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**MEETING DOCUMENT**

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From:	Presidency
To:	Working Party on Tax Questions (Indirect Taxation – VAT)
Subject:	Presidency discussion paper - VAT rates

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Delegations will find attached a discussion paper from the Presidency in view of the Working Party on Tax Questions on 18 February 2021.

## PRESIDENCY DISCUSSION PAPER

### VAT RATES

**With a view to the meeting of the Working Party on Tax Questions on 18 February 2021, delegations will find attached a steering note prepared by the Portuguese Presidency**

#### **1. OUTCOME RESULTING FROM THE PREVIOUS MEETING**

At the last Council Working Party meeting on VAT rates, delegations supported the Presidency's strategy, backing a step-by-step approach which started with the discussion of the guiding principles of the positive list.

The majority agreed that the principles of the final consumer and general interest should be guidelines to the setting of the list, rather than legal conditions. A few delegations suggested the inclusion of a generic reference to the principles in the recitals.

Concerning the content of the list, some delegations supported extending the scope of current Annex III regarding health care, while others seemed to prefer a straightforward temporary provision to be applicable on exceptional circumstances.

A general clause allowing Member States to apply reduced rates according to national environmental policies was also mentioned. Nevertheless, the majority seems convinced that reduced VAT rates on environmentally friendly products are not the most effective instrument to pursue those policies<sup>1</sup>.

Most delegations agreed on the need to review the current Annex III in the light of the principle of neutrality, namely, by providing the same treatment towards VAT on goods and services despite being supplied through physical or digital means.

Several delegations also stated that, by principle, the content of Annex IIIa should not be part of the new positive list, except for works of art and those goods corresponding to derogations

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<sup>1</sup> As some delegations recalled, the Commission intends to propose revising Council Directive 2003/96/EC (Energy Taxation Directive), as part of the "Fit for 55 Package", a set of measures intended for the reduction of at least 55% of CO2 emissions in the EU by 2030.

that Member States currently apply. Some also suggested a case-by-case analysis on all items included in the negative list to ascertain if they comply with the principles outlined above.

Finally, a great number of delegations did not consider necessary or even adequate to identify goods and services to which reduced rates could be applied by the use of codes in Annex III of the Directive, in particular CPA codes.

## **2. BROAD OUTLINE OF THE CHANGES TO ANNEX III PROPOSED BY THE PRESIDENCY**

Following the Presidency's strategy, the next step to take is the drafting of the positive list.

For now, the Presidency chose not to eliminate any of the categories that currently exist in Annex III. This is because, despite the need for improvement, they generally respect the principles of the benefit of final consumer and general interest<sup>2</sup>.

The Presidency considers it could be useful to include a reference to the guiding principles in the recitals of the proposal, but it should also be clear that once goods and services are selected accordingly, reduced rates are to be applicable along the entire commercial chain, including on B2B transactions.

Being a political sensitive dossier, the Presidency approach is pragmatic, focusing on what may be acceptable to all Member States and including other main priorities identified on previous meetings: modernising the list regarding the health sector and considering the EU priorities on environment. The respect for the principles of neutrality and legal certainty is also a main concern.

To this regard, the Presidency proposes the following main actions:

- i. Expand the scope of point (4) to all medical equipment, other than equipment for the disabled, and along with a new point 4(a), to include the range of goods currently on

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<sup>2</sup> The Presidency acknowledges that in case of point 11 the benefit of the final consumer is not as clear as in other categories. However, in judgements C-415/85 and C-416/85, the CJEU, referring to agricultural inputs, clarified that «(...) the supplies at issue contribute to the production of substances intended for human consumption and are sufficiently close to the final consumer to be of advantage to him».

the COVID-19 indicative list of products to which the Decision (EU) 2020/491 of 3 April 2020 applies<sup>3</sup> <sup>4</sup>.

Note that some of those products are electronic and electrical equipment, meaning they are included in the negative list of the Commission's proposal<sup>5</sup>. However, the Presidency believes that, as long as Member States agree that supporting the health sector is a priority, their inclusion in the positive list would be duly justified.

Under amended point (4), repairing services related to medical equipment, devices, appliances, items and aids would be included and, for neutrality reasons, the rental or leasing of such goods as well.

