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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DIRECTIVE amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States

Delegations will find attached document COM(2017) 569 final.

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Proposal for a

COUNCIL DIRECTIVE

**amending Directive 2006/112/EC as regards harmonising and simplifying certain rules
in the value added tax system and introducing the definitive system for the taxation of
trade between Member States**

{SWD(2017) 325 final}

{SWD(2017) 326 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Indirect taxes on consumption are at international level governed by the fundamental principle of taxation in the country of destination. In other words, taxes are charged in the country in which the goods and services are consumed.

Value-added tax (VAT) is Europe's longest-standing consumption tax. In 1967, the commitment was made to establish a definitive VAT system operating within the European Community in the same way as it would within a single country¹. The need to abolish the fiscal frontiers between Member States by the end of 1992 made it necessary to reconsider the way in which trade in goods was taxed in the European Community. The goal was that goods would be taxed in the country of origin, so that the same conditions that apply to domestic trade would also apply to intra-Community trade, perfectly reflecting the idea of a genuine internal market.

Since the political and technical conditions were not ripe for such a system, transitional VAT arrangements were adopted². Those arrangements, as far as Business-to-Business (B2B) transactions on goods are concerned, split the cross-border movement of goods into two different transactions: an exempt supply in the Member State of departure of the goods and an intra-Community acquisition taxed in the Member State of destination. These rules were regarded as temporary and are not without drawbacks since allowing goods to be bought free of VAT increases the opportunity for fraud, while the inherent complexity of the system is not favourable to cross-border trade. However, these transitional arrangements are still in operation more than 20 years after their adoption.

After a broad public debate, launched with a consultation on the *Green Paper on the future of VAT*³ (Green Paper) on 6 December 2011, the Commission adopted the *Communication On the future of VAT — Towards a simpler, more robust and efficient VAT system tailored to the single market*⁴. That consultation confirmed that many businesses consider that the complexity, additional compliance costs and legal uncertainty of the VAT system often prevent them from engaging in cross-border activities and reaping the benefits of the single market. It also provided an opportunity to examine whether the commitment made in 1967 was still relevant.

Discussions with Member States showed that the objective of taxation in the Member State of origin was still politically unachievable and this was confirmed by the Council in May 2012⁵.

¹ First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes; Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax.

² Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ L 376 of 31.12.1991, p. 1).

³ COM(2010) 695, Commission Staff Working Document, SEC(2010) 1455, 1.12.2010.

⁴ COM(2011) 851, 6.12.2011.

⁵ Council conclusions on the future of VAT - 3167th Economic and Financial affairs Council meeting, Brussels, 15 May 2012 (see in particular point B 4)

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/130257.pdf

Also the European Parliament⁶ and the European Economic and Social Committee⁷ recognised the deadlock and favoured a new VAT system based on the principle of taxation at destination as a realistic solution.

After the adoption of the aforementioned Communication, the Commission entered into a broad-based and transparent dialogue with Member States and with stakeholders to examine in detail the different possible ways of implementing the destination principle. The main idea in this regard was that doing business across the European Union (hereinafter, "Union" or "EU") should be as simple and as secure as engaging in purely domestic activities. That dialogue took place in particular via the Group on the Future of VAT (GFV)⁸ and the VAT Expert Group (VEG)⁹.

Following this work, the Commission adopted on 7 April 2016 the *Action Plan on VAT – Towards a single EU VAT area – Time to decide*¹⁰ (VAT Action Plan). The Commission announced, inter alia, its intention to adopt a definitive VAT system for intra-Union cross-border trade based on the principle of taxation in the Member State of destination of the goods in order to create a robust single European VAT area. A legislative proposal for such a simpler and fraud-proof definitive VAT system for intra-Union trade was included in the Commission Work Programme for 2017¹¹.

In its conclusions of 25 May 2016¹², the Council took note of the points made by the Commission in its VAT Action Plan as regards the way forward towards a definitive VAT system and of its intention to present, as a first step, a legislative proposal in 2017 for the definitive VAT system for cross-border B2B trade. It also reiterated its view that the principle of “taxation in the Member State of origin of the supply of goods or services” should be replaced by the principle of “taxation in the Member State of destination”. The European Parliament also welcomed the Commission’s intention to propose a definitive VAT system by 2017 that is simple, fair, robust, efficient and less susceptible to fraud¹³.

⁶ European Parliament resolution of 13 October 2011 on the future of VAT (P7_TA(2011)0436) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0436>

⁷ European Economic and Social Committee Opinion of 14 July 2011 on the ‘Green Paper on the future of VAT - Towards a simpler, more robust and efficient VAT system’ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011AE1168>

⁸ The Group on the Future of VAT provides a forum for discussion with VAT delegates from the Member States' tax administrations on the Commission pre-legislative initiatives and for exchanges of opinions on the preparation of future VAT legislation.

⁹ The VAT Expert Group is composed of 40 members: individuals with the requisite expertise in the area of VAT and organisations representing in particular businesses, tax practitioners and academics.

¹⁰ COM(2016) 148 final.

