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STUDIES

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“The e-commerce package and the definitive VAT system: A critical analysis”

# Outline

- 1. Reform is in the air: The EU Commission “VAT Action Plan”**
- 2. The e-commerce VAT package**
  - 2.1. Electronically supplied services: current and future rules & evaluation**
  - 2.2. Intra-EU distance sales: current and future rules & evaluation**
  - 2.3. Imports (distance sales from third countries): current and future rules & evaluation**
- 3. The definitive system proposal:**
  - 3.1. Current and proposed rules & risks of fraud**
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# I. Reform is in the air: The EU Commission VAT Action Plan

# I. The VAT Action Plan

**7 April 2016:** *‘This action plan sets out the pathway to the creation of a single EU VAT area. A VAT area that can support a deeper and fairer single market, and help to boost jobs, growth, investment and competitiveness. A VAT area that is fit for purpose in the 21st century’.*

# I. The VAT Action Plan

## Includes:

1. The e-commerce package (1 December 2016 – Adopted 5 December 2017)
2. The definitive VAT system proposal
  - Main proposal (4 October 2017) + Technical aspects (25 May 2018)
  - Quick fixes (4 October 2017 – Adopted 2 October 2018)
3. The rate proposal (18 January 2018)
4. Simplified VAT rules for SMEs (18 January 2018)
5. Administrative cooperation between the MS (30 November 2017 – Adopted 2 October 2018)
6. Generalised reverse charge mechanism (21 December 2016 – Adopted 2 October 2018)

## 2. The “e-commerce package”

# A brief overview

- **One directive** ([Council Directive 2017/2455](#) amending the VAT Directive - Most of the new provisions)
- **Two regulations** ([Council Regulation 2017/2459](#): Simplification re customer location for TBE and [Council Regulation 2017/2454](#): Electronic exchange of data to combat fraud)
- New/amended provisions for:
  - [B2C](#) TBE and other services
  - [B2C](#) intra-EU remote sales (currently: distance sales)
  - [B2C](#) Imports

## **2.1. Electronically supplied services**

## 2.1. Electronically supplied services

**Article 7(1) Council Implementing Regulation (EU) No 282/2011** : *‘Electronically supplied services’ as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology’.*

See article 7(2) and 7(3) for positive and negative lists of examples.

# 2.1. Electronically supplied services

## Currently:

- VAT in the country of destination from first EUR.
- An EU and a non-EU MOSS for streamlining VAT collection on TBE (optional).
  - Taxable person registering in one MS (MS of identification).
  - Taxable person making single periodical returns (bulk declaration per country).
  - MSI to redistribute the VAT among MS of consumption.
  - Essential that taxable person make correct application of place of supply rules.
  - MSI is the contact point for both the taxable persons and the MS of consumption. Administrative cooperation in case MS of consumption has doubts.
  - A “Union scheme” and a “Non-Union scheme”
- 2 pieces of non-contradictory evidence to determine customer location (place of taxation), eg IP address, credit card details, billing address.
- Platforms deemed suppliers if “take part” to the transaction (Art. 9a Impl. Reg). In this case, the platform is liable for the payment of the VAT.

# 2.1. Electronically supplied services

## Evaluation?

- According to EC: a “success story”.
- Figures?
  - Revenue: 3 billion (2015) – an increase but also due to change of supply rule (before 2015, origin based taxation applied ... many businesses in Lux to benefit from lower rate).
  - Registrations: Mid-2016, **12 899 EU taxable persons** had registered in the Union scheme. Only **1 079 non-EU taxable persons** had registered in the Non-Union scheme
- Risks?
  - Intangibles, anonymous parties, instantaneous supplies. How to know what should be paid?
  - No enforcement jurisdiction on non-EU suppliers.
  - Audits? Incentive for MSI to dedicate resources to collect other MS' VAT?

# 2.1. Electronically supplied services

## New (as of 2019):

- A first threshold: option to charge VAT at origin if turnover related to cross-border TBE is below EUR 10.000 – For EU suppliers only.
- A second threshold: only one piece of evidence must be collected to determine customer location if domestic and cross-border TBE turnover is below EUR 100.000 – For EU suppliers only.
- Non-EU suppliers with an EU VAT number: may use the non-Union scheme.
- Home country rules for invoicing (but record keeping for 10 years).

# 2.1. Electronically supplied services

## New (as of 2021)

- Deadline for submitting VAT returns extended (from 20th day to last day of the month following the end of the tax period).
- Correction to previous VAT returns:
  - Can be made in a subsequent return instead of the original return to be corrected (up to 3 years back).
  - With reference to the MSC, tax period and VAT amount.

