EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
**Value added tax**

**taxud.c.1(2023)11150754 – EN**

Brussels, 20 October 2023

# VALUE ADDED TAX COMMITTEE
## (ARTICLE 398 OF DIRECTIVE 2006/112/EC)
## WORKING PAPER NO 1071

## NEW LEGISLATION

## MATTERS CONCERNING THE IMPLEMENTATION OF RECENTLY ADOPTED EU VAT PROVISIONS

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| **ORIGIN:** | **Slovakia** |
| **REFERENCE:** | **Title XII, Chapter 1** |
| **SUBJECT:** | **The special scheme for small enterprises: interaction with the standard VAT regime in case of late VAT registration** |

## 1. INTRODUCTION

As Member States are preparing the implementation of Council Directive (EU) 2020/285[1] which will update the special scheme for small enterprises ('SME scheme'), questions may arise. This is the situation faced by Slovakia which has therefore brought a question to the VAT Committee on the interaction of the new SME scheme with the general VAT regime. Focus is on the VAT treatment of intra-Community supplies of goods in the case of late registration of a taxable person exceeding the domestic threshold for exemption under the SME scheme in a Member State that does not apply any transitional period under the new Article 288a of the VAT Directive[2]. Where that is so, the taxable person will be excluded from the SME scheme already at the moment the threshold is exceeded.

The question and analysis submitted by Slovakia can be found in Annex.

## 2. SUBJECT MATTER

Before entering the subject matter, it is important to stress that the changes to the SME scheme which will apply from 1 January 2025 aim particularly at alleviating the administrative burden faced by small enterprises whose customers are final consumers. Indeed, without these changes, a small enterprise involved in business-to-consumer (B2C) transactions – like for example distance sale of goods – would be liable to VAT register and to submit periodical VAT returns in each of the Member State(s) where its customers are located. While the Union One-Stop-Shop may provide for facilitation, it does not ensure a level playing field between established and non-established enterprises.

That being said, the SME scheme is open and optional to any small enterprise established within the territory of the Community[3] that fulfils the requirements to apply the SME scheme[4], regardless of whether its customers are businesses or final consumers. If a small enterprise applies the SME scheme, the exemption will therefore also apply to its business-to-business (B2B) transactions.

### 2.1. Transactions covered by VAT exemption under the SME scheme

Under the SME scheme, the VAT exemption covers all the supplies made by the small enterprise: domestic supplies of goods and services, intra-Community supplies of goods and cross-border supplies of services, exports of goods and supplies of services to customers established outside the territory of the Community. The VAT exemption under the SME scheme which comes without the right of deduction of input VAT prevails over the VAT exemption for intra-Community supplies of goods that would apply under the standard VAT regime.

[1] Council Directive (EU) 2020/285 of 18 February 2020 amending Directive 2006/112/EC on the common system of value added tax as regards special scheme for small enterprises and Regulation (EU) No 904/2010 as regards administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises (OJ L 62, 2.3.2020, p. 13)

[2] 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).

[3] See Article 2 of the VAT Directive

[4] See new Article 284 of the VAT Directive

The VAT exemption under the SME scheme does not cover the purchases made by a small enterprise. For example, although intra-Community acquisitions of goods are taxable transactions from a VAT perspective, they are not covered by the VAT exemption under the SME scheme since they are purchases and not supplies[5] nor is their value to be included in the calculation of the threshold under the new Article 288 of the VAT Directive.

### 2.2. Conditions for applying VAT exemption to intra-Community supplies of goods

Under the standard VAT regime, intra-Community supplies of goods are exempt of VAT under Article 138 of the VAT Directive provided that some conditions are met, like for example that the recipient is identified for VAT purposes and has indicated its VAT identification number to the supplier (see point (b) of paragraph 1) and that the supplier submits a recapitulative statement (see paragraph 1a) for this supply:

*"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 the dispatch or transport of the goods begins and has indicated this VAT identification number to the supplier.*

*1a. The exemption provided for in paragraph 1 shall not apply where the supplier has not complied with the obligation provided for in Articles 262 and 263 to submit a recapitulative statement or the recapitulative statement submitted by him does not set out the correct information concerning this supply as required under Article 264, unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities."*

While under the SME scheme, a small enterprise is not able to benefit from this exemption for intra-Community supplies of goods as Article 139 of the VAT Directive excludes taxable persons covered by that scheme from the exemption.