However, as mentioned by some delegations during the meeting on last January, the inclusion of other services could be assessed, e.g., the installation or assembly of such goods.

Moreover, services related to sanitary protection could also be added, such as disinfection and disinfestation services.

- ii. Discuss with the Member States on a new provision to be applicable on cases of natural disasters, such as floods, forest fires, earthquakes, *etc.*, including pandemics<sup>6</sup>.
- iii. Address environmental protection by adding bicycles and motor vehicles powered exclusively by electric energy to the list and align some of the existing categories with the EU Green Deal<sup>7</sup>. In addition, encourage the reuse of goods by increasing the scope of repairing services that could be taxable at reduced rates<sup>8</sup>.

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<sup>3</sup> Indicative list of products eligible to be imported duty – VAT free (reference: Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020).

<sup>4</sup> See Annex I to the steering note

<sup>4</sup> See Annex I to the steering note

<sup>5</sup> Points 10 (Supply of computer, electronic and optical products; supply of watches) and 11 (Supply of electrical equipment) of Annex IIIa.

<sup>6</sup> See Annex II to the steering note.

<sup>7</sup> COM(2019) 640.

<sup>8</sup> On this issue, the Opinion of the European Economic and Social Committee - "Towards an EU strategy on sustainable consumption [own-initiative opinion], p. 12.

The Presidency focused mainly on smart mobility and on sustainable consumption, but other measures could be envisaged, e.g., increasing energy saving on households by including in the list household appliances with certified higher standards of energy efficiency<sup>9</sup> or photovoltaic solar panels and wind panels, or, as suggested by some delegations at the meeting on 21.01, support the use of renewable energy sources, such as biomass. However, as some delegations also pointed out, neutrality issues and distortions of competition<sup>10</sup> could be an obstacle.

- iv. Discuss the application of reduced rates to electronically supplied services to some categories of the list, other than point (6), to tackle the lack of uniformity in the VAT treatment of transactions that frequently have a digital counterpart.

Other amendments are referenced to in the next chapter.

## **2.1. CHANGES TO EXISTING CATEGORIES OF ANNEX III**

### **Point (3) – Pharmaceutical products**

The Presidency believes that in order to provide legal certainty regarding the scope of point (3) and reduce litigation<sup>11</sup>, it could be useful to eliminate the use of vague and unclear wording, such as “*normally used for health care*”.

This amendment would ensure that reduced rates [and/or zero rates]<sup>12</sup> apply to finished goods which may be used directly by final consumers, because that would be the logic inherent to the list, while not excluding those used in the production of medicinal products, if able to fit that purpose<sup>13</sup>.

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<sup>9</sup> On the effectiveness of these kind of measures, the study by Copenhagen Economics “Reduced VAT for Environmentally Friendly Products” (2008), p. 24 e 25.

<sup>10</sup> E.g., cross-border shopping of household appliances.

<sup>11</sup> See Judgments of 17 January 2013, European Commission vs. Kingdom of Spain, C-360/11; 4 June 2015, European Commission vs. Poland, C-678/13; 9 March 2017, Oxycure Belgium SA, C-573/15; 27 June 2019, Belgisch Syndicaat van Chiropraxie, C-597/17.

<sup>12</sup> The full scope of zero rates and reduced rates lower than the minimum of 5% will be addressed at a later stage in the discussions.

<sup>13</sup> See Judgments of 17 January 2013, European Commission vs. Kingdom of Spain, C-360/11, § 47-49.

In addition, a general category “*absorbent hygiene products*” is added to clarify that, aside from female sanitary protection products, baby diapers and adult incontinence products are included under this point.

#### **Point 4 – Medical equipment and other**

Considering the challenges faced by Member States with the COVID-19 pandemics, amendments to point (4) are intended to allow Member States with increased flexibility regarding the use of reduced rates [and/or zero rates] on goods and services considered to be essential to support the health sector.

As such, the Presidency proposes to enlarge the scope of point (4) and, for that purpose, to continue using broader terms, instead of including an exhaustive list of goods to which reduced rates [and/ or zero rates] could be applied. Nevertheless, as stated, amended point (4) intends to encompass goods covered by Decision (EU) 2020/491 of 3 April 2020<sup>14</sup> while also meaning that Member States would be able to apply those rates to medical equipment which is not designed for a specific usage (devices for the disabled) and for that reason is excluded from current point (4).