# 2.1. Electronically supplied services

## Evaluation?

- The thresholds:
  - **10.000**: no distortion if applied correctly (but how to monitor?)
  - **100.000**: 1 piece of evidence is weak, but only concerns small businesses (minimal distortions). Sub-question: how do tax admin check the 2 pieces of evidence anyway?
- HCR for invoicing: fair in B2C sector
- Technical changes for MOSS returns: simplification for businesses, no related risk.

## 2.2. Distance sales (intra-EU B2C supplies of goods)

## 2.2. Intra EU distance sales

- Articles 33 and 34 of the VAT Directive.
- In short:
  - Concerns intra-EU supplies of goods to private customers (typically Internet sales).
  - Provides for an exception to the general rule regarding supply of goods with transport (point of departure of the transport operation) when the taxable person makes sales above a certain threshold in order to avoid distortions of competition (below that threshold, the origin taxation rule prevails in order to avoid too high of a compliance burden for the taxable person).

## 2.2. Intra EU distance sales

### Currently

- Per country thresholds (often 35.000 EUR but not always; eg. 100.000 EUR in DE and LUX).
- Taxation at destination when exceeding the threshold (exception to the main rule).

### Risks? Issues to be fixed?

- How to monitor the national thresholds?
- Inconsistent application among the MS

## 2.2. Intra EU distance sales

### New (as of 2021):

- EUR 35.000 (per country) threshold is removed and replaced by (EU-wide) EUR 10.000 threshold. The threshold takes into account both supplies of services and of goods.
- Union Scheme becomes available (supplies of goods and services will have to be reported separately  27 lines X 2).
- No more mandatory invoice requirement for such sales.

## 2.2. Intra EU distance sales

- Platforms deemed to receive and supply the goods in the cases where they “**facilitate**” :

New Article 14a(2) VAT Directive: “Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself”.

## 2.2. Intra EU distance sales

- Deeming provision does not apply in C2C supplies (eg. Ebay) – out of scope.
- Deeming provision does apply even in domestic sales (still only when supplier is non-EU).
- Deeming provision does apply irrespective of whether platform is established in the EU or not and irrespective of whether the platform is registered to the OSS or not.
- Deeming provision only applies for sales below EUR 150 (like OSS).

## 2.2. Intra EU distance sales

### Evaluation?

- An EU wide threshold rather than national thresholds is a better approach (current threshold difficult to monitor + open questions). But how to monitor?
- OSS a real simplification for businesses (however, new proposal on rates – what impact?).

## 2.2. Intra EU distance sales

- Deeming provision for platforms:
  - Which platforms? “Facilitates” is broader than “takes part”. MS willing to catch more than those processing payments? In practice?
  - Risk related to returned goods and refund requests.

## 2.3. Imports (distance sales from third countries)

## 2.3. Imports

### Currently:

- Customs procedure
- Exemption for low value goods (EUR 22)

### Risks? Issues to be fixed?

- Undervaluations
- Administrative costs

## 2.3. Imports

### New (As of 2021):

- Removal of exemption for low value goods.
- Replacement of the customs procedure by a hybrid system for supplies below EUR 150:
  - *Optional I-OSS registration.*
  - *A fall back procedure: transporter liable to collect the VAT (monthly returns).*
- Deeming provision for platforms of intra-EU distance sales.

## 2.3. Imports

- *Optional I-OSS:*
  - Obligation to appoint tax representative (exc. NO because cooperation agt).
  - Import exempt if supplier registered in the OSS database.
  - Periodical declaration and payment (monthly).
- *Liability of the transporter:*
  - Must take “appropriate measures to ensure that the correct tax is paid”.
  - No reduced rate under this procedure (a separate customs declaration must be filled).

## 2.3. Imports

- *Deeming provision for platforms:*

**New Art. 14a(1) VAT Directive:** “Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself”.

## 2.3. Imports

**New Art. 66a VAT Directive:** *“in respect of supplies of goods for which VAT is payable by the person facilitating the supply pursuant to Article 14a, the chargeable event shall occur and VAT shall become chargeable at the time when the payment has been accepted.”* (meaning that the taxable event may occur before payment has actually been made).

## 2.3. Imports

+ record keeping for all platforms (deemed supplier or not)

## 2.3. Imports

+ New obligation for the member States to exchange data re I-OSS imports:

*New article 17(1)e) of Regulation 904/2010: “data on the VAT identification numbers referred to Article 369q of Directive 2006/112/EC it has issued and, per VAT identification number issued by any Member State, the total value of the imports of goods exempted under Article 143(1), point (ca), during each month”.*

- Objective? Reconcile import data and I-OSS declarations

## 2.3. Imports

### Evaluation?

- Removal of exemption: OECD recommendation but sometimes challenged in economic literature.

