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# Article

## Definitive VAT Regime: Ready for the Next Step?

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*Since the European Commission presented the outlines of the definitive VAT system for intra-EU trade in October 2017 a lot has happened. The European Commission released the accompanying proposals on VAT rates, SMEs and administrative cooperation in December 2017 and January 2018. In May 2018 the European Commission tabled a proposal on the detailed implementation of the definitive VAT system. The quick fixes and the regulation on administrative cooperation were adopted by EU Member States. In this article the authors analyse these (adopted) proposals and provide critical comments.*

### 1 Introduction

In our previous article,[1] we suggested that the adoption of the proposals amending the current VAT system for cross-border trade would face a fierce opposition amongst many Member States. Even more, given the political deadlock between some Member States regarding other Commission proposals we were reluctant to put our money on the idea that the members of the Economic and Financial Affairs (ECOFIN) Council of the European Union would be unanimous regarding the pending proposals to modernize the VAT. However, much to our surprise, the Member States were able to overcome their political differences and agreement was reached on many files on 2 October 2018. On that day, consensus was reached in the ECOFIN meeting on the quick fixes, one of the main subjects of our previous article. On top of that, the directive to allow Member States to align the VAT rates they set for e-publications, currently taxed at the standard rate in most Member States, with the more favourable regime currently in force for traditional printed publications was approved, and, last but not least, the new rules to exchange more information and boost cooperation on criminal VAT fraud between national tax authorities and law enforcement authorities were formally adopted as well on the same day. We also suggested that it perhaps would be a good idea that the European Commission should reconsider the certified taxable person (CTP) concept in order to avoid the desired stairway to heaven turning into the feared highway to hell. That is exactly what happened: the debate on the CTP concept has been put on hold for the time being. To sum up, the Member States seem to have set off along the right road, but they must tread the path resolutely in order to achieve a definitive VAT system that will battle VAT fraud efficiently.

The reason to write a follow-up on our previous article is that, apart from catching up with these developments, three other proposals were tabled by the European Commission, as announced in the follow-up to the VAT Action Plan *Towards a single EU VAT area – Time to act*[2] in January 2018: one concerning VAT rates[3] and one regarding the special scheme for small enterprises.[4] The third proposal concerning combating fraud in the field of VAT has already been adopted.[5] Furthermore, in May 2018, the proposal containing the detailed technical arrangements for the definitive VAT regime was published.[6] These important proposals deserve our full attention. With this in mind, we do not address the adopted VAT Digital Single Market Package since these new e-commerce rules have already been discussed by other

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1 M. M. W. D. Merkx, J. Gruson, N. Verbaan & B. van der Doef, *Definitive VAT Regime: Stairway to Heaven or Highway to Hell?*, 2 EC Tax Rev. (2018).

2 Communication from the commission to the Commission to the European Parliament, the Council and the European Economic and Social Committee On the follow-up to the Action Plan on VAT Towards a single EU VAT area – Time to act COM(2017) 566 final.

3 Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax, COM(2018) 20 final of 18 Jan. 2018.

4 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax. as regards the special scheme for small enterprises, COM(2018) 21 final of 18 Jan. 2018.

5 Council Regulation (EU) 2018/1541 of 2 Oct. 2018 amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax ST/10472/2018/INIT, OJ L 259, 16 Oct. 2018, at 1–11.

6 Proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for

authors.[7] For the same reason, the pending proposals linked to this package, published on 11 and 12 December 2018, dealing with further detailed rules for distance sales and the VAT liability for electronic interfaces and certain obligations for payment service providers (PSPs)[8] are beyond our scope.

With our previous article in mind, we will provide a summary of the proposals for a definitive VAT system and analyse the amended conditions of the quick fixes in the remaining part of section 1. In section 2 we will discuss the proposal for the technical implementation of the definitive VAT system. The enhanced rules for administrative cooperation we will analyse in section 3. We will discuss the proposal for the simplified VAT rules for SMEs in section 4 and the proposal for flexibility in setting the VAT rates in section 5. We will conclude with a final note in section 6.

The table below gives an overview of all proposals relating to the EU VAT Action plan, their status, date of (intended) coming into force and whether they are discussed in this article.

| *Proposal* | *Status* | *Enters into force* | *Reference* |
|---|---|---|---|
| E-commerce changes to VAT Directive 2016 proposal[9] | Approved | 1 January 2019 and 1 January 2021 | Other publications |
| E-commerce changes to VAT Implementing Regulation 2016 proposal[10] | Approved | 1 January 2019 | Other publications |
| E-commerce changes to the Regulation for administrative cooperation 2016 proposal[11] | Approved | 1 January 2021 | Other publications |
| VAT rates e-publications[12] | Approved | 4 December 2018 | Section 5.4 of this article |
| Definitive VAT system 2017 proposal[13] | Pending | 1 July 2022[14] | Our previous article |
| Quick fixes[15] | Approved | 1 January 2020 | Section 1.2 of this article and our previous article |
| Minimum standard rate proposal[16] | Approved | 12 June 2018 | Section 5 of this article |
| VAT rates proposal[17] | Pending | 1 July 2022 | Section 5 of this article |
| Proposal for SMEs[18] | Pending | 1 January 2022 | Section 4 of this article |
| Proposal to amend the regulation on administrative cooperation[19] | Approved | 1 January 2019 and 1 January 2020 | Section 3 of this article |

the operation of the definitive VAT system for the taxation of trade between Member States, COM(2018) 329 final of 25 May 2018.

7 *See* A. M. Bal, *EU VAT Proposals to Stimulate Electronic Commerce and Digital Publishing*, 28(2) Int'l VAT Monitor (2017); M. Lamensch, *European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, 28(2) Int'l VAT Monitor (2017); M. Lamensch, *Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?*, 28(5) Int'l VAT Monitor (2017); M. M. W. D. Merkx, *Nieuwe plannen voor BTW en e-commerce: eenvoudig, neutraal en minder verlies aan belastinginkomsten?* (*New Plans for VAT and E-Commerce: Simplified, Neutral and Less Loss of Tax Revenue?*), 59 WFR (2017); M. M. W. D. Merkx, *Nieuwe btw-regels voor e-commerce* (*New VAT Rules for E-Commerce*), 146 WFR (2018); and J. I. W. Lock, M. M. W. D. Merkx, A. D. M. Janssen & R. Arendsen, *De toekomst van de btw bij e-commerce: heffing via platforms* (*The Future of VAT for E-Commerce: Platform Taxation*), 1–5 MBB (2019).

8 Proposal for a Council Directive amending Council Directive 2006/112/EC of 28 Nov. 2006 as regards provisions relating to distance sales of goods and certain domestic supplies of goods, COM(2018) 819 final of 11 Dec. 2018; Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods, COM(2018) 821 final of 11 Dec. 2018; Proposal for a Council Directive amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers, COM(2018) 812 final of 12 Dec. 2018; and Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud, COM(2018) 813 final of 12 Dec. 2018.