*"1. The exemption provided for in Article 138(1) shall not apply to the supply of goods carried out by taxable persons who are covered by the exemption for small enterprises provided for in Articles 282 to 292.*

*Nor shall that exemption apply to the supply of goods to taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1)."*

[5] See Working paper No 1052 of the VAT Committee on the interaction of the new rules of the special scheme for small enterprises with the rules on intra-Community acquisitions.

### 2.3. Non-application of a transitional period in case the national threshold is exceeded under the new rules of the SME scheme

In case the annual turnover of a small enterprise exceeds the domestic threshold set in a Member State granting exemption (Member State of establishment included), the taxable person is excluded from the SME scheme in that Member State. The new Article 288a of the VAT Directive sets some options based on which Member States can choose for the application of a transitional period i.e., the moment between the domestic threshold is exceeded and the moment the taxable person is excluded from the SME scheme. This new provision also gives the possibility for Member States to choose not to apply any transitional period thus, to exclude the taxable person from the SME scheme as from the moment the domestic threshold is exceeded:

*"1. A taxable person, whether or not established in the Member State granting the exemption provided for in Article 284(1), shall not be able to benefit from that exemption during a period of one calendar year where the threshold laid down in accordance with that paragraph was exceeded in the preceding calendar year. The Member State granting the exemption may extend this period to two calendar years.*

*Where, during a calendar year, the threshold referred to in Article 284(1) is exceeded by:*

*(a) not more than 10%, a taxable person shall be able to continue to benefit from the exemption provided for in Article 284(1) during that calendar year;*

*(b) more than 10%, the exemption provided for in Article 284(1) shall cease to apply as of that time.*

*Notwithstanding points (a) and (b) of the second subparagraph, Member States may set a ceiling of 25% or allow the taxable person to continue to benefit from the exemption provided for in Article 284(1) without any ceiling during the calendar year when the threshold is exceeded. However, the application of this ceiling or option may not result in exempting a taxable person whose turnover within the Member State granting the exemption exceeds EUR 100 000.*

*By derogation from the second and third subparagraphs, Member States may determine that the exemption provided for in Article 284(1) shall cease to* ***apply as of the time when the threshold laid down in accordance with that paragraph is exceeded.****"*

### 2.4. Issue at stake

The issue brought by Slovakia relates to the situation where a small enterprise under the SME scheme supplies goods from Member State A to a customer in Member State B by way of a B2B transaction. At the moment of supply, its annual turnover had already exceeded the domestic threshold in the Member State of supply which is one not applying any transitional period. When the domestic threshold was exceeded, taxable person X neither registered for VAT purposes nor filed VAT returns or recapitulative statements in Member State A for its supply to its customer.

In a B2C situation, the correction or regularisation of the situation of taxable person X would have limited impact as it would only affect taxable person X itself. In the case at hand involving a B2B transaction, the VAT consequences of a correction or regularisation

of the situation of taxable person X might also impact the customer in Member State B. Therefore, a common approach on the treatment of the situation at hand is called for.