¹¹ Commission Work Programme 2017: Delivering a Europe that protects, empowers and defends, COM(2016) 710 final

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1487237841093&uri=CELEX:52016DC0710>

¹² See: <http://www.consilium.europa.eu/en/press/press-releases/2016/05/25-conclusions-vat-action-plan/>

¹³ European Parliament resolution of 24 November 2016 on Towards a definitive VAT system and fighting VAT fraud (2016/2033(INI))

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0453>

In its conclusions of 8 November 2016¹⁴ the Council stated that, while the Commission is working on the definitive VAT system for intra-Union trade, improvements to the current VAT system should be made in the meantime. In this context, the Council requested amendments in four areas:

- VAT identification number: the Council invited the Commission to present a legislative proposal aimed at making the valid VAT identification number of the taxable person or non-taxable legal person acquiring the goods, allocated by a Member State other than that in which dispatch or transport of the goods began, an additional substantive condition for the application of the exemption in respect of an intra-Community supply of goods.
- Chain transactions: the Commission was invited by the Council to propose uniform criteria and appropriate legislative improvements which would lead to increased legal certainty and harmonised application of VAT rules when determining the VAT treatment of chain transactions, including triangular transactions.
- Call-off stock: the Council invited the Commission to propose modifications to the current VAT rules in order to allow simplification and uniform treatment for call-off stock arrangements in cross-border trade. To this effect, 'call-off stock' refers to the situation where a vendor transfers goods to a warehouse at the disposal of a known acquirer in another Member State and that acquirer becomes the owner of the goods upon calling them off the warehouse.
- Proof of intra-Community supply: the Council invited the Commission to explore possibilities for a common framework of recommended criteria for the documentary evidence required to claim an exemption for intra-Community supplies.

In order to meet the request of the Council, amendments to the VAT Directive¹⁵ are proposed for the three first areas. The fourth area requires a modification of the VAT Implementing Regulation¹⁶ and is therefore subject to a separate proposal.

In addition the present proposal introduces the cornerstones of the definitive system for intra-Union B2B trade. A forthcoming proposal in 2018 will then further provide detailed technical provisions for the actual implementation of these cornerstones. The first legislative step of the definitive VAT system announced in the VAT Action Plan¹⁷ therefore includes two sub-steps:

¹⁴ Council conclusions of 8 November 2016 on Improvements to the current EU VAT rules for cross-border transactions (No. 14257/16 FISC 190 ECOFIN 1023 of 9 November 2016) <http://data.consilium.europa.eu/doc/document/ST-14257-2016-INIT/en/pdf>

¹⁵ 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).

¹⁶ 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 (recast) (OJ L 77, 23.3.2011, p. 1).

¹⁷ The VAT Action Plan provided for two legislative steps in relation with the introduction of the definitive VAT system. See the last two paragraphs of point 4 of the VAT Action Plan for further details on the content of these legislative steps.

one contained in the present proposal and made of the aforementioned cornerstones and another one that will take place in 2018¹⁸.

- **Consistency with existing policy provisions in the policy area**

The introduction of a definitive system for intra-Union supplies of goods is one of the main parts of the VAT Action Plan. This proposal is a step towards replacing the transitional arrangements, applicable since 1 January 1993, by a definitive VAT system for intra-Union B2B trade under which domestic and cross-border transactions of goods will be treated in the same way¹⁹. Further, that definitive VAT system will create a robust single European VAT area which can support a deeper and fairer single market that helps to boost jobs, growth, investment and competitiveness.

- **Consistency with other Union policies**

The creation of a simple, modern and fraud-proof VAT system is one of the fiscal priorities set out by the Commission for 2017²⁰.

Combating missing trader VAT fraud is also one of the European Union's priority crime areas, under the 2014-2017 EU Policy Cycle of Europol²¹.

Reducing administrative burden, particularly for SMEs, is also an important objective highlighted in the EU's growth strategy²².

The proposed initiative and its objectives are consistent with the EU SME policy as set out by the Small Business Act (SBA)²³, in particular principle VII on helping SMEs to benefit more from the opportunities offered by the Single Market.

It is consistent with the Single market strategy (SMS)²⁴ and the objectives of the Regulatory Fitness and Performance programme (REFIT).

¹⁸ A detailed description of the successive steps and sub-steps of the introduction of the definitive VAT system may be found in the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – On the follow-up to the Action Plan on VAT - Towards a single EU VAT area - Time to act (COM(2017) [...]).

¹⁹ Although currently not in the forefront of the work on the definitive VAT system, there might be a need to assess in the future certain customs procedures (e.g. CP 42) so as to ensure this principle is coherently applied in combination with import/export schemes.

²⁰ Annual Growth Survey 2017; see: https://ec.europa.eu/info/publications/2017-european-semester-annual-growth-survey_en

²¹ [EMPACT priorities](#)

²² Europe 2020 – A strategy for smart, sustainable and inclusive growth; see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>

²³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - "Think Small First" – A "Small Business Act" for Europe (COM(2008) 394 final).

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions – "Upgrading the Single Market: more opportunities for people and business" (COM(2015) 550 final).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The Directive amends the VAT Directive on the basis of Article 113 of the Treaty on the Functioning of the European Union. This Article provides for the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to adopt provisions for the harmonisation of Member States' rules in the area of indirect taxation.

- **Subsidiarity (for non-exclusive competence)**

According to the principle of subsidiarity, as set out in Article 5(3) of the Treaty on European Union, action at Union level may only be taken if the envisaged aims cannot be achieved sufficiently by the Member States alone and can therefore, by reason of the scale or effects of the proposed actions, be better achieved by the EU.