9 Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final, 1 Dec. 2016.

10 Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, COM(2016) 756, 1 Dec. 2016.

11 Proposal for a Council Regulation amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax, COM(2016) 755, 1 Dec. 2016.

12 Proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals, COM(2016) 758 final of 1 Dec. 2016.

13 Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonizing and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States, COM(2017) 569 final of 4 Oct. 2017.

14 In the proposal the date of 1 Jan. 2022 is mentioned. However, it becomes clear from the later proposal on the definitive VAT regime that the implementation date has been postponed to 1 July 2022.

15 Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the certified taxable person, COM(2017) 567 final of 4 Oct. 2017; Proposal for a Council Implementation Regulation amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions, COM(2017) 568 final of 4 Oct. 2017.

16 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, with regard to the obligation to respect a minimum standard rate, COM(2017) 783 final of 19 Dec. 2017.

17 COM(2018) 20 final.

18 COM(2018) 21 final.

19 Proposal for a Council Regulation amending Regulation No 904/2010 as regards measures to strengthen administrative cooperation

| *Proposal* | *Status* | *Enters into force* | *Reference* |
|---|---|---|---|
| Proposal on the definitive VAT regime 2018[20] | Pending | 1 July 2022 | Section 2 of this article |
| E-commerce changes VAT Directive 2018[21] | Pending | 1 January 2021 | Other publications |
| E-commerce changes VAT Implementing Regulation 2018[22] | Pending | 1 January 2021 | Other publications |
| E-commerce changes to Directive–obligations for PSPs[23] | Pending | 1 January 2022 | No publications yet |
| E-commerce changes to the regulation on administrative cooperation–obligations for PSPs[24] | Pending | 1 January 2022 | No publications yet |

## 1.1 New Rules in a Nutshell

In our previous article we discussed the legislative proposals for a definitive VAT system for cross-border trade announced by the European Commission on 4 October 2017. The proposals included the introduction of a series of fundamental principles or 'cornerstones' of the definitive VAT regime for intra-Union B2B trade. They also included four short-term 'quick fixes' to come into force on 1 January 2019, and introduced the concept of a 'certified taxable person' (hereinafter: CTP), whereas the definitive VAT system should enter into force on 1 January 2022.

The fundamental principles or 'cornerstones' for a definitive VAT regime, are as follows:

– The principle of taxation at destination for intra-EU cross-border supplies of goods. As a result, the VAT exemption on cross-border trade (the intra-Community supply) and the intra-Community acquisition will be abolished;
– The confirmation that, as a general rule, the vendor is liable for charging and collecting the VAT of the Member State of destination. However, if the buyer is a reliable taxpayer, a CTP, he will be liable for payment of the VAT due by way of a reverse charge;
– The 'One Stop Shop' ('OSS') online portal currently existing for e-services will be extended, allowing businesses to take care of their cross-border VAT obligations in their own country in their own language. The extended portal will also allow to deduct input VAT outside a business' home country. Member States will settle the VAT to each other directly.

As we described more in detail in our previous article the four quick fixes are:

– Simplification of the VAT treatment of supplies from a call-off stock;
– Simplification of the VAT treatment of chain supplies;
– Harmonization of the required proof of intra-Community transport of goods; and
– Recognition of the VAT identification number as a substantive condition

These quick fixes deal with complications of the current system until the definitive VAT system is implemented. Notably, the European Commission proposed that the first three reforms would only apply where CTPs are involved. We commented on the individual components of the proposals and addressed the various questions the proposals raised. We concluded that we were positive to a certain extent that the adoption of the proposed measures would lead to a more uniform application of VAT rules and legal certainty for businesses desired by the Member States. We were less positive about the required CTP status which for many Member States that already adopted policies to simplify the VAT rules would lead to additional conditions going against the purpose of simplification.

## 1.2 Developments

The Member States thought it appropriate and necessary, in order to allow for early progress and to solve important issues in the VAT area, to advance the work on the short term quick fixes, while noting that the remaining parts of the proposals relating to the CTP will require further discussion, in the context of the legislative proposals on the details of the definitive system of VAT. In other words, the CTP layer was removed, probably for the time being, from the proposals regarding the quick fixes.

After reaching an agreement on 2 October 2018, the European finance ministers adopted the quick fixes package (the proposals for a directive and regulation) to improve the current cross-border VAT regime on 4 December 2018.[25] They will now be applicable as of 1

in the field for value added tax, COM(2017) 706 final of 4 Oct. 2017.

[20] COM(2018) 329 final.

[21] COM(2018) 819 final.

[22] COM(2018) 821 final.

[23] COM(2018) 812 final.

[24] COM(2018) 813 final.

[25] Council Regulation (EU) 2018/1909 of 4 Dec. 2018 amending Regulation (EU) No 904/2010 as regards the exchange of information for the purpose of monitoring the correct application of call-off stock arrangements, OJ L 311, 7 Dec. 2018, at 1–2; Council Directive (EU) 2018/1910 of 4 Dec. 2018 amending Directive (EU) 2006/112/EC as regards the harmonization and simplification of certain rules in the value added tax system for the taxation of trade between Member States, OJ L 311, 7 Dec. 2018, at 3–7; and

January 2020 instead of 1 January 2019, as originally foreseen in the proposal of 4 October 2017. However, apart from removing the CTP condition, other conditions of the quick fixes were subject to modification. We give an overview of the modified conditions below.

### *1.2.1 Call-Off Stock*

In case of call-off stock where stock is transferred by the supplier from one Member State to the other while the right to dispose of the goods as owner remains with the supplier until the customer takes goods from the stock, this qualifies as a transfer of own goods. Currently, the supplier will have to report a deemed intra-Community supply in the Member State of departure and a deemed intra-Community acquisition in the Member State of arrival of the goods. Consequently, he must register for VAT in the Member State of arrival. The quick fix for call-off stock provides a simplified and uniform regulation which enables the transfer of call-off stock not to qualify as a deemed intra-Community supply and acquisition. This simplification avoids a VAT registration of the supplier in the Member State of arrival. The new text introduces a twelve-month period in which goods have to be sold to the customer. If this time limit is exceeded, a transfer of the goods to another Member State is deemed to have taken place the day after the twelve-month period has ended, unless another customer has been found in the Member State of arrival. Further, the deemed transfer of the goods is avoided if the right to dispose of the goods has not been transferred, and those goods are returned to the Member State from which they were dispatched or transported. The quick fix cannot be applied in case the goods are supplied to a customer that does not meet the conditions of the quick fix, the goods have been moved to a country other than the Member State from which they were initially moved before the ownership is transferred to the customer, or in case of destruction, loss or theft of goods.