Under this point, the treatment to be given to the supply or the rental/leasing of goods should be the same for neutrality reasons.

- **Question 1:** By increasing the scope of point (4) and adding a new point (4a), goods that are usually used by the health sector would be covered by this provision, although there is clearly a public interest and the final consumer would also benefit indirectly from this enlargement. The principle of final consumer would, in this case, lose its priority to another main objective - support the health sector.  
Do Member States agree with this approach?
- **Question 2:** Do you think that in relation to subjects like health, and other that address basic needs and clear public policies, zero rates and super reduced rates should be available to all Member states?

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<sup>14</sup> For instance, Covid-19 testing kits would be covered under the wording “medical devices” and swabs, under the term “items”.

- **Points (7), (8) and (13) – Virtual cultural events, internet streaming services, internet access and online streaming sporting events**

The COVID-19 pandemics accelerated the emergence of virtual business models that operate side by side with the traditional ones.

Hence, amendments to point (8) aim at providing the same treatment regarding VAT rates both to radio and television services broadcasted only over the internet and traditional radio and television broadcasting services. As both are covered by the same place of supply rules and taxed at destination (article 58), the risks of distorting competition do not seem plausible.

At the meeting in January last, Member States have also identified categories (7) and (13) as examples of lack of neutrality towards virtual activities.

Accordingly, point (7) is amended to clarify that Member States may apply reduced rates to live streaming events (qualified as admission) but also to allow them to apply the same rates to some electronic supplied services, namely virtual events or visits.

Point (13) is also amended to illustrate that a reduced rate can be applied in case of access to live streaming sporting events.

In fact, live streaming events under these two points are most probably not electronic services but services that are taxable where the event takes place (articles 53 and 54). However, unlike physical events, in situations where the service is exclusively provided over the internet, the place of taxation might not be the place where the performers are situated but the place where that service is broadcasted by the supplier<sup>15</sup>, meaning that the risk of distortions of competition might exist if a business decides to move the place where the (virtual) event takes place or is transmitted from to third countries or low-tax countries.

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<sup>15</sup> See Judgment of 8 May 2019, *L. W. Geelen*, C-568/17, § 47-49.

Internet access is added for being perceived as a fundamental right by itself or as way to exercise fundamental rights. In any case, as a basic need, the Presidency believes Member States should be given the option to apply reduced rates to this service.

- **Question 3:** What is your opinion about the risks of including online and virtual access to cultural or sporting events referred to in points (7) and (13) in the list in the situations mentioned above? Do you share the Presidency's concerns? Do you consider that addressing the digitalisation of the economy regarding rates requires prior amendments to the Directive on other subjects?
- **Question 4:** Do you agree with including internet access in the list?

- **Point (10) – Housing**

The Presidency proposes to eliminate the obligation to restrict the reduced rate solely to housing under social policy by deleting the words "*provided as part of a social policy*"<sup>16</sup> and to merge points (10) and (10a).

Also, the requirement on current point 10(a) could probably be deleted for being susceptible to create useless distinctions and litigations<sup>17</sup>.

The word "repairing" is added to point (10).

A new point 10a is inserted.

- **Point (18) – Street cleaning and others**

It's proposed to include services of similar nature which are currently treated differently as regards rates<sup>18</sup>: services provided in connection to sewage and waste recycling.

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<sup>16</sup> This amendment was also on the proposal for a Council Directive amending Directive 77/388/EEC as regards reduced rates of value added tax - COM(2003) 397 final.

<sup>17</sup> Commission statements entered to the minutes of Council Directive 2009/47/EC (9202/09 FISC 53 ADD1).

<sup>18</sup> Sewage and waste recycling were also included in the proposal for a Council Directive amending Directive 77/388/EEC as regards reduced rates of value added tax - COM(2003) 397 final.



- **Point (19) – Minor repairing of goods**

The Presidency proposes broadening the scope of point (19) to allow the use of reduced rates on minor repairing of household appliances. This amendment encourages the repairing and reuse of such goods at the expenses of its replacement by new ones.

The repairing of bicycles is proposed to be included in a new category.