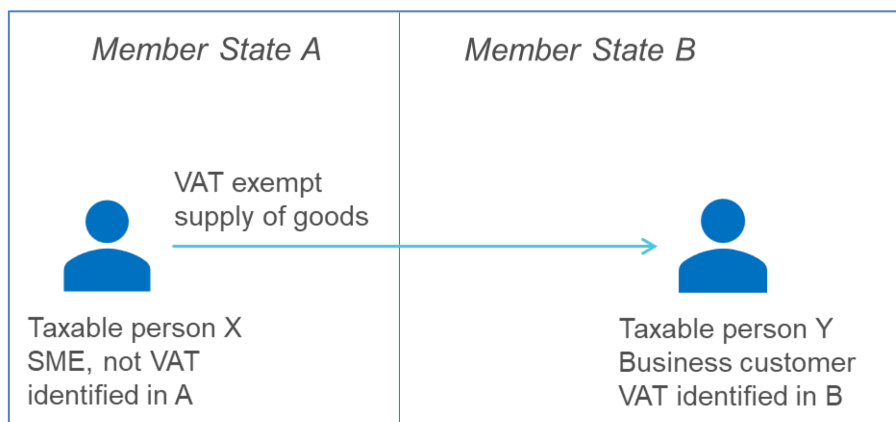
## 3. BACKGROUND

The scenario brought by Slovakia is the following:

Taxable person X is a small enterprise covered by the SME scheme. It performs VAT exempt supplies of goods from Member State A to taxable person Y located in Member State B. Taxable person X's annual turnover exceeds the domestic threshold in Member State A in December 2025, but it does not inform the tax authorities of Member State A. Instead, it continues to apply the VAT exemption under the SME scheme to its supplies of goods to taxable person Y. There is no fraud intention or abusive behaviour of the parties involved.

Member State A does not allow for any transitional period. The tax authorities of Member State A find out in September 2026 that taxable person X's annual turnover exceeded the domestic threshold in 2025 and that X should have been excluded from the SME scheme as from that moment and not allowed to apply the SME scheme in 2026. Taxable person X failed to fulfil its VAT obligations to register for VAT purposes, to submit VAT returns and to file recapitulative statements as from the moment its annual turnover exceeded the domestic threshold in Member State A.

Although the issue brought by Slovakia involves several Member States, for the sake of clarity, the example below is limited to Member States A and B and to taxable person X with one of its business customers Y. Although several scenarios could be envisaged, the example covers a basic (intra-Community) supply of goods, as illustrated below:




Under both the SME scheme and the standard VAT regime, the supply of goods to taxable person Y could be VAT exempt provided that the requirements to apply either one or the other VAT exemption are met. The exemption under the SME scheme comes without a right of deduction while the exemption under the standard VAT regime will entitle the supplier to deduction but it will see the customer face a liability to account for VAT.

From the supplier side, the issue triggered by the update made by Directive 2020/285 to the SME scheme is first and foremost linked to the situation where a Member State chooses to not apply any transitional period. In this sense, the supplier does not meet the requirements to VAT exempt the supply of goods under the SME scheme because its

annual turnover in Member State A exceeds the domestic threshold. It does not meet the requirements to apply the VAT exemption under the standard VAT regime either as it is not VAT registered in Member State A and not able to file VAT returns and recapitulative statements at the moment of the supply. The question is how to treat this situation.

## 4. COMMISSION SERVICES' OPINION

While the SME scheme as updated by Directive 2020/285 is at the centre of this question, focus is first and foremost on the interaction of the rules governing that special scheme and the normal VAT rules, especially in the case where the Member State granting the VAT exemption does not apply any transitional period between the moment the domestic threshold is exceeded and the moment the small enterprise is excluded from the SME scheme.

The analysis is focused on two alternatives: one in which the tax authorities in Member State A provide a VAT identification number to taxable person X retroactively and another one alternative in which the said tax authorities provide a VAT identification number as from the moment of the findings, so not retroactively.

When discussing those alternatives, it is also necessary to consider the impact on taxable person Y as the recipient.

### 4.1. Alternative I: the tax authorities in Member State A allocate a VAT identification number to taxable person X retroactively

Under this scenario, the tax authorities in Member State A provide taxable person X with a VAT identification number retroactively from December 2025 and request taxable person X to file late VAT returns, recapitulative statements and to correct the invoices issued to its customers.