We believe that the modified conditions have solved the problem that we pointed out in the original text of the proposal that the quick fix cannot be applied in case there are multiple known customers at the moment of transfer of the goods to another Member State. They also answer the question what to do with goods if they are not sold (within a certain period).

### *1.2.2 Chain Transactions*

In case of chain transactions when goods are sold from party A to B and subsequently from party B to C where the goods are transported directly from party A to C, there are two supplies for VAT purposes. Only one of these supplies is the intra-Community supply.[26] Under the current rules the deciding criteria is whether the ownership of the goods has already been transferred to party C in the Member State of departure. If that is the case the B-C supply is the intra-Community supply. If the ownership is transferred to party C in the Member State of arrival of the goods the A-B supply is the intra-Community supply.[27] As of 1 January 2020, there will be a presumption that the dispatch or transport is allocated to the supply to the intermediary operator (party B), allowing the first supplier (party A) to exempt his supply. In other words, the intra-Community supply is ascribed to the supply to the intermediary operator (A-B supply) who arranges or has the transport arranged. This will not apply if the intermediary operator communicates to the first supplier its valid VAT identification number in the Member State of departure of the goods. In that case the dispatch or transport is ascribed to the supply made by the intermediary operator (B-C supply). He is deemed to perform the intra-Community supply of the goods himself.

We are of the opinion that the amended text of the quick fix offers more clarity and provides the parties involved with more security. It dismantles the freedom of party B by either stating the name of the Member State of arrival or not to choose which transaction is the intra-Community supply. Under the proposed rule attribution of the transport to the A-B supply was not only dependent on party B providing A with a VAT number of another Member State than the Member State of arrival, but also upon the condition that B communicated the name of the Member State of arrival to A. There is, however, still an option for B to choose which supply is the intra-Community supply if he has both a VAT number of the Member State of departure and another EU Member State. Moreover, the amended text confirms that the quick fix can be applied to longer supply chains with more than two successive supplies.

### *1.2.3 Proof of intra-Community Supplies*

This quick fix serves to provide a common framework for documentary evidence of proof of transport required to claim a VAT exemption for intra-Community supplies. After modification of the conditions, there is a presumption that the goods have been dispatched or transported to another Member State if the vendor either indicates that the goods have been dispatched or transported by him or a third party, or he is in the possession of a written statement from the purchaser stating that the goods are transported by himself or on his behalf. In

Council Implementing Regulation (EU) 2018/1912 of 4 Dec. 2018 amending Implementing Regulation (EU) No 282/2011 as regards certain exemptions for intra-Community transactions, OJ L 311, 7 Dec. 2018, at 10–12.

26 CJEU 6 Apr. 2006, C-245/04, ECLI:EU:C:2006:232 (EMAG).

27 CJEU 16 Dec. 2010, C-430/09, ECLI:EU:C:2010:786 (Euro Tyre Holding); CJEU 26 July 2017, C-386/16, ECLI:EU:C:2017:599 (Toridas); CJEU 21 Feb. 2018, C-628/16, ECLI:EU:C:2018:84 (Kreuzmayr).

both cases the statements have to be underpinned by two pieces of evidence:

– At least two items of non-contradictory evidence relating to the dispatch or transport (e.g. a signed CMR, a bill of lading, an airfreight invoice) issued by two parties independent of each other; or
– such a transport document combined with an additional non-contradictory piece of evidence (e.g. an insurance policy, bank documents proving payment for transport, a warehouse receipt, an official document issued by a public authority, e.g. a notary, confirming arrival of the goods).

It seems that only a combination of documentary evidence of proof is allowed. It is unclear what the position of a taxable person is who does not possesses the documents referred to in the quick fix. Since the rule is formulated as a presumption the authors assume that proof of the correct application of the exemption can be provided by other means. If the supplier possesses the necessary documentation, the presumption can still be rebutted by the tax authorities. The authors also presume that in such a situation a taxable person can provide the proof by other means and this does not necessarily mean that the supplier cannot apply the exemption.

#### *1.2.4 VAT Identification Number as a Material Requirement*

The substantial requirement that the purchaser's valid VAT identification number is available and checked in the VIES system (VAT Information Exchange System) and that the supplier submits a correct recapitulative statement, in order to benefit from the VAT exemption for the intra-Community supply of goods has not been subject to modification.

## 2 The proposal for the technical implementation of the definitive VAT system

### 2.1 Introduction

As we described in our previous article the key aspects of the proposed definitive VAT system are:

1. The intra-Community supply and intra-Community acquisition are replaced by one taxable event: the intra-Union supply;
2. The intra-Union supply is subject to VAT in the Member State of arrival of the goods;
3. The VAT must be paid by the supplier to the tax authorities unless the customer is a CTP. In case the customer is a CTP the VAT can be reverse charged to the customer, for the time being;
4. In case the supplier must pay the VAT and he is not established in the Member State where VAT is due it can report and pay the VAT through the OSS return.

On 25 May 2018, the European Commission released a proposal[28] containing the detailed technical amendments to the EU VAT Directive that supplement the recently proposed overhaul of the system to make it more fraud-resilient. We will address the key elements separately in sections 2.2–2.5. We will also discuss some specific situations in section 2.6. Originally, the definitive VAT system would enter into force on 1 January 2022. This has been changed. Under the new proposal the definitive system will apply as of 1 July 2022. In the proposed Article 402 VAT Directive the current system for taxation of cross-border services is named transitional. It will be replaced by a system of taxation in the Member State of destination, liability of the supplier and a single registration scheme for the declaration, payment and deduction of VAT. This provision lays down the objective of the Commission to extent the concept of the definitive VAT regime for goods to services.

### 2.2 The intra-Union Supply

A supply qualifies as an intra-Union supply when four conditions are met:

1. The supplier must be a taxable person;
2. The customer is a taxable person or a non-taxable legal person. Supplies to non-taxable legal persons qualify as intra-Union supplies provided that the other conditions are met regardless the amount of purchases in other Member States. Currently, they are only required to report intra-Community acquisitions if they have acquired goods from other Member State for more than EUR 10,000 in total in the current year or have done so in the previous year. The supplier must account for the VAT due on the intra-Union supply, while the non-taxable legal person must pay the VAT on the intra-Community acquisition. Reporting intra-Community acquisitions therefore requires a VAT registration and payment of the non-taxable legal person. The intra-Union supply does not, because the supplier will need to report the VAT due on the intra-Union supply.[29] Non-taxable legal persons will be attributed a VAT identification number when they are recipients of intra-Union supplies (Article 214 (1) (b) VAT Directive);
3. The goods are dispatched or transported by or on behalf of the supplier or customer. This condition makes it clear that there is an intra-Union supply in case of pick up transactions too;

[28] COM(2018) 329 final.
[29] *See* at 7 of the explanatory memorandum on the proposal for a Council Directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States.