VAT rules for cross-border Union trade can, by their nature, not be decided by individual Member States since, inevitably, more than one Member State is involved. Moreover, VAT is a tax harmonised at Union level and therefore any initiative to introduce the definitive VAT system for cross-border supplies of goods requires a proposal by the Commission to amend the VAT Directive.

As regards the provisions to harmonise and simplify rules within the current VAT system contained in this proposal, they have unanimously been requested by the Member States which demonstrates that action at Union level is likely to be more effective as action at national level has proven not to be sufficiently successful.

- **Proportionality**

The proposal, as far as the introduction of the definitive system for intra-Union B2B trade is concerned, is consistent with the principle of proportionality i.e. it does not go beyond what is necessary to meet the objectives of the Treaties, in particular the smooth functioning of the single market. As with the subsidiarity test, it is not possible for Member States to address problems such as fraud or complexity without a proposal to amend the VAT Directive.

As regards the proposed improvements to the current system, they are targeted and limited to a restricted number of VAT rules which have proven difficult to apply in a systematic and uniform way and which have created problems for taxable persons.

- **Choice of the instrument**

A Directive is proposed in view of amending the VAT Directive.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

A retrospective evaluation of elements of the Union VAT system was conducted by an external consultant in 2011 and its findings have been used as a starting point to the examination of the current VAT system²⁵.

- **Stakeholder consultations**

On 6 May 2011, the European Commission organised a conference in Milan as part of the consultation process on the Green Paper. It brought together policy makers, experts, businesses and other stakeholders and the general public from all over Europe, and beyond²⁶. The open public consultation on the Green Paper, resulting in around 1700 contributions, provided the Commission with a clear understanding of the problems and possible solutions.

Following publication of the Green Paper, the Commission set up two working groups for discussions at technical level: the GFV and the VEG. A total of 12 meetings of the GFV and 14 meetings of the VEG took place to discuss different issues related to the definitive VAT system for intra-Union B2B trade as well as the improvements to the current system. Mixed sub-groups consisting of both GFV and VEG members were constituted to discuss jointly certain specific topics. Also a Fiscalis²⁷ seminar was organised in Vienna in 2015 which brought together members of both the GFV and the VEG. Another mixed sub-group was established in the framework of the EU VAT forum²⁸, a discussion platform where businesses and VAT authorities meet to discuss how the implementation of the VAT legislation can be improved in practical terms.

Finally, a public consultation on the definitive system for intra-Union trade was organised from 20 December 2016 to 20 March 2017 resulting in 121 contributions²⁹. The objective was to get the views of all stakeholders on the operation of the current transitional VAT arrangements, the possible short term improvements to these transitional arrangements, as requested by the Council, and the introduction of the definitive VAT system based on the principle of taxation at destination.

- **Collection and use of expertise**

Regarding the options for a definitive VAT system, the following studies have provided detailed analysis of the problems at stake and the possible ways forward:

²⁵ Institute for Fiscal Studies (project leader), 2011, A retrospective evaluation of elements of the EU VAT system:
http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/publications/studies/report_evaluation_vat.pdf

²⁶ More information on: https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat/communication-future-vat/green-paper_en

²⁷ Regulation (EU) No 1286/2013 of the European Parliament and of the Council of 11 December 2013 establishing an action programme to improve the operation of taxation systems in the European Union for the period 2014-2020 (Fiscalis 2020).

²⁸ Commission Decision of 3 July 2012 setting up the EU VAT forum, 2012/C198/05, (OJ C 198/4 of 6.7.2012).

²⁹ Summary of the results of the open public consultation:
https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations_en

- Study on applying the current principle for the place of supply of B2B services to B2B supplies of goods³⁰;
- Economic study on charging VAT on intra-EU supplies of goods and services³¹;
- Implementing the ‘destination principle’ to intra-EU B2B supplies of goods³²;
- Study and Reports on the VAT Gap in the EU-28 Member States³³.

- **Impact assessment**

Reference is made to the separate impact assessment which has been carried out in relation to this proposal. The preferred option, chosen in that impact assessment, would reduce cross border VAT fraud by EUR 41 billion and compliance costs for businesses by EUR 1 billion.

The impact assessment for the proposal was considered by the Regulatory Scrutiny Board on 14 July 2017. The Board gave a positive opinion to the proposal with some recommendations, in particular on the link of the proposal to other elements of the VAT Action Plan, the need for a staged approach and the concept of certified taxable person, that have been taken on board. The opinion of the Board and the recommendations are mentioned in Annex 1 to the Staff Working Document for the impact assessment accompanying this proposal.

4. BUDGETARY IMPLICATIONS

The proposal will have no negative implications for the Union budget.

5. OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

Certified taxable person: Article 13a (new)

This provision introduces the concept of the certified taxable person.

As a rule, taxable persons are identified for VAT purposes via a VAT identification number. No distinction is currently made at the level of the attribution of such a number between reliable and less reliable taxable persons. The VAT rules, as far as identification is concerned, apply in the same way to both categories.

The concept of certified taxable person allows for an attestation that a particular business can globally be considered to be a reliable taxpayer. The concept is important because certain simplification rules, which could be fraud-sensitive, will apply only where a certified taxable person is involved in the relevant transaction.