**Question 5:** Do you agree with the amendments proposed to point (10) and with the inclusion of a new point (10a)?

**Question 6:** What is your opinion on amendments proposed to points (18) and (19)?

## **2.2. NEW CATEGORIES ADDED**

- **Point (4a) - Personal protective equipment such as masks**

A separate category (new point 4a) is included for masks and other personal protective equipment covered by Decision 2020/491, when not considered pharmaceutical nor medical products according to the CN.

- **New point (10a) - Construction and renovation of immovable property and the restoration and upkeep of historic buildings as classified by Member States**

Point (10) refers only to private households. However, the same reasoning applies to buildings, e.g., schools and hospitals, and other immovable property, in particular, buildings with a cultural and a general interest.

In addition to eliminating different type of arrangements on buildings, amendments to point (10) and the introduction of new point (10a) would be aligned with the ‘renovation wave’ proposed by the Commission on the *European Green Deal* as way to address the challenges of energy efficiency and affordability on private buildings.<sup>19</sup>

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<sup>19</sup> See Communication from the Commission on The European Green Deal - COM(2019) 640 final, p. 9 : “(...)To address the twin challenge of energy efficiency and affordability, the EU and the Member States should engage in a ‘renovation wave’ of public and private buildings. While increasing renovation rates is a challenge,

- **Points (22) and (23) - Supply of natural gas, electricity, district heating and district cooling/ Live plants and firewood**

To reduce the current dispersion of provisions on rates throughout the VAT Directive, the Presidency proposes to include some particular provisions provided for in section 3, chapter 2 of title VIII, making the list the main reference for the application of reduced rates. District cooling is added because of its similar nature to the supplies included in article 102.

Despite the solution to be given to other temporary derogations, it is proposed to incorporate the goods referred to in article 122 as the Directive already allows all Member States to apply a reduced rate to those products.

- **Point (24) - Children's clothing and footwear and car seats**

Children's clothing and footwear are essential products which serve a public policy objective and thus are included in the drafting of the positive list.

It also seems appropriate to include children's car seat under this point, rather than point (3).

- **Points (25) and (26) - Electric vehicles and the supply and repairing of bicycles**

The Presidency proposes to include in Annex III environmentally friendly goods and services, such as supplies with no CO2 emissions, addressing the need to promoting sustainable and smart mobility, as declared on the European Green Deal<sup>20</sup>.

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*renovation lowers energy bills, and can reduce energy poverty. It can also boost the construction sector and is an opportunity to support SMEs and local jobs."*

<sup>20</sup> COM 2019(640) Final.

**Question 7:** Do you agree with the Presidency regarding the new categories added to the list?

**Question 8:** Do you consider that Annex III should be extended to other energy and environmentally friendly goods or services? If so, please provide examples.

**Question 9** Do you consider that, similarly to what the Presidency proposes regarding article 102, works of art should be included in the list as a cultural policy, since the application of reduced rates on these goods is already permitted to all Member States?

The Presidency would much appreciate hearing from the delegations their **reflexions and suggestions** on the approach of the Presidency and on the questions raised above and also on the draft included in Annex I (Positive list).

### **3. FLEXIBILITY IN CASE OF EXCEPTIONAL CIRCUMSTANCES**

In the last WPTQ meeting several Member States supported the suggestion to add a new provision in the VAT Directive conferring additional flexibility in the application of VAT rates in case of exceptional circumstances, such as natural disasters and pandemics.

Although the broadening of the scope of point (4) of Annex III of the VAT Directive is considered to be essential to support the health sector, the Presidency believes that its combination with the introduction of a general provision allowing a temporary application of reduced or zero rates in case of natural disasters or a pandemic, could be an important instrument to enable Member States to respond adequately to such exceptional situations.

Annex II to this steering note includes a draft proposal of such a possible measure, adapted from the solution contained in Articles 51 to 57 of Directive 2009/132/CE in relation to the importation of goods.

**Question 10:** Do you consider the introduction of this exceptional measure necessary?

If so, could you agree with the approach followed for its design in Annex II of this document?