The question is whether taxable person X would be allowed to apply the VAT exemption for intra-Community supplies of goods of Article 138 of the VAT Directive although it was not VAT registered and could not file recapitulative statement at the moment of the supply to taxable person Y. Given that paragraph 1a of Article 138 of the VAT Directive conditions the application of the VAT exemption for intra-Community supplies of goods to the submission of recapitulative statements, it could be that exemption is excluded.

That being said, paragraph 1a of Article 138 of the VAT Directive also gives the possibility for Member States to apply the VAT exemption for intra-Community supplies of goods provided that "*the supplier can duly justify his shortcoming to the satisfaction of the competent authorities*".

Based on the above, the tax authorities have the possibility to either refuse the application of the VAT exemption for intra-Community supplies of goods, or to allow it if the justification given by the supplier on the reason for the non-submission of the recapitulative statement is satisfactory. In case the tax authorities refuse the application of the VAT exemption, taxable person X would have to treat the supply of goods as non-exempt and pay VAT in Member State A. Since non-exempt supplies of goods open the right to deduct input VAT, taxable person X would be entitled to deduct input VAT in its late VAT returns.

This scenario would not necessarily impact recipient Y as it is unclear whether recipient Y could be obliged to pay VAT to taxable person X under such circumstances. In case recipient Y pays, it could be that Y would be entitled to refund of VAT under the VAT Refund Directive[6]. Since the supply would not be exempted, it could be understood that Article 4 of the VAT Refund Directive does not apply, thus refund should be possible.

In case the tax authorities of Member State A allow the application of the VAT exemption under Article 138 of the VAT Directive, taxable person X would not have to pay VAT for these supplies, but it could still be entitled to deduct input VAT as the exemption for intra-Community supplies of goods opens the right to deduct VAT.

This scenario could potentially have an impact for recipient Y if as a result of this, it would be faced with a demand from Member State B to pay VAT on its intra-Community acquisition of goods. To the extent that as a taxable person recipient Y has a full right of deduction, the impact should however be limited. Not being at fault, no penalty should be imposed on taxable person Y in Member State B on the account of the late declaration of the intra-Community acquisition of goods.

### 4.2. Alternative II: the tax authorities in Member State A allocate a VAT identification number to taxable person X from the moment of the findings

Under this scenario, the tax authorities in Member State A provide a VAT identification number to taxable person X as from September 2026. There is no possibility to correct invoices, to file late VAT returns or recapitulative statements.

This alternative would not be in line with the decision of Member State A to not apply any transitional period and to request taxable person X to be compliant with the VAT rules under the standard VAT regime as from the moment its annual turnover exceeds the national threshold of the SME scheme. Therefore, it is questionable whether alternative II makes sense in the case at hand.

### 4.3. Possible impacts on the recipient

Slovakia also raises the question of the impact that the regularisation of taxable person X may have on taxable person Y. In this sense, according to Article 16 of the VAT Implementing Regulation[7], the tax authorities of the Member State in which the dispatch or transport of the goods ends can exercise their power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began.

In the case at hand, this means that the tax authorities in Member State B can request taxable person Y to pay VAT on the intra-Community acquisition of goods, regardless of the VAT treatment given to the sale of these goods in Member State A. Should this be the case, taxable person Y should be entitled to deduct the amount of input VAT incurred,

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[6] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ L 44, 20.2.2008, p. 23).

[7] 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)

provided that this purchase is connected to non-exempt supplies that open a right to deduct VAT.

Should taxable person Y have a full right to deduct input VAT in Member State B, the payment of VAT on the intra-Community acquisition of goods should be accompanied by full deduction of input VAT. In this case, the VAT impact would in principle be nil.

### 4.4. Concluding remarks

A situation such as that raised by Slovakia is particularly complex, both because it touches on the interaction between the SME scheme and the standard VAT regime but also given that it involves 2 Member States (or potentially more). It is therefore important to agree on how best to address such a situation.

## 5. DELEGATIONS' OPINION

Delegations are invited to give their opinion on this question.

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**ANNEX**

**Question from Slovakia**

As we have been transposing the SME Directive into the national VAT Act we have come across the following issue.