4. The goods are transported from one Member State to the other.

Supplies of goods with installation or assembly, supplies of goods exempt under Article 148 or 151 VAT Directive[30] and supplies by flat-rate farmers do not qualify as intra-Union supplies.

### 2.3 Place of Supply

The new Article 35a VAT Directive determines the place of supply for intra-Union supplies. Intra-Union supplies are subject to VAT where the dispatch or transport of the goods ends. Article 35a VAT Directive is an addition to the current place of supply rules for goods. The current rules will remain. Article 35a VAT Directive does not apply to the supply of second-hand goods, works of art, collector's items or antiques, Article 35c VAT Directive.

### 2.4 Liability

The main rule under the definitive VAT system is that the supplier must pay the VAT due to the tax authorities. However, as a transitional provision, the VAT can be reverse charged to the supplier if he qualifies as a CTP. The CTP is a 'reliable' taxable person. In order to become a CTP a taxable person must meet three conditions:

1. An absence of any serious infringement or repeated infringements of taxation rules and customs legislation and no record of serious criminal offences relating to the economic activity of the taxable person;
2. A high level of control of the operations of the taxable person and of the flow of the goods by means of a system managing commercial and, where appropriate, transport records. The system must allow appropriate tax controls by means of a reliable or certified audit trail;
3. Evidence of financial solvency of the taxable person. This can be proven by a good financial standing or the taxable person can provide guarantees provided by insurance or other financial institutions or by other economically reliable third parties.

The CTP status is only open to taxable persons established within the EU. Authorized Economic Operators (AEOs) for customs purposes can become CTPs without being tested on the above mentioned requirements. This is because the requirements for becoming an AEO are equal to those applying for CTPs. Taxable persons that fall within the scope of the flat-rate scheme for farmers, the exemption for small enterprises or taxable persons carrying out supplies of goods or services in respect of which VAT is not deductible cannot apply in as far they carry out those activities. The provisions on CTPs in the proposal for the detailed technical measures do not provide any further insight or clarification to the concept. We therefore refer to our previous article. We do however note that the European Parliament has proposed further clarification and specification of the concept of CTP and the applicable criteria.[31] We refer in particular to the amendments 22, 23, 25, 37 and 39. The European Parliament also proposes further guidance in an implementing act (see in particular amendment 27 and 40) and a simplified procedure for SMEs.

Originally, the CTP was linked to the quick fixes that deal with some issues in the current system. However, the quick fixes have been detached from the CTP status.[32] This means that the CTP status is only relevant as of 1 July 2022 if the proposals are adopted by the EU Member States. As the European Commission intends to evaluate the system after five years and as it seems that the reverse charge rule in case the customer is a CTP provides for a gradual transition into the new system (and will therefore be abolished),[33] this appears to be a relative short period of time considering the requirements and efforts that have to be made by businesses for obtaining the CTP-status. The authors advise the European Commission to provide clarity on the period during which the CTP status will be of relevance in the VAT system. On the other hand, we agree with Matesanz, that it is also unclear whether the tax authorities are ready to handle and process the volume of CTP applications.[34] Matesanz and Van de Leur also question whether SMEs will be able to meet the requirements.[35] The authors do however note that according to the proposal the CTP status should be open to SMEs too. Therefore, the way the requirements are applied must enable SMEs to apply for the status.[36]

For other supplies of goods than intra-Union supplies, for example local supplies, the reverse charge rule only applies if the customer is a CTP too. This is a mandatory reverse charge rule. EU Member States that

[30] This concerns the fuelling and provisioning of certain vessels and supplies of goods in the framework of diplomatic and consular arrangements.

[31] European Parliament, 'Report on the proposal for a Council directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States', COM (2017)0569 – C8-0363/2017-2017/0251 (CNS) of 7 Sept. 2018.

[32] Council Regulation 2018/1909, OJ L 311, 7 Dec. 2018, at 1–2; Council Directive 2018/1910, OJ L 311, 7 Dec. 2018, at 3–7; and Council Implementing Regulation 2018/1912, OJ L 311, 7 Dec. 2018, at 10–12.

[33] At 14 of the explanatory memorandum.

[34] Fernando Matesanz, *The Certified Taxable Person Status*, 29(6) Int'l VAT Monitor (2018).

[35] *Ibid.*, and Michael van de Leur, *EU Proposes New VAT Scheme for Small Businesses*, 29(3) Int'l VAT Monitor (2018).

[36] *See also* amendments 3 and 14 advocated by the European Parliament in and adopted by the ECON committee: EP Report on the proposal for a Council directive amending Directive 2006/112/EC as regards the introduction of the detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States (COM(2018)0329 – C8-0317/2018 – 2018/0164(CNS)) of 25 Jan. 2019.

currently do not have a reverse charge rule on local supplies of goods must implement it by 1 July 2022. Member States that currently have a reverse charge rule for local supplies of goods will have to make it dependent on the customer having a CTP status. The reverse charge rule applies if the customer is a CTP and the supplier is not established in the Member State in which the VAT is due, pursuant to Article 194a VAT Directive. Because it is not required that the CTP is established in the Member State where VAT is due VAT can be reverse charged to non-established taxable persons. In that case the customer can report the VAT under the reverse charge rule in the OSS return too.

### 2.5 One Stop Shop

To ensure the smooth collection of VAT on intra-Union supplies the current Union scheme of the OSS is extend to cover B2B-supplies of goods (Article 369a VAT Directive). Considering the extension of the MOSS (Mini One Stop Shop) as of 1 January 2021 with distance sales and other services than telecommunications, broadcasting and electronic services the OSS will cover all B2C-supplies of services, B2B-supplies of goods and B2C-distance sales. Taxable persons established outside the EU can make use of the Union scheme if they appoint an intermediary in the EU. It is the authors' opinion that the EU relies much on voluntary compliances as regards these non-EU suppliers and it should be made as easy as possible for them to comply with the EU VAT rules.[37] Keeping OSS as simple as possible is one of the means to achieve this.

Currently, under MOSS quarterly VAT returns are filed. Under the proposed definitive VAT system taxable persons are required to file monthly VAT returns if their annual EU turnover is above EUR 2,500,000 (Article 369f (2) VAT Directive). VAT due can be deducted in the OSS return too if the taxable person has an obligation to pay VAT in the Member State in question in the current or previous eleven (in case of monthly VAT returns) or three (in case of quarterly VAT returns) periods. In case of a credit position the excess will be carried forward to the following tax period. If a taxable person is in a credit position for two (in case of quarterly VAT returns) or three (in case of monthly VAT returns) consecutive tax periods the VAT can be refunded upon request, pursuant to Article 369ia VAT Directive. The authors regret that the European Commission has not used this opportunity to integrate the refund procedure under Directive 2008/9/EC in the OSS instead of applying two different schemes for the refund of VAT depending on whether a taxable person also needs to pay VAT in a Member State. In case a taxable person has both taxable supplies and exempt supplies for which he cannot deduct VAT he will need to calculate a deductible proportion. In case a taxable person has several establishments within the EU that provide both taxable and exempt supplies the deductible proportion will be determined by each Member State of establishment for all transactions carried out by the taxable person from that establishment (Article 369ga VAT Directive). This provision, that seems to be an implementation of the CJEU judgment in the Le Crédit Lyonnais case,[38] seems to be outdated after the CJEU judgment in the Morgan Stanley case.[39] Whether the provision will be maintained remains to be seen.

