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2016/0371 (CNS)

Modernising VAT for cross-border B2C e-commerce

Proposal for a

COUNCIL REGULATION

amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax

{SWD(2016) 379}
{SWD(2016) 382}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

This proposal is part of the package of legislation on modernising VAT for cross-border B2C e-commerce. The context for the package as a whole is set out comprehensively in the explanatory memorandum for the 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.

The proposal to amend Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax[1] is an important element of the package as it provides the basis for the underlying IT infrastructure and the necessary cooperation by Member States to ensure the success of the extension of the Mini One Stop Shop (MOSS) to services other than telecommunications, broadcasting and electronically supplied services and to distance sales of goods, both within the Community and from outside the Community. The overall package is estimated to increase VAT revenues for Member States by EUR 7 billion annually and reduce regulatory costs for business by EUR 2.3 billion annually.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposal is based on Article 113 of the Treaty on the Functioning of the European Union (TFEU). 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)

The proposal is consistent with the principle of subsidiarity as the main problems which have been identified (distorting effects, high administrative burdens and compliance costs, etc.) are triggered by the rules of the existing Council Directive 2006/112/EC on the common system of value added tax[2] (the 'VAT Directive') and associated acts. Given that VAT is a tax harmonised at Community level, Member States cannot by themselves set different rules and therefore any initiative to modernise VAT for cross-border e-commerce requires a proposal by the Commission to amend the VAT Directive and associated acts. It is considered that the proposal will clearly offer value over and above what can be achieved at Member State level. In particular, in addition to the technical changes required to extend the scope of the MOSS, this proposal will reduce administrative burdens for taxable persons making use of the MOSS by providing for the principle that requests for records from tax administrations to the taxable persons and administrative enquiries should always be coordinated by the Member State of identification of the taxable person.

• Proportionality

The proposal is consistent with the principle of proportionality i.e. it does not go beyond what is necessary to meet the objectives of the TFEU in particular the smooth functioning of the single market. As to the subsidiarity test, it is not possible for Member States to address the problems and problem drivers without a proposal to amend the VAT Directive and associated

[1] OJ L 268, 12.10.2010, p. 1.
[2] OJ L 347, 11.12.2006, p. 1.

acts. Two aspects of the proposal are very important in terms of proportionality. The first relates to the coordination by Member States in respect of administrative queries and audits of businesses within the MOSS system. This coordination can lead to a more effective and efficient compliance regime for both Member States and businesses. However, a Member State of consumption will not be prohibited from direct contact with businesses if the Member State of identification does not agree with the need for an audit. The second aspect relates to the introduction of an administrative fee whereby the Member State of identification will receive a fee of 5% of the amounts collected on behalf of other Member States to compensate for the investment needed to update the MOSS IT system following the extension of its scope, ongoing maintenance costs and the resources spent controlling businesses established in that Member State with a view to bolstering cooperation and improving compliance.

- **Choice of the instrument**

This proposal amends Council Regulation (EU) No 904/2010.

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

This proposal is part of the package of legislation on modernising VAT for cross-border B2C e-commerce. The results of the ex-post evaluation, stakeholder consultation and the impact assessment are set out in detail in the explanatory memorandum for the 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.

In the stakeholder consultation, business representatives were strongly in favour of the need for Member States to coordinate audits as, otherwise, a business could be faced with a scenario of receiving 28 separate audit requests. The lack of such a provision under the current legislation has led to uncertainty for businesses particularly in cases where they receive correspondence from other tax administrations. Further, most Member States have indicated that they are also in favour of this approach as it is a more efficient means of using audit resources. In terms of the impact assessment, the preferred option which included coordination of audits was estimated to lead to higher reductions in compliance costs for businesses compared to the alternatives.

4. BUDGETARY IMPLICATIONS

This proposal is part of the package of legislation on modernising VAT for cross-border B2C e-commerce. The budgetary implications for the proposal as a whole are set out in detail in the explanatory memorandum for the 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.

This element of the package is estimated to have important positive budgetary implications. The coordination of audits together with the incentive of the administrative fee should result in risk based audits. A more efficient audit process which focuses on audit yield should lead to higher compliance rates compared to the alternative of an uncoordinated approach which can needlessly tie up resources. Inefficient use of scarce audit resources can also have secondary effects whereby other businesses outside the MOSS system are not properly audited and this can lead to lower compliance rates under VAT and other taxes and hence a negative budgetary impact.

