable person registered for VAT purposes in the Member State of destination of the goods;
- The supplier records the transfer of the goods in a register whose content is to be regulated and includes the identity of the customer and the VAT identification number assigned to him by the Member State to which the goods are dispatched, in the VIES listing (called, in Romania, ‘statement 390’).

In addition to the above, the new rules provide for a 12-month period during which the goods in the stock must be supplied to the customer or returned to the supplier. If such period expires, the movement of the goods from the Member State of the supplier to the stock from the Member State of the customer becomes a transfer of goods (i.e. the supplier will perform an assimilated

intra-Community supply/acquisition). In this case, the transfer is deemed to take place on the day following the expiry of the 12-month period. Also, such movement will also be deemed as a transfer of goods if:

- The customer is different, and the aforementioned conditions are not met; in this case, the transfer of goods (i.e., the assimilated intra-Community supply) is deemed to take place prior to the supply of the goods to the new customer;
- The goods are not supplied to the customer, but are re-dispatched to a Member State other than the Member State of the supplier; in this case, the transfer of goods shall be deemed to take place prior to the dispatch to such Member State;
- The goods are destroyed, lost or stolen; in this case, the transfer of goods shall be deemed to take place on the date the goods are destroyed, lost or stolen, or on such date when their absence or destruction was found.

What can the companies do to comply with the new amendments?

The companies should revise their flow of goods to determine the potential impact of the new regulations on their business. For instance, the companies should analyse whether there are elements which may trigger a potential annulment of the registration for VAT purposes in the Member State of the customer and adjust their existing contractual arrangements accordingly. Furthermore, the companies which so far avoided implementing such structures should consider whether this is a feasible option. Finally, the companies having already implemented such structures should make sure that they are prepared to keep a strict record (i.e. in special registers) of such type of operations.

Against this background, I believe that the quick fixes harmonize the provisions and approaches of the tax authorities in different the Member States. On a long term, they are also capable of facilitating the activity of the companies operating in the sectors addressed by such quick fixes. Nevertheless, Council Implementing Regulation (EU) 2018/1912 and Council Directive (EU) 2018/1910 which lay down such quick fixes leave room for interpretation, and such inconsistencies can only have the opposite effect to the one pursued, that is to simplify and harmonize the legislation.

To prevent it, the European Commission is working intensely to prepare additional clarifications. At the same time, the tax authorities should closely cooperate with the business environment which is directly impacted by the new provisions so that such quick fixes may be accurately and timely transposed/implemented in the national legislations. Somehow, all such actions should be finalized by 1 January 2020. We will eventually see how things turn out.

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