³⁰ PwC, 2012; see: http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/publications/studies/place_supply_b2b.zip

³¹ CPB (project leader), 2013; see: <https://circabc.europa.eu/sd/a/60e05641-2653-4ac3-aca2-3060896aa6e3/33-ANN%20-%20Final%20report%20-%20Study%20on%20charging%20VAT%20on%20intra-EU%20supplies%20of%20goods%20and%20services%5B1%5D.pdf>

³² EY, 2015; see: https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/ey_study_destination_principle.pdf

³³ CASE, 2016; see: https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09_vat-gap-report_final.pdf

Further, the certified taxable person concept will be one of the essential elements of the first step of the definitive VAT system for intra-Union B2B trade. That definitive system will replace, by one taxable supply of goods located for VAT purposes in the Member State of destination (the so-called intra-Union supply of goods), the current transitional arrangements which entail an exempt supply of goods in the Member State of departure and a taxed intra-Community acquisition in the Member State of destination, for which the acquirer is the person liable to VAT. The certified taxable person concept will allow for a gradual implementation of the definitive VAT system because, in the first step of that system, reverse charge (i.e. liability to VAT of the acquirer and not of the supplier, which gives rise in practice to a similar situation to what exists today under the transitional arrangements) will apply where the acquirer, in case of intra-Union supplies, is a certified taxable person³⁴. The justification is that no fraud should occur as a result of VAT not being charged on intra-Union supplies made for a certified taxable person, as the certified taxable person by definition is a reliable taxpayer.

The provision sets out the overall criteria on the basis of which the Member States will be able to certify taxable persons. Following the adoption of this proposal, a Council Implementing Regulation will have to be adopted, based on Article 397 of the VAT Directive, so as to arrange the practicalities of the certified taxable person status and to ensure that the procedure for granting and withdrawing the certified taxable person status is sufficiently harmonised and standardised throughout the Union so that a uniform application can be guaranteed. Also an amendment to the Administrative Cooperation Regulation³⁵ is to be proposed in order to enable the certified taxable person status of taxable persons being integrated in the VIES (VAT information and exchange system) thus allowing both tax administrations and businesses to verify online the certified taxable person status of a particular business.

Since the certified taxable person status entails VAT reporting and payment obligations, non-taxable persons will not be eligible. For the same reason, the proposal excludes flat-rate farmers, exempt SMEs, other taxable persons exempt without the right to deduct and occasional taxable persons from the possibility of obtaining the certified taxable person status. However, any SME not applying the exemption scheme will be able to apply for the certified taxable person status under the same conditions as any other taxable person. It is therefore consistent with the EU SME policy as set by the Small Business Act (SBA)³⁶.

Similarity exists between the criteria to be used for granting the certified taxable person status and those applied regarding the Authorised Economic Operator (AEO) as defined in the Union Customs Code (Article 39). Similar criteria, based on the AEO status, can also be found in the recent VAT proposal on e-commerce³⁷.

³⁴ As announced in the VAT Action Plan, in a future second legislative step of the definitive VAT system, taxation would cover all cross border supplies of goods and services (and therefore the supplier, and not the customer, would be liable for the VAT on all goods and services purchased from other Member States) so that all supplies of goods and services within the single market, either domestic or cross-border, will be treated the same way.

³⁵ Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) (OJ L 268, 12.10.2010, p. 1).

³⁶ See footnote 23.

³⁷ Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods (COM(2016) 757 final of 1.12.2016; see the proposed Article 369m(1)(c) of Directive 2006/112/EC).

Call-off stock: Articles 17a (new), 243(3) and 262 (amended)

Call-off stock is a scheme whereby a supplier transfers goods to a known acquirer without transferring the ownership of the goods yet. The acquirer has the right to take the goods from a stock of the supplier at his own discretion at which point a supply of goods takes place. In domestic relationships, the use of this model does not create specific problems but issues arise when supplier and acquirer are situated in different Member States.

Under the current VAT rules, a business transferring own goods to another Member State in order to constitute a stock for a customer is deemed to have made a VAT exempt supply of goods in the Member State of departure. The arrival of the goods gives rise to an intra-Community acquisition made by the business that transferred the goods which is subject to VAT in that other Member State. The business that has transferred the goods is obliged, as a rule, to be identified for VAT purposes in the Member State of arrival in order to be able to declare the intra-Community acquisition in its VAT return. When the goods are taken out of the stock and delivered to the acquirer a second supply occurs, the place of supply of which is the Member State in which the stock is situated.

In order to address the difficulties that this can cause in practice, certain Member States apply simplification measures regarding these transactions while others do not. These differences run against the uniform application of the VAT rules within the single market.

The proposed solution consists in considering the call-off stock arrangements as giving rise to a single supply in the Member State of departure and to an intra-Community acquisition in the Member State where the stock is situated insofar as the transaction is taking place between two certified taxable persons. This will avoid that the supplier has to be identified in every Member State where he has placed goods under the call-off stock arrangements. However, to ensure an adequate follow-up of the goods by the tax administrations, the supplier as well as the acquirer will be required to keep a register of call-off stock goods to which these rules apply. Further, in the recapitulative statement of the supplier the identity of the acquirers to whom goods dispatched under call off stock arrangements will be supplied at a later stage must be mentioned.