5. OTHER ELEMENTS

• Detailed explanation of the specific provisions of the proposal

The provisions relating to the MOSS included in Council Regulation (EU) No 904/2010 need to be amended and completed following the proposed amendments to the VAT Directive. These provisions cover the rules and procedures for the exchange by electronic means between taxable persons and their tax administration as well as between Member States' tax administrations of VAT information concerning VAT identification, VAT returns and VAT payments within the MOSS.

Articles 1(4), 2(2), 17(1)(d) and 31 of the Regulation are amended so as to reflect the extension of the scope of the MOSS to services other than telecommunications, broadcasting and electronically supplied services (hereafter 'electronic services') and to distance sales of goods (Article 1, points 1 to 4 of the proposal).

The title of Section 2 of Chapter XI of the Regulation is amended so as to limit its application until 31 December 2020 (Article 1, point 5(a) of the proposal).

Article 1, point 5(b) of the proposal inserts a new Section 3 in Chapter XI of the Regulation. It contains the provisions applicable from 1 January 2021.

Subsection 2 of Section 3 (Articles 47b to 47g) contains the provisions relating to the exchange of information between Member States concerning the identification of taxable persons making use of the MOSS, VAT returns and VAT payments. They mirror the existing provisions of Section 2 of Chapter XI and extend them to services other than electronic services and to distance sales of goods.

Subsection 3 of Section 3 (Articles 47h to 47k) contains the provisions relating to control of transactions and taxable persons. Article 47h provides that the Member State of importation should verify the validity of the VAT identification number to be provided to the customs authorities upon importation of goods for which VAT is declared and paid using the MOSS. A valid VAT identification number is a condition for the application of the exemption upon importation of such goods. Articles 47i and 47j provide that requests for records by Member States to taxable persons and administrative inquiries should be coordinated by the Member State of identification, so as to avoid uncoordinated requests for records or administrative inquiries by several Member States of consumption. Similarly, Article 47k provides for the intervention of the Member State of identification for the notification of a tax assessment issued by a Member State of consumption following an administrative enquiry and for the collection of the amounts due from such an assessment.

Subsection 4 of Section 3 (Article 47l) provides for the payment of a fee of 5% to be paid by the Member States of consumption to the Member State of identification in order to compensate the latter Member State for the costs linked to the collection and control of VAT under the special schemes. Under the current MOSS, Member States are allowed to retain a certain percentage of the amounts of VAT which they collect and have to transfer to the Member States of consumption until end of 2018[3]. The proposal introduces a permanent mechanism, similar to established practice in the field of customs, allowing the Member State of identification to receive a fee of 5% of the amounts collected on behalf of other Member States to compensate for the investment needed to update the MOSS IT system following the extension of its scope, ongoing maintenance costs and the resources spent controlling business established in that Member State with a view to bolstering cooperation and improving

[3] 30% from 1 January 2015 until 31 December 2016; 15% from 1 January 2017 until 31 December 2018; no retention anymore from 1 January 2019.

compliance. Under the current system (Article 46(3) of the Regulation) these amounts are retained from each VAT payment in the MOSS from the Member States of identification to a Member State of consumption, which however caused a lot of complications, in particular in dealing with refunds to taxable persons. It is therefore proposed to calculate this fee annually and outside the MOSS based on the net amounts involved.

Subsection 5 of Section 3 (Article 47m) provides for the possibility for the Commission to automatically access information related to the MOSS stored in the Member States' electronic systems, with the exception of any personal data. This would allow the Commission to collect statistical information automatically (e.g. on the number of taxable persons registered in a special scheme) without having to question Member States. This is also necessary for evaluation purposes required under Better Regulation rules.

Subsection 6 of Section 3 (Article 47n) confers the implementing powers to the Commission needed to determine the data to be included in the information exchanges concerning identification, VAT returns, VAT payments, requests for records or administrative enquiries, etc., between taxable persons and Member States or between Member States as well as the technical means for the submission or transmission of this information. For clarity, these provisions are grouped in a single article instead of including them in every single provision concerned, as is the case in the current text of the Regulation.

Finally, Article 1, point 6 of the proposal amends point (1) of Annex I, aligning it with the proposed amendments to the VAT Directive regarding distance sales of goods (deletion of its Article 34).

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amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax

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 Parliament[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Regulation (EU) No 904/2010[3] lays down rules on the exchange and storage of information by Member States in order to establish the special schemes provided for by Chapter 6 of Title XII of Council Directive 2006/112/EC[4].

