

Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to import and other cross-border transactions'

COM(2008) 805 final — 2008/0228 (CNS)

(2009/C 277/24)

Rapporteur: **Mr BURANI**

On 28 January 2009 the Council decided to consult the European Economic and Social Committee, under Article 93 of the Treaty establishing the European Community, on the

Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to import and other cross-border transactions

COM(2008) 805 final – 2008/0228 (CNS).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 1 April 2009. The rapporteur was Mr BURANI.

At its 453rd plenary session, held on 13 and 14 May 2009 (meeting of 13 May), the European Economic and Social Committee adopted the following opinion by 192 votes, nem. con. with five abstentions.

1. Summary and conclusions

danger is that **unconnected, divergent national solutions** will be adopted.

1.1. The Commission Communication ⁽¹⁾, which was issued at the same time as the Proposal for a Directive discussed in this Opinion, proposes a **short-term action plan**, which may be more realistic and easier to implement than others conceived in the past for **combating tax fraud**. The previous action plans were based on broader, longer-term strategies, but a number of Member States failed to give them unreserved support. The short-term action plan lays down **common standards for registration** and deregistration in VIES ⁽²⁾, better **control tools** thanks to enhanced communication and cooperation between Member States and, in time, the creation of Eurofisc, a body which will perform surveys and take a hand. Lastly, as regards **collection of lost tax**, the proposal for a directive published alongside the Communication is the first tangible proposal implementing the action plan.

1.2. The EESC welcomes the Communication, which paints a picture of implementation of the VAT system which is not wholly unsatisfactory. The system is still described as 'temporary' several decades on from its introduction. However, it is still too complex and costly, and, most importantly, **open to considerable tax evasion**. Electronic procedures are essential for combating evasion but their effectiveness is dependent on them being **adopted in a uniform manner** by the Member States; for the moment these objectives are still rather far off. One possible

1.3. A number of suggestions should be made regarding **points which could be included in the action plan**: revision of the SCAC (Standing Committee for Administrative Cooperation) model; more accessible and useful databases and legislation which strikes the right balance between data protection and cooperation between administrations; creation of professional reference bodies to act as an interface between the various administrations; certifying the reliability of operators.

1.4. First and foremost, the **proposal for a directive** clarifies a number of provisions of the initial directive on **tax exemption**, which are open to abuse: it has been noted that **implementation of the rule** that exemption is to be granted when the imported goods are sold within the Community is **difficult to follow up** on the ground. The new rules lay down a set of precautionary requirements, including the requirement for the importer to provide data identifying the end customer *at the time of importation*.

1.5. The EESC fully endorses these rules, along with the rules on **joint and several liability of a buyer and a seller established in different countries** in cases where one of the two does not meet their VAT obligations. Moreover, this is not a new or innovative rule: it already exists and is implemented rigorously within Member States but is almost **always overlooked when applying it would involve cooperation between administrations of different Member States**.

(1) COM(2008) 807 final – Communication on a coordinated strategy to improve the fight against VAT fraud in the European Union.

(2) VAT Information Exchange System.

1.6. On the subject of liability, the EESC points out an aspect which is never taken into consideration: **administrations' liability towards taxpayers and each other** in cases where errors or delays lead to financial or legal prejudice. This must be addressed in the name of basic fairness and transparency.

2. Introduction

2.1. The Commission **Communication** and proposal follow on from two other Communications: the 2006 Communication, which first launched a debate on the need for a 'coordinated approach' to combating tax fraud in general, and the 2007 Communication, which focused attention on VAT fraud, expounding the key components of a strategy. In February 2008 a further Communication won the Council's approval regarding a proposal to adopt two 'far-reaching' measures to change the VAT system to fight fraud: a **system of taxation of intra-Community transactions**, and a **general reverse-charge system**. The Commission offered to launch a pilot project for the second of these solutions but the Ecofin Council did not manage to reach agreement.

2.2. In view of the clear political reluctance to adopt a far-reaching joint policy, the Commission fell back on the proposal for a **short-term action plan** with a time schedule: a 'conventional' solution which might have a better chance of being approved.