VAT identification number and the exemption for certain intra-Community transactions: Article 138(1) (amended)

The VAT exemption for intra-Community supplies of goods laid down in Article 138(1) of the VAT Directive is at the centre of the current transitional arrangements. At the same time, this exemption is also at the root of the so-called carousel fraud. The VAT definitive system for intra-Union trade is intended to solve that problem but, in the meantime, interim solutions have been requested by the Member States. In particular they have requested including in the VAT Directive the requirement for a valid VAT identification number of the acquirer in a Member State other than that in which transport of the goods begins as a substantive condition in order for the supplier to be allowed to apply the exemption. This goes further than the current situation under which, according to the interpretation of the Court of Justice of the European Union³⁸, the VAT identification number of the acquirer is simply a formal condition of the right to exempt an intra-Community supply. That currently leads to situations

³⁸ Judgments of 6 September 2012, *Mecsek-Gabona*, C-273/11, ECLI:EU:C:2012:547; of 27 September 2012, *VSTR*, C-587/10, ECLI:EU:C:2012:592; of 20 October 2016, *Plöckl*, C-24/15, ECLI:EU:C:2016:791 and of 9 February 2017, *Euro-Tyre*, C-21/16, ECLI:EU:C:2017:106.

where, when the condition has not been complied with, Member States are only able to impose fines or administrative sanctions, but not to refuse the exemption itself.

The current transitional arrangements are further based on the obligation for the supplier to submit a recapitulative statement (the so-called VIES listing which includes the VAT identification number of the acquirer). This is again a formal but not a substantive condition in relation to the exemption. This information is, via the VIES system, accessible for the tax authorities of the Member State of the acquirer which are thus informed of the arrival in its territory of goods that are normally subject to a taxed intra-Community acquisition. The acquirer has to declare this intra-Community acquisition in his VAT return and the tax authorities have the possibility to cross-check this declaration with data in the VIES system. The VIES listing has therefore been a crucial component of the VAT system since the abolition of the fiscal borders and the corresponding disappearance of the customs documentation.

Without correct information from the VIES system, the tax authorities of the Member States are not duly informed of the arrival of untaxed goods in their territory and have solely to rely on what their taxable persons declare. Nevertheless, if the listing is not filled in as regards a supply, this can give rise to penalties but not to the rejection of the exemption as such.

The new proposed Article 138(1) therefore includes changes as regards these two aspects. First, whereas currently reference is made to the acquirer as a taxable person or a non-taxable legal person acting as such, it is now stipulated, as a substantive condition for the application of the exemption, that the acquirer has to be identified for VAT purposes in a Member State other than that in which dispatch or transport of the goods begins. As it already happens today, the supplier will have to verify the status of his customer via the VIES system before applying the exemption. From that perspective, there is no practical difference for the supplier, but the consequences might be different as the non-identification of his customer can, on that basis, lead to a rejection of the exemption. Secondly, also the correct filing of the VIES listing becomes a substantive condition which can lead, where that condition is not met, to the rejection by the tax administration of an applied exemption.

Chain transactions: Article 138a (new)

Chain transactions, which are considered within the remit of this proposal, have to be understood as successive supplies of the same goods where the goods supplied are subject to a single intra-Community transport between two Member States. In this situation, according to the case-law of the Court of Justice³⁹, the transport is to be attributed to one supply within the chain so as to determine to which of the transactions the exemption for intra-Community supplies should be applied in accordance with Article 138 of the VAT Directive. This provision stipulates, as a condition for the exemption, that the goods are 'dispatched or transported by or on behalf of the vendor or the person acquiring the goods' from one Member State to another. In this context, Member States have asked for legislative improvements in order to increase legal certainty for operators in determining the supply within the chain of transactions to which the intra-Community transport must be ascribed (which will be the supply within the chain to which the exemption laid down in Article 138 will be applicable, provided all the other conditions for that exemption are met).

³⁹ Judgment of 6 April 2006, *Emag Handel*, C-245/04, ECLI:EU:C:2006:232.

Where the transport has been made by or on behalf of one of the intermediate suppliers in the chain, rules are proposed whereby that transport will be ascribed (i) to the supply made for that intermediate supplier if he is, for VAT purposes, identified in a Member State other than the Member State of supply and has communicated the name of the Member State of arrival of the goods to his supplier; (ii) to the supply made by the intermediate supplier to the next operator in the chain, where any of the two conditions mentioned in (i) is not met. The rules, and the legal certainty they allow, apply only where the intermediate supplier and the taxable person who supplied the goods to him are both certified taxable persons. No rule of this kind is needed where the transport is made on behalf of the first supplier in the chain (in which case the transport can only be ascribed to the first supply) or on behalf of the last taxable person in the chain (in which case the transport can only be ascribed to the supply made for that taxable person).

It is not excluded that, in case of involvement of a non-certified taxable person, the transport could be ascribed to the same supply. However, in that case the legal rules in Article 138a will not apply and thus it remains, in the same way as under the current conditions, for the taxable person concerned to demonstrate that the transport and the exemption are linked to that particular supply.

Definitive system for intra-Union trade: Articles 402 (amended), 403 and 404 (deleted)

The cornerstones of the definitive system for intra-Union trade are introduced and the lines along which the new system will operate are set out. As regards the choice of this particular system, a reference is made to the impact assessment accompanying this proposal.