The issue relates to intertwining of common VAT rules and SME scheme when the intracommunity transactions are in stake. We are trying to take into consideration both supplier and customer side.

1) **At the side of a supplier the following Articles in particular should be analysed:**

**Articles 138 (1) and (1a) of VAT Directive**

*(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 the dispatch or transport of the goods begins and has indicated this VAT identification number to the supplier.*

*(1a) The exemption provided for in paragraph 1 shall not apply where the supplier has not complied with the obligation provided for in Articles 262 and 263 to submit a recapitulative statement or the recapitulative statement submitted by him does not set out the correct information concerning this supply as required under Article 264, unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities.*

**Article 262 of VAT Directive**

*(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 point (c) of Article 138(2);*

*(b) the persons identified for VAT purposes to whom he has supplied goods which were supplied to him by way of intra-Community acquisition of goods 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 taxable person shall submit information about the VAT identification number of the taxable persons for whom goods, dispatched or transported under call-off stock arrangements in accordance with the conditions set out in Article 17a, are intended and about any change in the submitted information.*

**Article 139 (1) of VAT Directive**

*The exemption provided for in Article 138(1) shall not apply to the supply of goods carried out by taxable persons who are covered by the exemption for small enterprises provided for in Articles 282 to 292.*

*Nor shall that exemption apply to the supply of goods to taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1).*

**Article 288a (1) of SME Directive**

*1. A taxable person, whether or not established in the Member State granting the exemption provided for in Article 284(1), shall not be able to benefit from that exemption during a period of one calendar year where the threshold laid down in accordance with that paragraph was exceeded in the preceding calendar year. The Member State granting the exemption may extend this period to two calendar years.*

*Where, during a calendar year, the threshold referred to in Article 284(1) is exceeded by:*

*(a) not more than 10%, a taxable person shall be able to continue to benefit from the exemption provided for in Article 284(1) during that calendar year;*

*(b) more than 10%, the exemption provided for in Article 284(1) shall cease to apply as of that time.*

*Notwithstanding points (a) and (b) of the second subparagraph, Member States may set a ceiling of 25% or allow the taxable person to continue to benefit from the exemption provided for in Article 284(1) without any ceiling during the calendar year when the threshold is exceeded. However, the application of this ceiling or option may not result in exempting a taxable person whose turnover within the Member State granting the exemption exceeds EUR 100 000.*

*By derogation from the second and third subparagraphs, Member States may determine that the exemption provided for in Article 284(1) shall cease to* ***apply as of the time when the threshold laid down in accordance with that paragraph is exceeded.***

*2. A taxable person not established in the Member State granting the exemption provided for in Article 284(1) shall not be able to benefit from that exemption, where the Union annual turnover threshold referred to in point (a) of Article 284(2) was exceeded in the preceding calendar year.*

*Where, during a calendar year, the Union annual turnover threshold referred to in point (a) of Article 284(2) is exceeded, the exemption provided for in Article 284(1) granted to a taxable person not established in the Member State granting that exemption shall cease to apply as of that time.*

**2) At the side of a customer the following Articles in particular should be analysed:**

***Article 2(1)(b)(i) of VAT Directive***

1. The following transactions shall be subject to VAT:

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

…

**Article 3(1)(b) and (3) of VAT Directive**

1. By way of derogation from Article 2(1)(b)(i), the following transactions shall not be subject to VAT: (a) the intra-Community acquisition of goods by a taxable person or a non-taxable legal person, where the supply of such goods within the territory of the Member State of acquisition would be exempt pursuant to Articles 148 and 151;

(b) the intra-Community acquisition of goods, other than those referred to in point (a) and Article 4, and other than new means of transport or products subject to excise duty, by a taxable person for the purposes of his agricultural, forestry or fisheries business subject to the common flat-rate scheme for farmers, or by a taxable person who carries out only supplies of goods or services in respect of which VAT is not deductible, or by a non-taxable legal person.