Under the definitive VAT regime recapitulative statements are no longer obligatory, pursuant to Articles 262–271 VAT Directive. This obligation will only apply for B2B-services that are subject to VAT in the Member State of the customer under the main B2B place of supply rule for services. Member States can however still monitor the movements of goods to some extent due to the fact that taxable persons are required to report the supplies of goods that are being supplied from a Member State other than the Member State of identification separately (Article 369g (2) VAT Directive).

Records must be kept for ten years for transactions reported under OSS. The OSS is optional. Taxable persons may choose to register for VAT and file regular VAT returns in the Member States in question.

### 2.6 Specific Situations

#### 2.6.1 *Transfer of Own Goods and Call-Off-Stock*

Like in the current system a taxable person will be required to report a transfer of own goods. Currently, he must report a deemed intra-Community supply in the Member State of dispatch and a deemed intra-Community acquisition in the Member State of arrival of the goods. In the proposed system the taxable person will be required to report a deemed intra-Union supply in the Member State the goods are transported to. This deemed intra-Union supply can be reported in the OSS-return if the taxable person is not established in the Member State the goods are transported to. There are some exceptions to the main rule that transfers of own goods need to be reported.

In the authors' opinion this deemed intra-Union supply must be reported to uphold the destination principle for VAT. If a transfer of own goods is not regarded as a deemed intra-Union supply taxable persons without a full right to deduct VAT or non-taxable legal persons might consider purchasing goods locally in EU Member States with low VAT rates and subsequently transferring

37 OECD (2017) International VAT/GST Guidelines, para. C.3.2 and OECD (2018) 'Simplified registration and collection mechanisms for taxpayers that are not located in the jurisdiction of taxation'. OECD Taxation Working Papers No. 39, at 5.

38 CJEU 12 Sept. 2013, C-388/11, ECLI:EU:C:2013:541 (Le Crédit Lyonnais).

39 CJEU 24 Jan. 2019, C-165/17, ECLI:EU:C:2019:58 (Morgan Stanley).

those goods to their own Member State. However, when the taxable person has a full right to deduct VAT, there is no need for this. The EU might consider abolishing the obligation to report deemed intra-Union supplies in those cases. Considering the abolishment of the two taxable supplies (intra-Community supply and intra-Community acquisition) and of recapitulative statements the movement of goods cannot be monitored like they can be monitored in the current system in case of regular sales transactions. The authors therefore see no other reason to monitor movements of goods through deemed intra-Union supplies.

In a call-off-stock situation the transfer of goods from one Member State to the other shall not be considered a deemed intra-Union supply. Instead there is an intra-Union supply at the moment the ownership of the goods is transferred to the customer. The simplification applies if the following conditions are met:

– The supplier is a CTP, not established in the Member State to which the goods are dispatched or transported;
– The customer is a CTP identified for VAT purposes in the Member State to which the goods are transferred;
– The customer's identity[40] and VAT identification number are known at the time the transport begins;
– The supplier mentions the dispatch or transport in the register provided for in Article 243 (3) VAT Directive.

Since the EU Member States have adopted the quick fixes without the requirement of a CTP status (section 1.2) we might expect that requirement being dropped in the process of the implementation of the definitive VAT regime too. What's more, the quick fix adopted by Member States also contains time limits, a provision on customer substitution and provisions that deal with certain situations, such as transport of the goods to another Member State or theft. It can be expected that provisions like these will be introduced to the simplification under the definitive VAT regime too.

### 2.6.2 *Chain Transactions*

Because the current rules on the place of supply are maintained and only a specific place of supply rule is added for intra-Union supplies we assume that with chain transactions the supplies preceding the intra-Union supply are still subject to VAT in the Member State of departure and the supplies following the intra-Union supply are subject to VAT in the Member State of arrival. In a simple scenario where A sells goods to B, who subsequently sells goods to C and the goods are transported directly from Slovakia (where A is established) to Greece (where B is established) there are therefore two options:

1. If the transport is attributed to the A-B supply the A-B supply is the intra-Union supply subject to VAT in Greece. The B-C supply is a local Greek supply;
2. If the transport is ascribed to the B-C supply the A-B supply is a local Slovakian supply. The B-C supply is the intra-Union supply subject to VAT in Greece.

The proposed Article 36a VAT Directive provides for a simplification when attributing the transport to one of the links in the supply chain. When B communicates the name of the Member State of arrival of the goods to A and he is identified for VAT purposes in a Member State other than the one where the dispatch or transport of the goods begins, the A-B supply is considered the intra-Union supply. If these conditions are not met the B-C supply is the Intra-Union supply. The simplification is not linked to the CTP-status and the definition of intermediary operator (in our example party B) makes it clear that the simplification can be applied to longer supply chains as well. Following the CJEU judgment in the Hans Bühler case,[41] we assume that party B can be registered for VAT purposes in the Member State where the transport begins as long as he doesn't provide this VAT number to A.

One should consider that in the situation where the A-B supply is the intra-Union supply there is not much of a difference as regards the VAT treatment of that supply and any subsequent supplies. All are subject to VAT in the Member State of arrival of the goods and for all supplies the VAT can be reported through the OSS if the supplier is not established in the Member State of arrival or reverse charged to the customer in case he is a CTP. We have found differences as regards:

– Tax point (Article 67 VAT Directive): for intra-Union supplies VAT due at moment invoice is issued or at moment it should have been raised under Article 222 VAT Directive. Continuous intra-Union supplies, such as supplies through pipelines of natural oils, will be regarded as being completed each calendar month until the supply comes to an end. The regular provisions on continuous supplies (Article 64 VAT Directive) and payments on account (Article 65 VAT Directive) do not apply. For local supplies the regular rules on tax point (Articles 63-66 VAT Directive apply);
– Invoicing rules (Article 219a (2) (a, iii) VAT Directive): for intra-Union supplies the invoicing rules of the taxable persons own Member State apply. In case the reverse charge rule applies the same rule applies for the local supply. However in case the reverse charge rule does not apply the invoicing rules of the Member State of taxation must be applied for the local supply;

[40] A definition of identity is not provided in the proposal.

[41] CJEU 19 Apr. 2018, C-580/16, ECLI:EU:C:2018:261 (Firma Hans Bühler).