As already explained in point 1 above, a forthcoming proposal in 2018 will then further provide detailed technical provisions for the actual implementation of these cornerstones. That forthcoming proposal will overhaul the whole VAT Directive and will replace or delete the current transitional articles. Further changes regarding the administrative cooperation rules and substantial IT developments will be needed in order to ensure the proper operation of the system.

In the proposed Article 402 of the Directive, it is now established that the VAT definitive system for intra-EU trade will be based on the principle of taxation in the Member State of destination of the supply of goods and services. In this context, a new concept in relation to goods - the so-called 'intra-Union supply' – will be introduced in the above-mentioned detailed technical provisions. This new single taxable event is intended to replace the current system of an exempt supply in the Member State of departure and a taxed 'intra-Community acquisition' in the Member State of destination as a second and separate taxable event. Under this new concept, the 'place of supply' will be situated in the Member State of arrival of the goods.

Further, the supplier will be liable for the payment of the VAT on this 'intra-Union supply' unless the acquirer is a certified taxable person, in which case the certified taxable person will account for the VAT in his VAT return. Where the person liable for VAT is not established in the Member State where the tax is due, he will be able to settle his declaration and payment obligations via a so-called One-Stop Shop system. Use of that system will also be possible for the deduction of input VAT.

Although at this stage not yet explicitly stipulated, the system could or should further be based on the abolition of the recapitulative statement (the so-called VIES listing), the

application of the overall invoicing rules of the Member State of the supplier, and the harmonisation of certain rules related to invoicing (such as the time of issuing of invoices), chargeable event and chargeability of VAT in relation to 'intra-Union supplies' of goods.

Proposal for a

COUNCIL DIRECTIVE

amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) In 1967, when the Council adopted the common system of value added tax (VAT) by means of Council Directives 67/227/EEC³ and 67/228/EEC⁴, the commitment was made to establish a definitive VAT system operating within the European Community in the same way as it would within a single Member State. Since the political and technical conditions were not ripe for such a system, when the fiscal frontiers between Member States were abolished by the end of 1992 transitional VAT arrangements were adopted. Council Directive 2006/112/EC⁵, which is currently in force, provides that these transitional rules have to be replaced by definitive arrangements.
- (2) In its VAT Action Plan⁶, the Commission announced its intention to put forward a proposal setting out the principles for a definitive VAT system for cross-border business-to-business (B2B) trade between Member States that would be based on the taxation of cross-border supplies of goods in the Member State of destination.

¹ OJ C , , p. .

² OJ C , , p. .

³ First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ 71, 14.4.1967, p. 1301).

⁴ Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ 71, 14.4.1967, p. 1303).

⁵ 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).

⁶ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT - Towards a single EU VAT area - Time to decide (COM(2016)148 final of 7.4.2016).

- (3) This would require replacing the current system consisting of an exempt supply in the Member State of departure of the goods and a taxed intra-Community acquisition of goods in the Member State of destination by a system of a single supply taxed in and in accordance with the VAT rates of the Member State of destination. As a rule, the VAT will be charged by the supplier who will be able to verify the applicable VAT rate of any Member State online by means of a web portal. However, where the person acquiring the goods is a certified taxable person (a reliable taxpayer recognised as such by Member States), the reverse charge mechanism would apply and the certified taxable person should be liable to VAT on the intra-Union supply. The VAT definitive system will also be based on the concept of a single registration scheme (One-Stop Shop (OSS)) for businesses allowing for the payment and deduction of the VAT due.
- (4) These principles should be established in the Directive and should replace the current concept according to which the definitive arrangements shall be based on the taxation in the Member State of origin.
- (5) The Council, in its conclusions of 8 November 2016⁷, invited the Commission to make certain improvements to the Union VAT rules for cross-border transactions, regarding the role of the VAT identification number in the context of the exemption for intra-Community supplies, call-off stock arrangements, chain transactions and the proof of transport for the purposes of the exemption for intra-Community transactions.
- (6) Given this demand and the fact that it will take several years for the definitive VAT system for intra-Union trade to be implemented, these specific measures, intended to harmonise and simplify certain arrangements for businesses, are appropriate.
- (7) The creation of the certified taxable person status is needed for the efficient application of the improvements to the Union VAT rules for cross-border transactions as well as for the gradual transition towards the definitive system for intra-Union trade.
- (8) In the current system no distinction is made between reliable and less reliable taxable persons as regards the VAT rules to be applied. The granting of the certified taxable person status on the basis of certain objective criteria should enable the identification of those reliable taxable persons. This status would allow them to benefit from the application of certain fraud-sensitive rules not applicable to other taxable persons.
- (9) Access to the certified taxable person status should be based on criteria harmonised at Union level and therefore certification provided by one Member State should be valid in the whole Union.
- (10) Certain taxable persons covered by particular arrangements excluding them from the general VAT rules, or who only occasionally carry out economic activities, should not be granted the certified taxable person status as far as those particular arrangements or occasional activities are concerned. Otherwise the smooth application of the proposed changes could be disrupted.
- (11) Call-off stock refers to the situation where at the time of transport of goods to another Member State, the supplier already knows the identity of the person acquiring the goods to whom they will be supplied at a later stage and after arrival of the goods in the Member State of destination. This currently gives rise to a deemed supply (in the

⁷ Council conclusions of 8 November 2016 on Improvements to the current EU VAT rules for cross-border transactions (No. 14257/16 FISC 190 ECOFIN 1023 of 9 November 2016).