***Article 16 Council Implementing Regulation*** *282/2011 (hereinafter "CIR"):*

***Article 16 of CIR***

Where an intra-Community acquisition of goods within the meaning of Article 20 of Directive 2006/112/EC has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began.

Any request by a supplier of goods for a correction in the VAT invoiced by him and reported by him to the Member State where the dispatch or transport of the goods began shall be treated by that Member State in accordance with its own domestic rules.

**Issue:**

**There is a question how to treat the situation when a taxable person (X), (*using the exemption for small enterprises provided for in Articles 282 to 292)* not identified for VAT in MS A, supplies goods to other Member State B to a taxable person (Y).**

**The amount of this supply exceeds the threshold in MS B (*Article 3 (2) (a) of VAT Directive*) and thus the customer (Y) in the Member State B is obliged to pay VAT from the acquisition of the goods in the Member State B (*Article 16 of CIR 282/11*).**

The abovementioned issue is closely interconnected with application of SME Directive and exemptions for SMEs.

In the situation above there is another fact that the **taxable person X was using the exemption misleadingly because at the time of supply he should already have been identified for VAT purposes due to exceeding the national threshold.**

For better understanding we are illustrating the scenario **on the following timeline:**

The taxable person X in MS A had exceeded its national threshold in December 2025 (threshold entitled him for granting exemption for SME), however he did not notify its Members State A this fact and he still was acting as SME taxable person in the Member State A.

The tax office in the Member State A only in September 2026 found out that he had failed to fulfil his obligation to register for VAT (the taxable person X should have been allocated VAT number in December 2025). For that period (December 2025 – September 2026), the supplier should have been identified for VAT but he had not have been and he was supplying the goods to different Member States.

Because he had not any VAT identification number he did not apply any VAT exemptions (Article 138 of VAT Directive) either did not fill any recapitulative statements for particular period. Nevertheless, the Member State B is entitled to treat the supply as the intracommunity acquisition based on Article 2(1)(b)(i) of Vat Directive and Article 16 of CIR and therefore the taxable person Y has been obliged to apply VAT in the Member State B for intracommunity acquisition.

Based on the presumption that there is no fraud intention or abusive behaviour of the parties involved, we are considering the following alternatives how to treat the situation above:

1) **The tax office will allocate the VAT number to the supplier retroactively – since December 2025 and the supplier will file late VAT tax returns and recapitulative statements, as well as correct the all invoices issued to other Member States for its customers (if they have had VAT number).**

However, there are some questions and consequences.

As regards this alternative we would like to point out Article 138 of VAT Directive where the new provision (1a) was added (in force from 1 January 2021 within the **Quick Fixes Directive amendment**).

According to this new provision the exemption provided for in paragraph 1 of Article 138 shall not apply where the supplier has not complied with the obligation provided for in Articles 262 and 263 of VAT Directive to submit a recapitulative statement or the recapitulative statement already submitted by him does not set out the correct information concerning the supply in question as required under Article 264 of VAT Direcitve, unless

the supplier can duly justify his shortcoming to the satisfaction of the competent authorities.

Detailed issues arising from Article 138, paragraphs (1) and (1a) VD were analysed and guidelines from them were issued at the 113th meeting of the **VAT Committee of 3 June 2019.**

*Document F- taxud.c.1(2019) 7900872 Working Paper No 977 Exemption of an intra-Community supply of goods: Application of Article 138(1a) (section 3.3.2.)23 1.*

***The VAT Committee unanimously acknowledges that the fact that the exemption provided for in paragraph 1 of Article 138 of the VAT Directive shall not apply in cases of non-compliance by the supplier as set out in paragraph 1a can de facto only be established a certain period after the moment the supply was made and invoiced.***

*Indeed, the VAT Committee unanimously agrees that it is inevitable that there will be a time span between the moment the supply is made and invoiced to the acquirer and the moment when the supplier has to comply with the obligation provided for in Articles 262 22 This heading refers to the relevant section of the VAT Committee Working Paper No 968. 23 This heading refers to the relevant section of the VAT Committee Working Paper No 968. 72/85 and 263 of the VAT Directive to submit a recapitulative statement.*