– Payments on account (Article 220a (1,4) VAT Directive): considering that for intra-Union supplies VAT is not due on payments on account, there is also no obligation to issue invoices for payments on account. For local supplies VAT is due on payments on account and there is an invoicing obligation;
– Simplified invoices (Article 220a (2,a) VAT Directive): it is not an option to raise simplified invoices for intra-Union supplies. For local supplies simplified invoices can be raised if the conditions are met;
– Invoice requirements (Article 226 (4) VAT Directive): the VAT identification number of the customer must be mentioned on the invoice in case of an intra-Union supply. This requirement also applies when the VAT is reverse charged to the customer.

#### 2.6.3 *Proof of intra-Union Supply*

Due to different treatment of local supplies and intra-Union supplies as regards the place of supply, tax point and the obligations mentioned above, the authors expect debates between taxable persons and tax authorities on whether the conditions for an intra-Union supply have been met. It is yet unclear whether the quick fix on the proof of transport that will be added to the VAT implementing regulation as of 1 January 2020 will be continued in the definitive system. What's more, questions as regards substantive and formal requirements for intra-Union supplies can arise. For example, if a supplier does not have the VAT identification number of its customer or if it is invalid, will the supply still qualify as an intra-Union supply subject to VAT in the Member State the goods are transported to or will it be treated as a local supply in the Member State of departure. Looking at the definition of intra-Union supply in Article 14 (4,3) VAT Directive the authors feel that only if the conditions mentioned in this provision are not met the supply will not qualify as an intra-Union supply. Any additional requirements in their view do not lead to that conclusion.

## 3 Enhanced administrative cooperation

On 30 November 2017 the European Commission tabled its plan for new measures to strengthen the administrative cooperation and to improve the prevention of VAT fraud. After reaching political agreement on this regulation on 22 June 2018, the measures were adopted on 2 October 2018.[42] Most of the provisions have entered into force as of 1 January 2019. However, the provisions regarding improving access to vehicle registration data and customs data require essential new technologies which are subject to development. These provisions will enter into force as of 1 January 2020.

According to the explanatory memorandum[43] the main objectives of the new regulation are:

– Jointly processing and analysing all relevant data within Eurofisc;
– Improving the operational framework for coordinated checks between Member States;
– Developing the exchange of data between Member State's tax administrations and law enforcement authorities at EU level;
– Tackling fraud involving the dual VAT regime applicable to cars by improving access to vehicle registration data; and
– Fighting fraud involving customs procedures 42 and 63.

### 3.1 Enhanced Cooperation Between Member States

According to the European Commission enhanced cooperation between Member States is necessary to combat cross-border VAT fraud more effectively and in a more timely manner and strengthens trust between Member States. The measures include therefore faster exchanges of information between tax administrations without prior request through standard forms, joint audits between two or more Member States and access for Eurofisc officials to the Member States' VIES data.

When joint audits take place, tax officials of other Member States will have the same powers of inspection as the Member State of establishment of the taxable person. This includes access to the premises of the taxable person and its documents and the possibility to interview taxable persons. Both tax authorities may agree on producing a common audit report. As a result, taxable persons may be confronted with officials of tax authorities of other Member States during an audit.

The Member State of establishment of the taxable person may be obliged to participate and initiate a VAT audit when at least two other Member States consider an administrative enquiry or audit necessary. Those Member States should assist the Member State of establishment by actively taking part in the audit.

### 3.2 Working with Other Law Enforcement Bodies

The measures also include a more enhanced cooperation between tax authorities and other law enforcement bodies. The proposal includes additional powers for Eurofisc to initiate and coordinate cross-border investigations and to forward information on VAT fraud trends

[42] Council Regulation 2018/1541, OJ L 259, 16 Oct. 2018, at 1–11.

[43] Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax COM(2017) 706 final – 2017/0248 (CNS) of 30 Nov. 2017, at 8.

and serious cases to Europol and the European Anti-Fraud Office (OLAF).

Member States participating in the European Public Prosecutor's Office (EPPO) [44] would have to disclose serious VAT fraud cases to Europol and OLAF. Serious fraud cases are considered as those involving two or more Member States and with a total damage of at least EUR 10 million.[45]

The Commission is currently developing Transaction Network Analysis (TNA) software for voluntary use by Member States. Participation in Eurofisc also remains voluntary. TNA software is used to jointly process and exchange VAT data within Eurofisc.

We think it is unlikely that businesses will notice something of these changes in a direct way. Through this enhanced cooperation VAT fraud can be tackled more effectively and in a timelier manner. As a result, this will benefit businesses indirectly because (the possibility of) VAT fraud may result in more burdensome administrative obligations (administrative measures targeted at discovering fraud often have a broader scope than just fraudulent transactions) disturbance of competition and the risk of being denied the right to VAT deduction or the exemption for intracommunity supplies.

### 3.3 Cross Border Refund

Taxable persons can get a VAT refund in a Member State where they are not established and do not carry out taxable transactions for which they are liable to pay VAT to the tax authorities. The refund request is done through an electronic portal of the taxable persons Member State of establishment. The Member State of establishment forwards the request to the Member State of refund and the refund – if approved – is granted by the Member State of refund directly to the taxable person.

Currently under Directive 2010/24/EU the authorities of the Member State of establishment of the taxpayer may send a request for recovery or precautionary measures to the Member State of refund for the VAT refund amounts to be seized for the benefit of the Member State of establishment. In case the taxpayer concerned wants to contest the recovery or precautionary measures taken he must undertake this action in the Member State of refund. A simplification is introduced to ease recovery assistance requests by the Member State of establishment towards the Member State of refund. The regulation offers tax authorities the opportunity to transfer VAT refunds directly to the Member State of establishment in case of outstanding VAT debts if the taxpayer gives his consent. The Member State of establishment can then use this money to settle a taxable persons VAT debts or to hold the money as a precautionary measure in case of disputed VAT debts. In case it concerns disputed VAT debts the transfer of the money is permitted only where the Member State of establishment has effective judicial control in place which enables local courts to grant the release of the amount retained or any part of it at the request of the taxable person and in all stages of the proceedings. Again, transfer of the money to the Member State of establishment is only allowed in the first place when the taxpayer has given his consent for the direct transfer of the VAT.

## 4 Simplified VAT rules for SMEs

### 4.1 Reasons for Change

The proposals for a definitive VAT system are accompanied with a proposal to amend the exemption for small businesses.[46] The proposal intends to deal with the expansion of cross-border trade. Currently, if a Member State has availed itself of the option to implement the exemption for small businesses the exemption is only open to taxable persons established in that Member State. This causes distortion of competition, because local enterprises are exempt while foreign enterprises that have the same amount of turnover need to pay VAT. Another issue with the current exemption is that taxable persons either fall within the scope of the exemption and enjoy the benefits of it or taxable persons fall out of scope of the exemption and fully have to comply with the VAT obligations. The proposal deals with this by using two different thresholds within the SME scheme. Last but not least, the European Commission intends to achieve more harmonization. Many Member State currently apply derogations under the VAT rules for SMEs.