Member State of departure of the goods) and a deemed intra-Community acquisition (in the Member State of arrival of the goods), followed by a 'domestic' supply in the Member State of arrival and requires the supplier to be identified for VAT purposes in that Member State. To avoid this, these transactions, where they take place between two certified taxable persons should be, under certain conditions, considered as giving rise to one exempt supply in the Member State of departure and one intra-Community acquisition in the Member State of arrival.

- (12) As regards the VAT identification number in relation to the exemption for the supply of goods in the intra-Community trade, it is proposed that the inclusion of the VAT identification number of the person acquiring the goods in the VAT Information Exchange System (VIES), assigned by a Member State other than that in which the transport of the goods begins, and the reference to that number in the recapitulative statement submitted by the supplier should become, in addition to the condition of transport of the goods outside the Member State of supply, substantive conditions for the application of exemption rather than formal requirements. The VIES listing is essential for informing the Member State of arrival of the presence of goods in its territory and is therefore a key element in the fight against fraud in the Union.
- (13) Chain transactions refer to successive supplies of goods which are subject to a single intra-Community transport. The intra-Community movement of the goods should only be ascribed to one of the supplies, and only that supply should benefit from the VAT exemption provided for the intra-Community supplies. The other supplies in the chain should be taxed and may require the VAT identification of the supplier in the Member State of supply. In order to avoid different approaches amongst Member States, which may lead to double or non-taxation, and in order to enhance legal certainty for operators, a common rule should be established that, provided certain conditions are met, the transport of the goods should be attributed to one supply within the chain of transactions.
- (14) Since the objectives of this Directive – improved operation of the VAT arrangements in the context of cross border B2B trade and definition of the principles of the definitive VAT system- cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (15) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (16) Directive 2006/112/EC should therefore be amended accordingly,

⁸ OJ C 369, 17.12.2011, p. 14.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 2006/112/EC shall be amended as follows:

(1) The following Article 13a is inserted:

'Article 13a

1. Any taxable person who has a place of business or a fixed establishment in the Community or in absence of place of business and fixed establishment has his permanent address or usual residence in the Community and who, in the course of his economic activity, carries out, or intends to carry out, any of the transactions referred to in Articles 17a, 20 and 21, or transactions in accordance with the conditions specified in Article 138 may apply to the tax authorities for the status of certified taxable person.

The tax authorities shall grant that status to an applicant where the criteria set out in paragraph 2 are met, unless the applicant is excluded from such certification by virtue of the terms of paragraph 3.

Where the applicant is a taxable person who has been granted the status of an authorised economic operator for customs purposes, the criteria in paragraph 2 shall be deemed to have been met.

2. All the following criteria shall be required to be met in order to grant the status of a certified taxable person:

- (a) the absence of any serious infringement or repeated infringements of taxation rules and customs legislation, as well as of any record of serious criminal offences relating to the economic activity of the applicant;
- (b) the demonstration by the applicant of a high level of control of his operations and of the flow of goods, either by means of a system managing commercial and, where appropriate, transport records, which allows appropriate tax controls, or by means of a reliable or certified internal audit trail;
- (c) evidence of financial solvency of the applicant, which shall be deemed to be proven either where the applicant has good financial standing, which enables him to fulfil his commitments, with due regard to the characteristics of the type of business activity concerned, or through the production of guarantees provided by insurance or other financial institutions or by other economically reliable third parties.

3. The following taxable persons may not be granted the status of a certified taxable person:

- (a) taxable persons covered by the common flat-rate scheme for farmers;
- (b) taxable persons covered by the exemption for small enterprises provided for in Articles 282 to 292;
- (c) taxable persons carrying out supplies of goods or services in respect of which VAT is not deductible;

- (d) taxable persons carrying out an occasional supply of a new means of transport within the meaning of Article 9(2) or carrying out an occasional activity within the meaning of Article 12.

However, the taxable persons mentioned under points (a) to (d) may be granted the status of a certified taxable person for the other economic activities that they carry out.

- 4. A taxable person who applies for the status of a certified taxable person shall supply all the information required by the tax authorities in order to enable them to take a decision.

For the purposes of granting this tax status, tax authorities shall mean:

- (a) those of the Member State where the applicant has established his business;
 - (b) those of the Member State with the fixed establishment of the applicant in which his main accounts within the Community for tax purposes are held or accessible, where the applicant has established his business outside the Community but has one or more fixed establishments within the Community;
 - (c) those of the Member State where the applicant has his permanent address or where he usually resides, where he has neither a place of business nor a fixed establishment.
- 5. Where the application is refused, the grounds for refusal shall be notified by the tax authorities to the applicant together with the decision. Member States shall ensure that the applicant is granted a right of appeal against any decision to refuse an application.
 - 6. The taxable person who has been granted the status of certified taxable person shall inform the tax authorities without delay of any factor arising after the decision was taken, which may affect or influence the continuation of that status. The tax status shall be withdrawn by the tax authorities where the criteria set out in paragraph 2 are no longer met.
 - 7. The status of a certified taxable person in one Member State shall be recognised by the tax authorities of all the Member States.'