(2) The extension from 1 January 2021 of those special schemes to distance sales of goods and services other than telecommunications, broadcasting or electronically supplied services requires extending the scope of the rules of this Regulation concerning the provision of information and transfer of money between the Member State of identification and the Member States of consumption.

(3) The extension of the special schemes to distance sales of goods imported from third territories or third countries requires that the customs authority of the Member State of importation is able to identify imports of goods in small consignments for which value added tax (VAT) is to be paid through one of the special schemes. The VAT identification number under which VAT is paid should therefore be communicated in advance to enable customs authorities to check its validity upon importation of the goods.

(4) Taxable persons using such special schemes may be subject to requests for records from and administrative enquiries by the Member State of identification and all the Member States of consumption where goods or services are supplied to. To reduce the administrative burden and compliance costs for businesses as well as for tax administrations of multiple requests for records and administrative enquiries and to

[1] OJ C , , p. .

[2] OJ C , , p. .

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

[4] 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).

avoid duplication of work, such requests and enquiries should as much as possible be coordinated by the Member State of identification.

(5) As under the special schemes, a Member State of identification collects and controls VAT on behalf of the Member States of consumption, it is appropriate to provide for a mechanism whereby the Member State of identification would receive a fee from the Member States of consumption concerned compensating for the costs of collection and control. However, as the current system whereby a fee is retained from the VAT amounts to be transferred by the Member State of identification to the Member States of consumption has caused complications for tax administrations, in particular when dealing with reimbursements, such a fee should be calculated and paid annually, outside the special schemes.

(6) To simplify the collection of statistical data concerning the application of the special schemes, the Commission should be authorised to automatically access general information related to the special schemes stored in the Member States' electronic systems, with the exception of data concerning individual taxable persons.

(7) The information to be submitted by the taxable person and to be transmitted between Member States for the application of the special schemes, as well as the technical means for the submission by the taxable person or the transmission of this information between Member States should be adopted in conformity with the regulatory procedure provided for in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council[5].

(8) Taking account of the time needed to put in place the measures necessary to implement this Regulation and for the Member States to adapt their IT system for registration and for declaration and payment of the VAT as well as to take into account amendments introduced by Article 2 of Council Directive […]/EU[6], this Regulation should apply from the date of the application of those amendments.

(9) Regulation (EU) No 904/2010 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 904/2010 is amended as follows:

(1) in Article 1, paragraph 4 is replaced by the following:

‘4. This Regulation also lays down rules and procedures for the exchange by electronic means of VAT information on goods and services supplied in accordance with the special schemes provided for in Chapter 6 of Title XII of Directive 2006/112/EC and also for any subsequent exchange of information and, as far as goods and services covered by the special schemes are concerned, for the transfer of money between Member States’ competent authorities.’

(2) in Article 2, paragraph 2 is replaced by the following:

[5] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

[6] Council Directive […]/EU of […] 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.

‘2. The definitions contained in Articles 358a, 369a and 369l of Directive 2006/112/EC for the purposes of each special scheme shall also apply for the purposes of this Regulation.’

(3) in Article 17(1), point (d) is replaced by the following:

‘(d) information which it collects pursuant to Articles 360, 361, 364, 365, 369c, 369f, 369g, 369o, 369p, 369s and 369t of Directive 2006/112/EC.’

(4) Article 31 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. The competent authorities of each Member State shall ensure that persons involved in the intra-Community supply of goods or of services and non-established taxable persons supplying services, are allowed to obtain, for the purposes of such transactions, confirmation by electronic means of the validity of the VAT identification number of any specified person as well as the associated name and address. This information shall correspond to the data referred to in Article 17.’

(b) paragraph 3 is deleted.

(5) Chapter XI is amended as follows:

(a) the heading of Section 2 is replaced by the following:

‘Provisions applicable from 1 January 2015 until 31 December 2020’

(b) the following Section 3 is added:

‘*SECTION 3*
Provisions applicable from 1 January 2021

Subsection 1

General provision

Article 47a

The provisions of this Section shall apply from 1 January 2021.

Subsection 2
Exchange of information

Article 47b

1. The information provided by the taxable person making use of the special scheme in Section 2 of Chapter 6 of Title XII of Directive 2006/112/EC to the Member State of identification when his activities commence pursuant to Article 361 of that Directive shall be submitted by electronic means. Similar details for the identification of the taxable person making use of the special scheme in Section 3 of Chapter 6 of Title XII of Directive 2006/112/EC when his activities commence pursuant to Article 369b of that Directive shall be submitted by electronic means.