### 4.2 Thresholds

Businesses are small business under the proposed legislation when their turnover in the EU is no higher than EUR 2,000,000. The proposed legislation allows Member States to implement an exemption for small business whose turnover is below a certain threshold. Member States can set this threshold with a maximum of EUR 85,000. Member States can use different thresholds per business sector. If a Member State has availed itself of the option to implement the exemption it must open up the exemption to taxable persons established in a different Member State too provided that their EU turnover is no more than EUR 100,000. Because the EU turnover

[44] Council Regulation (EU) 2017/1939 of 12 Oct. 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31 Oct. 2017, at 1–71.

[45] Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax COM(2017) 706 final – 2017/0248 (CNS) of 30 Nov. 2017, at 10.

[46] COM(2018) 21 final.

can be best determined by the Member State of establishment a taxable person must indicate to its Member State of establishment that it wants to use the exemption for small businesses in another Member State. The Member State of establishment will inform the Member States where the business wants to apply the exemption. The example below shows the operation of the proposed legislation. Taxable persons that fall within the scope of the exemption may choose to opt out.

A, B and C are all active in the designing industry. A is established in the Netherlands, B in Germany and C in France. All Member States have an exemption for small enterprises in the designing industry but apply different thresholds. The Netherlands applies a threshold of EUR 7,500, Germany EUR 25,000 and France EUR 35,000. A, B and C's turnover in 2023 is:

| | A | B | C |
|---|---|---|---|
| Turnover Netherlands | 7,000 | 6,000 | 8,000 |
| Turnover Germany | 30,000 | 80,000 | 20,000 |
| Turnover France | 30,000 | 3,000 | 15,000 |
| Turnover EU other | 40,000 | 1,000 | 20,000 |
| Turnover non EU | 0 | 0 | 60,000 |

A can apply the exemption for small businesses in the Netherlands because it does not exceed the threshold of the national exemption. A cannot apply the exemption in Germany and France because its EU turnover exceeds EUR 100,000. B cannot apply the exemption in Germany because it exceeds the national German threshold. B can however apply the exemption in the Netherlands and France, because it does not exceed the EU turnover threshold of EUR 100,000 and does not exceed the national thresholds in both Member States. C can apply the exemption in France, because it does not exceed the national threshold. C can also apply the exemption in Germany because its EU turnover does not exceed EUR 100,000 and its German turnover does not exceed EUR 25,000. C cannot apply the exemption in the Netherlands because it exceeds the national threshold of EUR 7,500.

If a taxable person exceeds the national threshold set by the Member State it can still apply the exemption that year provided that the annual turnover in that Member State does not exceed the threshold by more than 50%. This prevents taxable persons from having to comply with the regular VAT rules in case of one-off exceedances.

### 4.3 Relief of Administrative Obligations

For administrative obligations the proposed legislation distinguishes between exempt small enterprises and non-exempt small enterprises. Exempt small enterprises are enterprises that fall with the scope of the national exemption. Non-exempt small enterprises are enterprises whose turnover is between the national exemption and EUR 2,000,000 or small enterprises that have opted out of the exemption. The table below shows the administrative relief that Member States can or must implement for these types of small enterprises.

| Obligation | Exempt small enterprises | Non-exempt small enterprises |
|---|---|---|
| VAT registration | Member States may exempt taxable persons from having to register for VAT. If this option is not used Member States must provide for a simplified procedure for registration. | Member States must set up a simplified procedure for registration. |
| Invoicing obligations | Member States must release taxable persons from the obligation to issue invoices. | x |
| Accounting | Member States may release taxable persons from all or some accounting obligations laid down in Chapter 4 of Title XI VAT Directive. Where Member States require invoices to be stored, they may not impose further requirements on exempt small enterprises in addition to those provided for in national law in areas other than VAT and relating to record keeping. | Member States must determine simplified obligations relating to the storage of invoices. |
| VAT returns | Member States may release taxable persons from the obligation to file VAT returns. Where this option is not exercised, Member States shall allow taxable persons to submit a simplified VAT return to cover the period of a calendar year. | The tax period for VAT returns is a calendar year. |
| Interim payments | x | Member States shall not require interim payments to be made. |
| Other obligations | Member States may release taxable persons from certain or all obligations referred to in Articles 217 to 271 VAT Directive. | X |

### 4.4 Comments

The proposed new legislation on small enterprises is in our opinion an improvement to the current legislation particularly because of its cross-border application. However equality between local and foreign taxable persons is not completely achieved. We refer to the fact that the application of the national exemption does not depend on the amount of EU turnover. The example below shows this.

A and B both have a business in repairing cars. A is established in Germany, B is established in Denmark. Denmark has a national exemption for small businesses with a threshold of EUR 50,000. Germany has a national exemption for small businesses with a threshold of EUR 70,000. Both A and B have a turnover of EUR 45,000 in Denmark and a turnover of EUR 65,000 in Germany. In this situation A can apply the exemption in Germany, but not in Denmark because its turnover exceeds the EU turnover threshold of EUR 100,000. B can apply the exemption in Denmark, but not in Germany because it exceeds the EU turnover threshold of EUR 100,000.

The authors feel that the application of the national exemption should also be dependent on the EU turnover threshold to ensure equality in application of the exemption. Furthermore, the authors agree with the European Parliament[47] that the proposal should be detached from the proposals on the definitive VAT system and the VAT rates. The VAT simplification measures for SMEs could be implemented more quickly than the definitive VAT regime. Likewise, the authors agree with the European Parliament that the date of implementation of this proposal could be advanced from 1 January 2022 to 1 January 2020.

## 5 VAT RATES PROPOSAL

The proposals for a definitive VAT system are, last but not least, accompanied with a proposal to give Member States more flexibility to set VAT rates.[48] According to the European Commission, the shift towards taxation of goods and services according to the destination principle results in suppliers deriving no longer significant benefits from being established in Member States applying much lower reduced VAT rates and enhances the functioning of the single market. A reform of VAT rates therefore would be consistent with the definitive arrangements based on the destination principle that will gradually replace the current transitional arrangements.

### 5.1 Purpose

Currently, the VAT rules allow Member States to apply one or two reduced VAT rates at a minimum of 5%, next to the standard VAT rate of at least 15%. Furthermore, the VAT rules allow Member States to apply reduced VAT rates to a limited set of certain specified listed goods and services. However, in addition to this list a series of individual VAT derogations and standstill measures exist, allowing Member States to apply rates below 5% or even zero rates on specific products. At the same time, Member States consider VAT rates as a useful instrument to pursue some of their political objectives. The purpose of the Commission's proposal is to introduce the application of the same rules and to grant equal freedom in setting VAT rates to all Member States in order to create a more level playing field.