2.3. A Community approach is necessary in both legislative and operational terms. Operation has thus far been left exclusively to the Member States, and differences in the methods adopted by the different administrations have encouraged fraudsters to shift their activities to countries which do not introduce effective measures. Moreover, there is also a problem of compliance costs for businesses, which are forced to use different procedures according to the country in which they are operating.

2.4. The **proposal for a directive** published at the same time as the Communication is a first step in the area of conventional measures. **Specific exemption on importation** is already regulated by the initial VAT directive (2006/112/EC), but the original wording had been interpreted in ways leading to abuse. The proposal clarifies the requirements and limits for obtaining exemption while, at the same time, providing Member States with a tool for recovering any VAT which may have been lost through evasion.

3. The gist of the Communication

3.1. The analysis of past measures carried out by the Commission's Anti Tax Fraud Strategy (ATFS) expert group revealed three main areas of focus for implementation of a **short-term action plan** to fight fraud: a more watertight VAT system; enhancing tools for control and investigation; greater possibilities for collecting lost tax.

3.2. As regards **making the system watertight**, clear common standards are needed for registration and deregistration in the Information Exchange System (VIES). Some Member States keep VAT identification numbers valid even where the taxable person concerned is involved in VAT fraud; this allows them to continue their activity. The Commission is soon to issue a legislative proposal on common standards for **registration and deregistration in VIES**. The proposal will also include provisions on operators' rights to **access electronically information** on their counterparts' names, addresses and VAT identification numbers, a right which is currently denied or limited in some Member States. Other rules will concern a simplified, modernised common **invoicing** system. Lastly, provisions will be laid down on **exchange of information**, eliminating the differences in interpretation between Member States on chargeability of VAT and ensuring that the administrations concerned do their reporting at the same time.

3.3. **Control tools** are the most sensitive, and perhaps the most deficient, part of the system. The focus is on the weak points identified over time: **communication, cooperation and access to information**. A number of legislative proposals are being developed. One promising operational measure could be the establishment of **Eurofisc**, a European early warning network along the lines of Eurocanet, a system set up by the Belgian tax administration and supported by the Commission and Olaf.

3.4. The third section of the action plan, **possibilities for the collection of lost tax**, includes a **number of measures**. Firstly, Member States are encouraged to take legal steps against fraudsters operating in the country concerned whose actions have caused VAT losses in another Member State. The most important part concerns, however, the **principle of joint and several liability of operators resident in different Member States**, a principle that already has a legal basis but which, thus far, each Member State has only applied domestically and only to

operators under its jurisdiction. A proposal for uniform systems of enforcement or precautionary measures will also be issued, to improve the prospects for cross-border tax collection. Lastly, a definitive solution will be provided to the issue of **cross-border protection of VAT revenue**, independently of the Member State in which the VAT is due: an issue which only a few countries are already exploring.

4. General comments

4.1. The Commission is still working on fine-tuning the rules on application, management and collection of VAT, which still form a 'temporary system' 40 years on from its creation. For it to become permanent, rates of taxation need to be harmonised and taxable persons need to be given the means of paying tax due directly in their own country, with invoices issued including VAT as is currently the case in domestic transactions. This goal is not even in sight. The reasons for this are neither technical nor legal: they are political, and this means that the issues involved are almost irresolvable. The measures proposed here are therefore 'conventional', making effective a system which is 'temporary' in name alone.

4.2. That said, it should be pointed out that the VAT scene overall is not wholly unsatisfactory, despite numerous aspects which leave room for improvement, but the system is complex, costly and, what is worse, still open to evasion on a huge, international scale. The defect lies in the very concept of a temporary system, which only political will, which is currently lacking, can transform into a simpler, more effective, permanent system.

4.3. The Commission is doing its best to deal with the greatest, most glaring shortcomings, wedged as it is between a Council which is incapable of taking unanimous decisions and the behaviour of the Member States, which are all working to solve their own problems with their own solutions internally. One example which the Commission cites is that of **electronic procedures** used in relations between taxpayers and administrations. Some Member States, like a number of non-EU countries, are keeping pace with the times while others have fallen behind. Overall, the Commission's verdict is: 'the management of the VAT system in the EU has not kept pace with ... information technology' ⁽³⁾. The EESC can only agree.