2. The Member State of identification shall transmit the information referred to in paragraph 1 by electronic means to the competent authorities of the other Member States within 10 days from the end of the month during which the information was received from the taxable person making use of one of the special schemes in Sections 2 and 3 of Chapter 6 of Title XII of Directive 2006/112/EC. In the same manner, the Member State of identification

shall inform the competent authorities of the other Member States of the allocated individual VAT identification number.

3. The Member State of identification shall without delay inform by electronic means the competent authorities of the other Member States if the taxable person making use of one of the special schemes in Sections 2 and 3 of Chapter 6 of Title XII of Directive 2006/112/EC is excluded from that special scheme.

Article 47c

1. The information provided by the taxable person making use of the special scheme in Section 4 of Chapter 6 of Title XII of Directive 2006/112/EC or his intermediary, to the Member State of identification when his activities commence pursuant to Article 369p(1) and (2) of that Directive shall be submitted by electronic means. Any changes in this information provided pursuant to Article 369p(3) of Directive 2006/112/EC shall also be submitted by electronic means.

2. The Member State of identification shall transmit the information referred to in paragraph 1 by electronic means to the competent authorities of the other Member States within 10 days from the end of the month during which the information was received from the taxable person making use of the special scheme in Section 4 of Chapter 6 of Title XII of Directive 2006/112/EC or, where applicable, his intermediary.

3. The Member State of identification shall without delay inform by electronic means the competent authorities of the other Member States if the taxable person making use of the special scheme in Section 4 of Chapter 6 of Title XII of Directive 2006/112/EC or, where applicable, his intermediary is excluded from the special scheme.

Article 47d

1. The VAT return with the details set out in Articles 365, 369g and 369t of Directive 2006/112/EC shall be submitted by electronic means.

2. The Member State of identification shall transmit this information by electronic means to the competent authority of the Member State of consumption concerned at the latest 20 days after the end of the month during which the return was received.

The Member State of identification shall also transmit the information provided for in paragraphs 2 and 3 of Article 369g of Directive 2006/112/EC to the competent authority of the Member State of establishment concerned.

Member States which have required the VAT return to be made in a national currency other than euro, shall convert the amounts into euro using the exchange rate valid for the last date of the tax period. The exchange shall be done following the exchange rates published by the European Central Bank for that day, or, if there is no publication on that day, on the next day of publication.

Article 47e

The Member State of identification shall transmit by electronic means to the Member State of consumption the information needed to link each payment with a relevant quarterly VAT return or an assessment.

Article 47f

1. The Member State of identification shall ensure that the amount the taxable person making use of one of the special schemes provided for in Chapter 6 of Title XII of Directive 2006/112/EC or, if applicable his intermediary, has paid is transferred to the bank account denominated in euro which has been designated by the Member State of consumption to which the payment is due.

Member States which required the payments in a national currency other than euro shall convert the amounts into euro using the exchange rate valid for the last date of the tax period. The exchange shall be done following the exchange rates published by the European Central Bank for that day, or, if there is no publication on that day, on the next day of publication.

The transfer shall take place at the latest 10 days after the end of the month during which the payment was received.

2. If the taxable person making use of the special scheme or, if applicable, his intermediary does not pay the total tax due, the Member State of identification shall ensure that the payment is transferred to the Member States of consumption in proportion to the tax due in each Member State. The Member State of identification shall inform by electronic means the competent authorities of the Member States of consumption thereof.

Article 47g

Member States shall notify by electronic means the competent authorities of the other Member States of the relevant bank account numbers for receiving payments in accordance with Article 47f.

Member States shall without delay notify by electronic means the competent authorities of the other Member States and the Commission of changes in the tax rates applicable for supplies of goods and services to which the special schemes apply.

Subsection 3
Control of transactions and taxable persons

Article 47h

Member States shall, upon importation of goods on which VAT is declared under the special scheme provided for in Section 4 of Chapter 6 of Title XII of Directive 2006/112/EC, verify the validity of the individual VAT identification number allocated by way of Article 369q of that Directive and communicated in advance in respect of that importation to the Member State where the importation takes place.

Article 47i

1. To obtain the records held by a taxable person or intermediary pursuant to Articles 369, 369k and 369x of Directive 2006/112/EC, the Member State of consumption shall first make a request to the Member State of identification by electronic means.

2. Where the Member State of identification receives such a request, it shall transmit that request by electronic means and without delay to the taxable person or his intermediary.