### 5.2 Flexibility

To that purpose, in addition to a standard VAT rate at a minimum of 15% (the ECOFIN Council adopted the directive making the 15% minimum standard rate a permanent feature of a new VAT system)[49] the Commission proposes to give the Member States more flexibility to put in place:

– A maximum of two separate reduced rates of at least 5%;
– One extra reduced rate lower than the minimum of 5%; and
– One exemption from VAT with right to deduct or 'zero rate'.

### 5.3 Negative List

The current, complex list of goods and services to which reduced rates can be applied, would be abolished and replaced by a new, so-called negative list of products on which the reduced rate or zero rate cannot be applied by Member States.[50] This limitative (short) list includes the following supplies:

– Services subject to the tour operator margin scheme (TOMS);
– Goods subject to VAT under the margin scheme for second-hand goods;
– Goods subject to VAT in accordance with the special arrangements for sales by public auctions;
– Precious metals, jewellery and bijouterie;
– Alcoholic beverages;
– Tobacco products;
– Supply, hire, maintenance and repair of means of transport;

47 Explanatory statement in Report on the proposal for a Council directive amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises (COM(2018)0021 – C8-0022/2018 – 2018/0006(CNS) of 16 Jul. 2018).
48 COM(2018) 20 final.
49 Council Directive (EU) 2018/912 of 22 June 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the obligation to respect a minimum standard rate OJ L 162 27 Jun. 2018, at 1–2.
50 ANNEX to COM(2018) 20 final.

– Fuel oil, gas and lubricating oils;
– Weapons and ammunition;
– Computer, electronic and optical products and watches;
– Electrical equipment;
– Furniture;
– Musical instruments;
– Works of art;
– Financial and insurance services;
– Gambling and betting services.

To maintain some rate harmonization under the new rules, reduced rates (or zero rates) can only be implemented by Member States if they benefit the final consumer and shall be applied to pursue an objective of general interest. Furthermore, to safeguard public revenues, Member States will also have to ensure that the weighted average VAT rate of all applied VAT rates is at least 12%.

The proposal was discussed at the European Parliament and has been sent to the European Economic and Social Committee for consultation, and to the Council for their agreement. It will require unanimous agreement from all Member States in the Council before the proposal can enter into force.

As said above, the entry into force of the new provisions on VAT rates has been linked to the introduction of the definitive VAT regime, which is intended for 2022, although a confirmation is expected in the detailed proposals on that regime which are expected in the course of early 2019. The authors feel that this link is somewhat surprising, as the destination-principle is already to a large extent realized for cross-border services and will be achieved for cross-border B2C supplies of goods through the e-commerce VAT changes with effect from 1 January 2021.[51] Moreover, the authors agree with De La Feria that increases of rates discrepancy across Member States can have far reaching effects on the functioning of the internal market. For example, competing products may be treated differently rate wise, compliance and administrative costs are likely to increase because of questions arising on the scope of the reduced VAT rate and the opportunities for evasion are likely to increase.[52] Lobby groups will also try to influence governments to change their legislation and apply the reduced VAT rate on certain products. Up till now governments could hide behind EU legislation stating that it is not possible to apply the reduced VAT rate on certain products. With this proposal this is not an option and pressure from lobby groups on governments will likely grow.[53] The authors do not consider this a positive development. But the biggest issue in the opinion of the authors is the combination of the rates proposal and the proposal for the definitive VAT system. In the definitive system, as a main rule, VAT is due by the supplier. The supplier can be established in another Member State and must get acquainted with the VAT legislation of another Member State to determine, for example, what VAT rate applies. If VAT rate discrepancies increase this means that this is even more challenging.[54]

### 5.4 VAT Rates for E-Publications

On 5 November 2018, after a long political gridlock, the Member States finally reached an agreement the proposal that allow Member States to apply reduced VAT rates on the supply of e-books and other e-publications that qualify as electronic services (i.e. e-books and other e-publications that are downloaded or streamed via the internet). The new rules have entered into force on 4 December 2018.[55] The rules also allow Member States to apply lower VAT rates than 5% on both e-publications and their physical equivalents (i.e. article books, books on USB sticks, article magazines and newspapers etc.).

Unfortunately, the VAT rates proposal fails to mention explicitly this proposal. The authors assumed the proposal on e-publications to be a dead letter, because the prohibition to apply the reduced VAT rate on these publications would have been abolished by the VAT rates proposal anyway, while Member States even get the option to set reduced VAT rates at a lower level than 5%. Now that Member States are allowed to apply the reduced VAT rates on e-publications, the authors emphasize that we need to take into account that the new rules will only be temporary, pending the adoption of the VAT rates proposal. If political agreement will be reached on this proposal, a huge upheaval regarding setting new VAT rates throughout the EU can be expected.

## 6 Final note

Despite the fact that the proposals of the European Commission are progressive and must be accepted unanimously by Member States, there seems to be a clear sense of momentum as De La Feria puts it.[56] Member States clearly realize that action is needed to deal with the defects of the current VAT system. The authors,

[51] Council Directive (EU) 2017/2455 of 5 Dec. 2017 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, OJ L 348, 29 Dec. 2017, at 7–22.

[52] Rita De La Feria, *The Definitive VAT System: Breaking with Transition*, 3 EC Tax Rev. 125 and 126 (2018).

[53] *See also* Marit Peeters, *Rating the European Commission's Proposal on VAT Rates*, 29(4) Int'l VAT Monitor (2018).

[54] *See also ibid.* and Gorka Echevarria Zubeldia, *Definitive VAT Regime … Really?*, 29(4) Int'l VAT Monitor (2018).

[55] Council Directive (EU) 2018/1713 of 6 Nov. 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals, OJ L 286, 14 Nov. 2018, at 20–21.

[56] La Feria, *supra* n. 52, at 125.

however, feel that the proposed definitive VAT system is a bridge too far for some Member States, because they will largely depend on other Member States for collection of 'their' VAT. What's more, VAT fraud will not be eradicated. Fraudsters can purchase goods in EU Member States with low VAT rates and subsequently sell them to customers in EU Member States with high VAT rates and disappear with the rate difference. This is a risk especially when rate discrepancies increase within the EU due to the proposal on VAT rates. That VAT rates proposal is closely linked to the definitive VAT system and is thus expected to share the same fate. What's more, the combined effect of both proposals is an overcomplex VAT system for international trade that may give rise to other types of VAT fraud. The authors consider that there is greater potential in technological solutions to deal with VAT fraud upfront or to quickly detect it. In that respect, the adoption for the regulation on enhanced cooperation is a good step forward. The authors do however note that it is important to monitor the success of the new rules constantly and to evaluate them after a certain period of time. The proposal for SMEs could be implemented on a standalone basis and will provide equality on an EU level. However, the annual turnover should be taken into account when applying the national exemption as well, to provide for total equality. VAT is surely ready for some next steps, however, the path we choose to walk must be chosen carefully.