4.4. It therefore comes as no surprise that various Member States – not just the most advanced but others as well – are working with their own operators to seek better management solutions. This worries the Commission as it can see the **danger of unconnected, divergent national solutions** and strongly suggests that Member States coordinate their developments. At this point the EESC would like to **bring the Commission down to**

earth: when it comes to coordinating Community-level activities, the Commission has the power to regulate, and it has used and continues to use this power in an exemplary fashion. However, when it comes to domestic issues of individual Member States, where the Commission has no power, **recommendations have little impact**: each Member State can give a good reason for acting independently. Only where two or more countries have common interests can coordinated solutions be found.

4.5. Bearing this in mind, the EESC congratulates the Commission on an initiative which is wisely couched in terms of a suggestion: the creation of an *ad hoc* group involving tax authorities and businesses (although certified operators are not mentioned), with the objective of seeking a common approach to the various issues surrounding relations between them. The parties concerned are advised 'to put in the necessary expertise and resources in order to give this exercise a real chance of success'. The EESC hopes that this success is achieved.

5. Comments on outstanding issues

5.1. The EESC would like to take this opportunity to suggest that the **action plan include major points** which are not directly linked to combating fraud: efficient structures and effective rules help *per se* to build a watertight system, or at least help to avert abuse or, in the worst-case scenario, to clamp down on it.

5.2. As regards **electronic procedures**, the Commission has already done everything in its power with Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92; in practice, the SCAC (Standing Committee for Administrative Cooperation) model used for exchange of information and requests for action should be revised so that procedures are better geared to providing immediate, targeted responses.

5.3. **Databases** are a more sensitive matter: here it is not just a question of usefulness but also and above all of **accessibility and completeness of information**. With specific reference to VAT, the **balance between data protection and cooperation between administrations** has to some extent yet to be found; this can only be resolved with **legislation** setting out the limits of the respective requirements – which data have to be protected and which not, in which circumstances, and what the procedures are for access to information. Recommendations and agreements are not enough: the issue needs a solid legal basis which, without jeopardising fundamental rights, gives precedence to the public interest.

⁽³⁾ Commission Communication, COM(2008) 807, point 4, first paragraph.

5.4. One practical issue to be resolved is **collecting information on the ground**: Member States should create **professional reference bodies** which can collect information useful to the Member State requesting it, and which are authorised to exchange this information with their counterparts in other Member States concerned. A Community initiative could help to create a genuine **rapid intervention 'network'**, whose members can interact directly along reserved channels, working together with any other authorities carrying out investigations.

5.5. The EESC stresses that any common solution must take into account the need for **VIES to work perfectly**, providing administrations with data on each transaction **in real time**. The basic prerequisite is that the entities given a VAT code are **reliable**: the qualities ensuring this reliability must be verified in advance. If and when it is possible for both conditions – real-time operation and prior certification – to be met, missing trader fraud will fall sharply.

5.6. Pending comprehensive solutions (which may take some time), as a priority the option could be explored of **'certifying' the reliability of operators** in the sector with a single set of rules for all EU countries: if a certificate were to be issued by the relevant tax authority for each VAT identification number, two birds would be killed with one stone: both Member States' domestic interests and the commercial interests of Community operators would be protected. If information were published through a network, members would be aware of any revocation or suspension immediately.

6. The proposal for a directive: clarification and new rules

6.1. As stated in the introduction to the proposal, it is 'part of the first set of proposals announced in this Communication'. **Two changes are made to the initial directive**, 2006/112/EC: a number of provisions on **exemption from VAT** upon importation are clarified as they have led to **abuse** in the form of evasion of VAT payments, and the **right to apply joint and several liability** in some cases of supply of intra-Community goods is **made an obligation**.