**LIST OF SUPPLIES OF GOODS AND SERVICES TO WHICH THE REDUCED RATES REFERRED TO  
IN ARTICLE 98 MAY BE APPLIED**

- (1) Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs;
- (2) Supply of water;
- (3) Pharmaceutical products used for medical and veterinary purposes, including products used for contraception and absorbent hygiene products;
- (4) Medical equipment, appliances, devices, items, aids and medical protective gear, including the repair, rental and leasing of such goods;
- (4a) Personal protective equipment such as masks;
- (5) Transport of passengers and their accompanying luggage;
- (6) Supply, including on loan by libraries, of books, newspapers and periodicals either on physical means of support or supplied electronically or both (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), other than publications wholly or predominantly devoted to advertising and other than publications wholly or predominantly consisting of video content or audible music;
- (7) Admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities, including live streaming and virtual events or visits;
- (8) Reception of radio and television broadcasting services, including other similar programmes broadcasted only over the internet; internet access;
- (9) Supply of services by writers, composers and performing artists, or of royalties due to them;
- (10) Provision, construction, renovation, repairing and alteration of housing;
- (10a) Construction and renovation of immovable property, and the restoration and upkeep of historic buildings as classified by Member States;
- (10b) Window-cleaning and cleaning in private households;
- (11) Supply of goods and services of a kind normally intended for use in agricultural production but excluding capital goods such as machinery or buildings;
- (12) Accommodation provided in hotels and similar establishments, including the provision of holiday accommodation and the letting of places on camping or caravan sites;
- (12a) Restaurant and catering services, it being possible to exclude the supply of (alcoholic and/or non-alcoholic) beverages;

- (13) Admission to sporting events, including online streaming events;
- (14) Use of sporting facilities;
- (15) Supply of goods and services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work, in so far as those transactions are not exempt pursuant to Articles 132, 135 and 136;
- (16) Supply of services by undertakers and cremation services, and the supply of goods related thereto;
- (17) Provision of medical and dental care and thermal treatment in so far as those services are not exempt pursuant to points (b) to (e) of Article 132(1);
- (18) Supply of services provided in connection with sewage, street cleaning, refuse collection and waste treatment or waste recycling, other than the supply of such services by bodies referred to in Article 13;
- (19) Minor repairing of household appliances, shoes and leather goods, clothing and household linen (including mending and alteration);
- (20) Domestic care services such as home help and care of young, elderly, sick or disabled;
- (21) Hairdressing;
- (22) Supply of natural gas, electricity, district heating and district cooling;
- (23) Live plants and other floricultural products, including bulbs, roots and the like, cut flowers and ornamental foliage, and of wood for use as firewood;
- (24) Children's clothing and footwear; supply of children's car seats;
- (25) Vehicles designed for the transport of <10 persons, exclusively powered by electricity;
- (26) Bicycles, including rental and repairing services.

**Chapter 2****Section 2a****Exceptional situations****Article 101a**

1. A Member State may, in case of imperative urgency to respond to a natural disaster or a pandemic that affects its territory, apply a reduced rate or grant an exemption with deductibility of VAT paid at the preceding stage in respect of supply of goods or services needed for that response.

2. The reduced rate or exemption referred to in paragraph 1 only applies to supplies of goods or services to State organisations or other charitable or philanthropic organisations approved by the competent authorities, that are intended:

(a) for distribution free of charge to victims and first responders to disasters or a pandemic; or

(b) to be made available free of charge to the victims and first responders to such disasters or a pandemic, while remaining the property of the organisations in question.

3. No exemption shall be granted for materials and equipment intended for rebuilding disaster areas.

4. The organisations benefiting from the exemption may not lend, hire out or transfer, whether for a consideration or free of charge, the goods referred to in paragraph 2 under conditions other than those laid down in that paragraph without prior notification thereof to the competent authorities.

5. Where the organisations benefiting from the exemption used those goods for purposes other than those provided for in this Article, they shall be liable to VAT at the rate applying on the date on which the goods are put to another use, on the basis of the type of goods and the value ascertained on that date by the competent authorities.

6. Member States shall lay down the conditions for the application of paragraphs 4 and 5.

7. The reduced rates and exemption referred to in paragraph 1 shall be applied temporally, up to a maximum of 24 months.

#### **Article 101b**

A Member State wishing to apply the measure referred to in Article 101a shall inform the VAT Committee of the national legislative measures adopted pursuant to that provision, including the following information:

- a) The list of the supplies of goods and services covered by the reduced rate or the exemption;
- b) The starting date of application of that measure and its duration.