*The VAT Committee also agrees unanimously that a time span cannot be avoided between the moment when the supplier had to submit the recapitulative statement and the moment where the tax authorities take action as such action can only be triggered by the recapitulative statement not having been submitted or by the submitted recapitulative statement being found not to contain the correct information.*

*Moreover, The VAT Committee unanimously agrees that the supplier shall therefore be able to exempt the supply, at the time the supply is made, subject to the conditions of Article 138(1) of the VAT Directive being met since these are the only conditions relevant at the time of the supply to determine whether or not the exemption applies. As to the cases envisaged by Article 138(1a) of the VAT Directive, the VAT Committee almost unanimously agrees that the exemption may only be revoked retroactively, if and when the tax authorities establish non-compliance of the supplier with the obligation provided for in Articles 262 and 263 of the VAT Directive to submit a recapitulative statement or where the recapitulative statement already submitted by him does not set out the correct information concerning the supply in question as required under Article 264 of the VAT Directive, unless that supplier can duly justify his shortcoming to the satisfaction of the competent authorities.*

Against this background one could come to the conclusion**, that for the alternative 1 it is not possible to apply the exemption retroactively (even VAT number is allocated with retroactive effect) because at the time when the transaction took place there was no possibility to submit the recapitulative statement and thus,** even the VAT number would have been allocated retroactively **there is no possibility to apply exemption. At the end of the day, there would be a double taxation and principle of neutrality would be broken.**

Moreover, there is **another aspect that should be taken into** consideration when correcting the invoices retroactively, **that the legal certainty should be somehow**

**disputed. Also there could be no guarantee when verifying the status of the supplier as a VAT identified person.**

**As for this alternative**, there could be **also another conclusion, based on the wording of Article 138(1a) of VAT Directive, in particular** "… unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities." **One would come also to conclusion (the complete opposite as expressed above) that if the supplier duly justify that he had not fulfilled its obligations due to some particular reason and after the finding out of the tax office he would completely fulfil its obligations (VAT returns, recap statements and corrections all invoices) it could be covered by the mentioned wording in Article 138(1a).**

The **background for the latter possible conclusion** could be find in the wording of the **Articles 138, 139(1),** as well as of **the Article 2 of the VAT Directive** as these Articles stipulate that **neither exempted intra-community supply nor intra-community acquisition** (which would be a subject to tax) **take place only when the goods is supplied by a taxable person who is covered by the exemption for small enterprises** (what is not the case in the present scenario).

Additionally, we have had a look **also at the particular guidance regarding the filling the** recapitulative statements. **In the Functional Specification (document VIES-FS-030-v2.01)** there is a part **2.1.2.1 VAT Information** and there is stated:

*"The Competent authority is the authority appointed by each Member State to be the correspondent for the purpose of applying the Council Regulation (EC) No 1798/2003.*

*It is the responsibility of each Member State Competent Authority to define the exact set of data elements that are* ***used to specify the VAT registration*** *information representing a trader registered for VAT purposes by its administration. Nevertheless, a common core of data elements can be identified. This set of data elements is used to exchange VAT registration information between Member States pursuant to [R9] Article 17 In addition, some generic rules may be expressed; these rules represent the constraints that must be respected by the VAT registration information issued in any Member State.*

*A common core of data elements is used to exchange VAT registration information between Member States. This set of data elements is composed of the name, the address, the company type and the activity type of the trader, the date of issue and, where appropriate, the expiry date of the VAT registration number ([R9] Article 17).*

*The VAT registration information is therefore composed of:*

- *Trader VAT Identification Number. For a given Member State, a VAT Identification Number must be unique;*
- *Trader Name;*
- *Trader Address;*
- *Company Type;*
- *Activity Type;*

- *Issue Date: the date of issue of the VAT Identification Number;*

- *Cessation Date: where appropriate, the date of cessation of activity (expiry date) of the VAT Identification Number. Whenever specified, the cessation date must be greater than the issue date.*