6.2. **Exemption from VAT on importation** (Article 143 (d)) is permitted when this importation is followed by an intra-Community supply or transfer of the imported goods to a taxable person in another Member State; in other words, **exemption is permitted when the importer sells the imported goods to another taxable person within the EU**. Fraud investigators have drawn attention to large-scale abuse due to 'inadequate' implementation of this Community rule in national law. According to

the Commission, the result is that 'the follow-up of the physical movement of the imported goods by the customs and tax authorities within the Community is not guaranteed'. In tax jargon, this is a case of the **'missing trader in intra-Community (MTIC) fraud'**.

6.2.1. The proposal provides for presentation of documents proving that the person requesting exemption is in effect compliant with the requirements already laid down by the initial directive: to be identified for VAT purposes or to have appointed a fiscal representative in the Member State of importation; the obligation to declare that the imported goods will be transported or dispatched to another Member State; the obligation for the importer to provide *at the time of importation*, the VAT identification number of the person to whom the goods will be sent in that other Member State.

6.2.2. The EESC has no particular comment to make as this is an area where the reason for the provisions is the need to improve administrative systems to prevent potential fraud. Merely, a certain **doubt remains regarding what are termed 'third territories'**. The concept of 'Member State' in the context of VAT rules is defined in Article 5(2) of the initial directive; Article 6 of that directive states that **the directive does not apply to 'third territories'** ⁽⁴⁾ as they are exempted from paying VAT upon importation under the provisions of Article 143 (c) and (d). The rule is quite clear, but it does need to be ascertained, however, whether and to what extent this exemption is likely to protect VAT application from abuse.

6.3. The new provision laid down in Article 1(2) of the proposal replaces Article 205 of the initial directive, which states that a person other than the person liable for payment of VAT is to be held **jointly and severally liable together with the exporter** for payment of VAT. In a nutshell, the new provision states that **the seller must declare their intra-Community transactions** so that the buyer's Member State can be made aware of taxable transactions carried out in that country.

6.3.1. The aim of joint and several liability is to ensure not only that the supplier discharges their reporting obligations but also, by implication, that they **select their customer wisely and familiarise themselves** with the customer and his state of solvency; where the customer has not met his obligations, the Member State in which he is resident is authorised to recover the sum of unpaid VAT and any penalties from the supplier. Member States have applied this rule diligently **but only to domestic transactions**. By implication, in neglecting to extend the principle to international transactions, they have forgotten their obligation to cooperate in order to protect the interests of administrations in the Member States of purchase *as well*.

⁽⁴⁾ Territories forming part of the customs territory of the Community: Mount Athos, the Canary Islands, the French overseas departments, the Åland Islands, the Channel Islands; territories not forming part of the customs territory of the Community: the Island of Heligoland, the territory of Büsingen, Ceuta, Melilla, Livigno, Campione d'Italia, the Italian waters of Lake Lugano.

6.3.2. The new proposal attempts to bridge this gap by explicitly extending provision for joint and several liability to international transactions; it should, moreover, be noted that in the Commission's view ⁽⁵⁾, this provision was already made in Article 205 but that "so far its use by Member States has been limited to domestic transactions'.

6.3.3. The EESC fully endorses the Commission proposal, but draws attention to the need to regulate recovery of a debt by an administration in one Member State from a resident in another Member State, and make this feasible. If this is to be done through the judicial system, the rules on judicial cooperation apply; if the debt is to be collected through the administration of the exporter's Member State by means of administrative procedures, clear

agreements will be required, along with the resolution of ensuing issues.

6.3.4. A further comment should be made, which, although general, is relevant to the subject addressed by the proposal, whose main aim is to protect tax administrations' interests. No reference is made in the text to **tax administrations' financial and legal liability towards taxpayers** regarding errors or delays in notification of counterparts' codes, nor of the **liability of an administration in one country towards another administration**. Legislation based on fairness and transparency should always take into account taxpayers' rights in the face of the greater power of the state.

Brussels, 13 May 2009.

*The President
of the European Economic and Social Committee*
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⁽⁵⁾ Commission Communication, COM(2008) 807, point 3.3.1, second paragraph.