(2) The following Article 17a is inserted:

'Article 17a

- 1. The transfer by a certified taxable person of goods forming part of his business assets to another Member State under call-off stock arrangements shall not be treated as a supply of goods for consideration.
- 2. For the purposes of this Article, call-off stock arrangements shall be deemed to exist where the following conditions are met:
 - (a) goods are dispatched or transported by a certified taxable person, or by a third party on behalf of that certified taxable person, to another Member State with a view that those goods shall be supplied there, at a later stage and after arrival, to another certified taxable person;
 - (b) the certified taxable person dispatching or transporting the goods is not established in the Member State to which the goods are dispatched or transported;

- (c) the certified taxable person to whom the goods are supplied is identified for VAT purposes in the Member State to which the goods are transported or dispatched and both his identity and the VAT identification number assigned to him by that Member State are known to the certified taxable person referred to in point (b) at the time when the dispatch or the transport begins;
- (d) the certified taxable person dispatching or transporting the goods has recorded the dispatch or transport in the register provided for in Article 243(3) and has included the identity of the certified taxable person acquiring the goods and the VAT identification number assigned to him by the Member State to which the goods are dispatched or transported in the recapitulative statement as provided for in Article 262.

3. Where the conditions laid down in paragraph 2 are met, at the time of the transfer of the right to dispose of the goods to the certified taxable person referred to in point (c) of that paragraph, the following rules shall apply:

- (a) a supply of goods, exempt from VAT in accordance with Article 138(1) shall be deemed to be made by the certified taxable person that dispatched or transported the goods either by himself or by a third party on his behalf in the Member State from which the goods were dispatched or transported;
- (b) an intra-Community acquisition of goods shall be deemed to be made by the certified taxable person to whom those goods are supplied in the Member State to which the goods were dispatched or transported.'

(3) In Article 138, paragraph 1 is replaced by the following:

'1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, where the following conditions are met:

- (a) the goods are supplied to another taxable person, or to a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods begins;
- (b) the taxable person or non-taxable legal 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;
- (c) reference is made to the person acquiring the goods in the recapitulative statement submitted by the supplier under Article 262.'

(4) The following Article 138a is inserted:

'Article 138a

1. For the purposes of applying the exemptions in Article 138 in the context of a chain transaction situation, the intra-Community transport shall be ascribed to the supply made by the provider to the intermediary operator, where the following conditions are met:

- (a) the intermediary operator communicates the name of the Member State of arrival of the goods to the provider;
- (b) the intermediary operator is identified for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins.

2. Where any of the conditions laid down in paragraph 1 is not met, in a chain transaction situation the intra-Community transport shall be ascribed to the supply made by the intermediary operator to the customer.

3. For the purposes of this Article, the following definitions shall apply:

- (a) 'chain transaction situation' shall mean a situation where successive supplies of the same goods by taxable persons give rise to a single intra-Community transport of those goods and where both the intermediary operator and the provider are certified taxable persons;
- (b) 'intermediary operator' shall mean a supplier in the chain other than the first supplier, who dispatches or transports the goods, himself or by a third party on his behalf;
- (c) 'provider' shall mean the taxable person in the chain who supplies the goods to the intermediary operator;
- (d) 'customer' shall mean the taxable person to whom the intermediary operator supplies the goods in the chain.'

(5) In Article 243, the following paragraph 3 is added:

'3. Every certified taxable person who transfers goods under the call-off stock arrangements referred to in Article 17a shall keep a register of the following:

- (a) the goods dispatched or transported to another Member State and the address where they are stored in this Member State;
- (b) the goods supplied at a later stage and after arrival in the Member State referred to in point (a).

Every certified taxable person to whom goods are supplied under the call-off stock arrangements referred to in Article 17a shall keep a register of those goods.'

(6) Article 262 is replaced by the following:

'Article 262

1. Every taxable person identified for VAT purposes shall submit a recapitulative statement of the following:

- (a) the acquirers identified for VAT purposes to whom he has supplied goods in accordance with the conditions specified in Article 138(1) and (2)(c);
- (b) the persons identified for VAT purposes to whom he has supplied goods which were supplied to him by way of intra-Community acquisitions referred to in Article 42;
- (c) the taxable persons, and the non-taxable legal persons identified for VAT purposes, to whom he has supplied services, other than services that are exempted from VAT in the Member State where the transaction is taxable, and for which the recipient is liable to pay the tax pursuant to Article 196.

2. In addition to the information referred to in paragraph 1, every certified taxable person shall identify the certified taxable persons for whom goods are intended and which are dispatched or transported under call-off stock arrangements in accordance with the conditions set out in Article 17a.'

(7) The heading of Chapter 1 of Title XV is replaced by the following:

'Definitive arrangements for the taxation of trade between Member States'

(8) Article 402 is replaced by the following:

'Article 402

The arrangements provided for in this Directive for the taxation of trade between Member States are transitional and shall be replaced by definitive arrangements based on the principle of taxation in the Member State of destination of the supply of goods or services; of liability for VAT of the supplier, or the acquirer if he is a certified taxable person, and of a single registration scheme for the declaration, payment and deduction of the tax.'

(9) Articles 403 and 404 are deleted.

Article 2

1. Member States shall adopt and publish, by 31 December 2018 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 1 January 2019.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*