3. Upon request, a taxable person or his intermediary shall submit the requested records by electronic means to the Member State of identification. A standard form may be used for submitting the records to the Member State of identification.

4. The Member State of identification shall transmit the records obtained by electronic means and without delay to the requesting Member State of consumption.

5. Where the requesting Member State of consumption does not receive the records within 30 days of the request, that Member State may take any action in accordance with its national legislation to obtain such records.

Article 47j

1. If the Member State of identification decides to carry out in its territory an administrative enquiry on a taxable person who makes use of one of the special schemes provided for in Chapter 6 of Title XII of Directive 2006/112/EC or, if applicable, on an intermediary it shall inform in advance the competent authorities of the other Member States.

2. If the Member State of consumption decides that an administrative enquiry is required, it shall first consult with the Member State of identification on the need for such an enquiry.

In cases where the need for an administrative enquiry is agreed, the Member State of identification shall inform the other Member States.

In cases where the Member State of identification does not agree on the need for an administrative enquiry, it shall inform the other Member States of consumption concerned outlining its reasons. If at least two Member States consider that an administrative enquiry is required, the Member State of identification shall be required to undertake an administrative enquiry in coordination with those Member States. If only one Member State of consumption considers that such an enquiry is needed, that Member State of consumption may take any appropriate actions according to its national law.

3. Any Member State of consumption concerned may participate in an administrative enquiry carried out by the Member State of identification of its own initiative or at the request of a Member State of consumption. For this administrative enquiry, the tools and procedures referred to in this Regulation may be used.

4. Each Member State shall communicate to the other Member States and the Commission the details of the competent person responsible for coordination of administrative enquiries within that Member State.

Article 47k

On completion of an administrative enquiry carried out in accordance with Article 47j, a Member State of consumption may decide to issue, according to its national law, a new tax assessment, including possible interest and penalties to be paid.

Where a Member State of consumption issues such an assessment, it shall request the Member State of identification, pursuant to Article 25, to notify this assessment to the taxable person or, if applicable, his intermediary and to collect the amount due from this assessment. This request for notification, as well as the subsequent notification to the taxable person or, if applicable, his intermediary shall be made by electronic means.

Subsection 4
Fees pertaining to the collection and control of taxes collected under the special schemes

Article 47l

The Member State of identification shall be paid by the Member State of consumption a fee relating to the total amount collected on behalf of that Member State under the special schemes provided for in Chapter 6 of Title XII of Directive 2006/112/EC.

This fee shall be calculated as 5% of the total amount collected by that Member State of identification on behalf of the Member State of consumption, including those amounts collected after an administrative enquiry pursuant to Article 47j.

The fee to be paid annually based on a full calendar year shall be transferred by the Member State of consumption to that Member State of identification at the latest by 31 March of the following calendar year.

Subsection 5
Statistical information

Article 47m

Member States shall grant the Commission access to statistical information stored in their electronic system pursuant to Article 17(1)(d). This information shall not contain any personal data.'

Subsection 6
Conferral of implementing powers

Article 47n

The Commission shall be empowered to adopt the following measures in accordance with the examination procedure provided for in Article 58(2):

(a) the information to be submitted by the taxable person as referred to in Articles 47b(1), 47d(1) and 47i(3), as well as the technical means for the submission of this information;

(b) the information to be transmitted between Member States as referred to in Articles 47b(2) and (3), 47c(2) and (3), 47d(2), 47e, 47f(2), 47i(1), (2) and (4), 47j(1), (2) and (4) and 47k as well as the technical means for the transmission of this information;

(c) the minimum list of the information to be submitted by the taxable person as referred to in Article 47c(1), as well as the technical means for the submission of this information;

(d) the technical means for the transmission between Member States of the information referred to in Articles 47g;

(e) the technical means by which the information referred to in Article 47h is to be verified by the Member State of importation;

(f) the information to be accessed by the Commission as referred to in Article 47m as well as the technical means for the extraction of this information.'

(6) Annex I is amended as follows:

(a) point 1 is replaced by the following:

‘1. distance selling (Article 33 of Directive 2006/112/EC);’

(b) point 3 is replaced by the following:

‘3. telecommunication services, radio and television broadcasting and electronically supplied services (Article 58 of Directive 2006/112/EC) except where the taxable person makes use of the special schemes in Chapter 6 of Title XII of Directive 2006/112/EC.’

Article 2

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

The Regulation shall apply from 1 January 2021.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President