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| *R9* | *Recast Regulation 904/2010* | *COUNCIL REGULATION (EU) No 904/2010*<br><br>*of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax*<br><br>*(recast)* | - |

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**And we would like to point out also this part of the FS - *2.1.1.8 Legal instruments* where the obligation of VAT registration is indicated:**

*The legal basis of VIES is constituted of the following legislation:*

- *Council Directive 2006/112/EC, which ensures that the supplier must have confirmation that his customer holds a valid VAT identification number in another Member State; and must hold adequate commercial documentary evidence to prove that the goods were transported out of the Member State of the supplier;*

- *Council Regulation (EC) No 1798/2003, which sets out the VAT control arrangements for administrative co-operation between Member States;*

- *Council Directive 2008/117/EC, amending Directive 2006/112/EC, which reduces the timeframes for the exchange of VAT information between Member States;*

- *Council Directive 2008/8/EC, amending Directive 2006/112/EC, concerning the place of supply of services;*

- *Council Regulation (EU) No 904/2010, covering the new information to be exchanged (richer VIES message, automatic access to information and third MS request).*

*2.1.1.8.1 Council Directive 2006/112/EC*

*The Directive makes provision for the continued zero rating of intra-Community supplies of goods and ancillary services, providing the supplier satisfactorily satisfies two main conditions:*

- *The supply must be made to an eligible person with the necessary VAT status in another Member State, and*

- *Evidence must be held to prove that the goods have left the Member State of departure.*

***The Directive also lays down the obligations applicable to traders, including:***

- ***Identification of persons dealing in intra-Community trade by a unique VAT identification number prefixed by a 2 alpha prefix related to the Member State of issue.***

- *The issue of an invoice for intra-Community supplies of goods and services showing the VAT identification number of both the supplier and the customer*

- *Provision of two boxes on the VAT periodic return for declaring the values of intra-Community supplies and acquisitions, and*

- *A recapitulative statement made each calendar quarter (or less frequently in respect of certain smaller businesses in some Member States) by each intra-Community supplier, showing the VAT identification number and net turnover value of his supplies to each of his intra-Community customers for the period. There are some variations with respect to these requirements concerning transactions involving work corrections to earlier declarations, triangular operations, exemption thresholds based on turnover and certain cases where goods are transferred.*

2) **The tax office will allocate the VAT number only from the moment of the findings (from the September 2026 onwards).**

This treatment **would not be in line with the new provisions on SMEs Directive,** in particular Article 288a(1) and (2) …. By derogation from the second and third subparagraphs, Member States may determine that the exemption provided for in Article 284(1) shall cease to apply as of the time when the threshold laid down in accordance with that paragraph is exceeded.

Against this background there is no possibility to correct invoices, VAT returns and recap statements because at the time of supply (or in a subsequent time) there was no VAT number. However, this treatment ensures the legal certainty at certain scale from the business perspectives, in particular as regards the VIES verifications, because there would not be retroactive changes of data in VIES.

However, double taxation still exists due to the fact that the Member State where the intracommunity acquisition takes place would ask VAT on intracommunity acquisition and the Member State, where the taxable person has not fulfilled its registration obligation, would ask to pay VAT owed regardless local or intra-EU transactions (all of them would be treated as a local supplies).

3) **The tax office will allocate the VAT number retroactively, however the supplier will not exempt the intracommunity supplies**

This treatment **would be in line with the SMEs Directive provisions**, however it **would not address the principle of neutrality because** the taxable person would have to tax the supply to other Member State because within the particular time frame it would not be able to submit a recapitulative statement because it did not have been allocated the VAT number. Since it would not have been able to submit the recap statement there was no possibility to apply VAT exemption according to Article 138 of VAT Directive.

**The conclusion is that there would be a double taxation, once at the side of the supplier (local supply), as well as at the side of the customer (intracommunity acquisition) – similar as in Alternative 2.**