## 2.3. Imports

- Hybrid collection model: Does it address the current risks?
  - Does the new system avoid undervaluations?
    - I-OSS: Suppliers now have to declare and pay the VAT directly... weeks after the import was made... Probably no valuation controls at the border. How to monitor compliance?
    - Transporter: Data provided by suppliers. Quality and cost of risk assessment procedures?
  - + High administrative costs for customs replaced by compliance costs for businesses/transporters + remaining costs for customs for the application of the exemption – How can the EC claim that it will reduce compliance costs?

## 2.3. Imports

+ New risk of fraud: misuse of I-OSS registration number:

Eg: A vendor selling via Ebay and via own website must use Ebay I-OSS registration number in import declarations that concern supplies made via the platform. Ebay is then liable to remit the VAT.

- What if the vendor also uses Ebay I-OSS number when selling via own website?
- What if anybody having Ebay or Amazon I-OSS registration number starts using it?

## 2.3. Imports

### Exchange of import data between the MS a solution?

- Ignores the fact that import and I-OSS declaration may not take place during same month
- Ignores the fact that many goods are returned by customers (but do not leave the EU).
- Even if a mismatch is being spotted – what to do?? And who is liable in the meantime?
  - A lot of work for the MS but is it worth it?

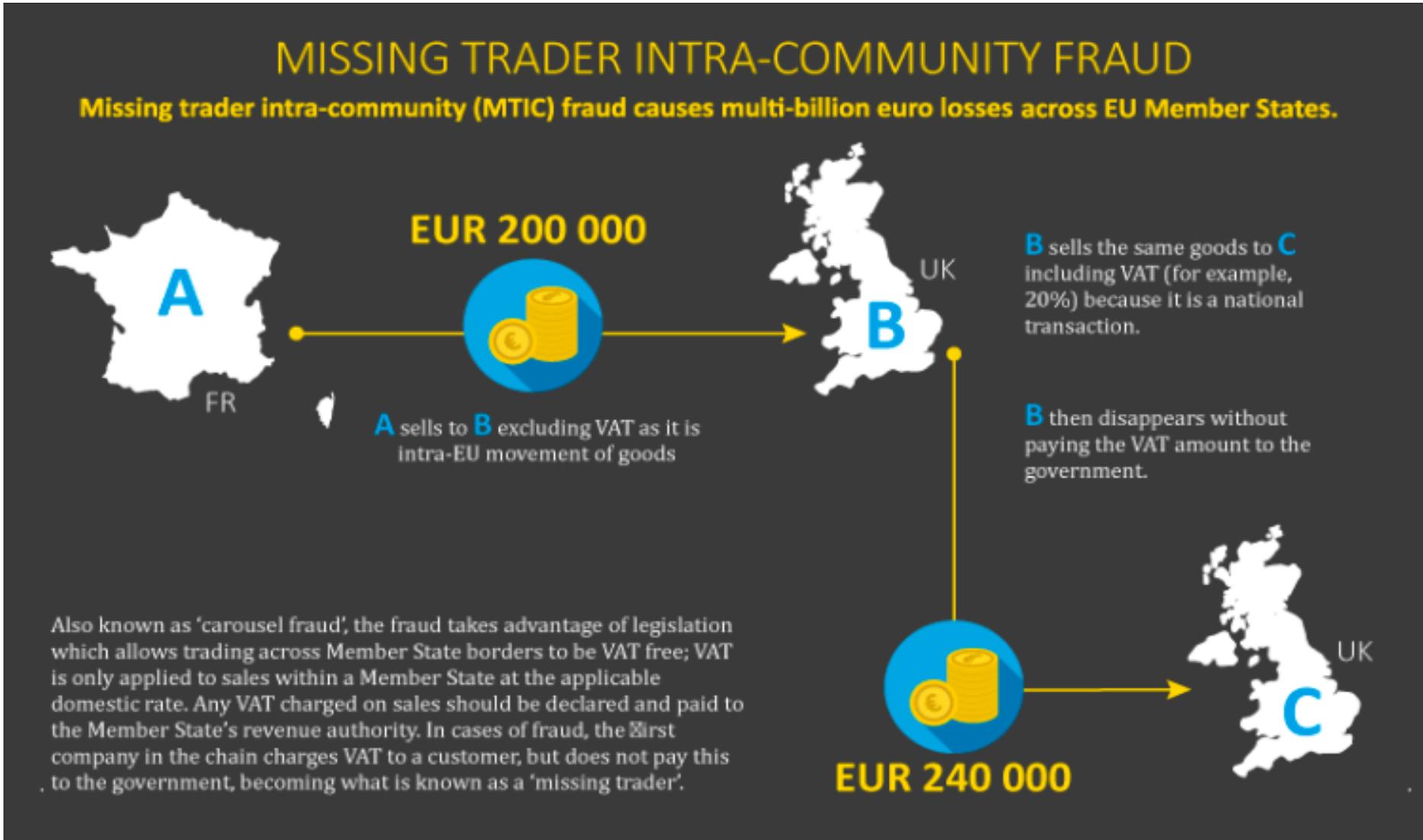
# 3. The definitive system proposal

## 3.1. Current and proposed rules & risks of fraud

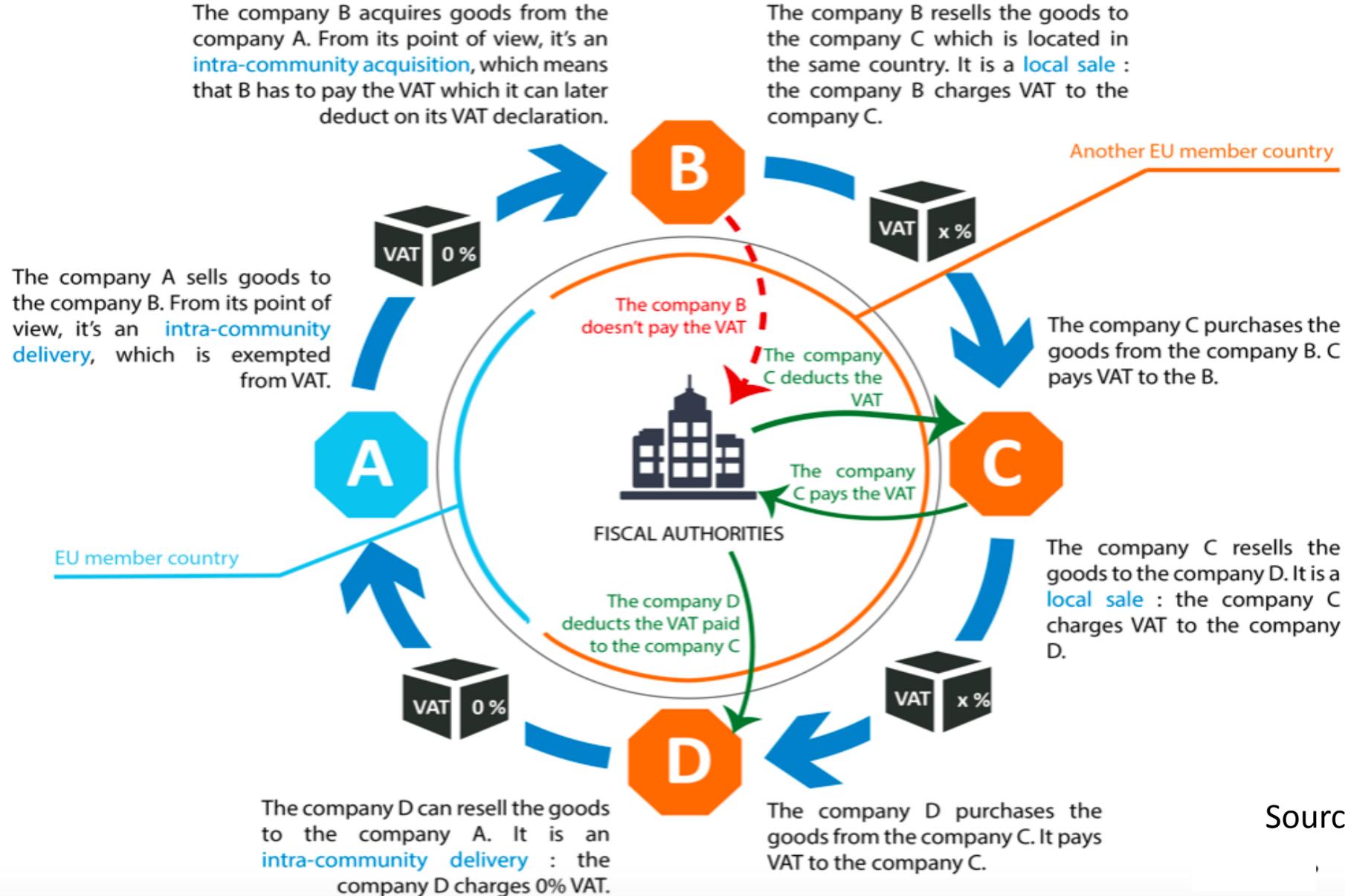
## 3.1. Current and proposed rules & risks of fraud

- **Concerns:** B2B supplies of goods with transport to another MS.
- **Currently:**
  - a zero-rated intra-CE supply
  - an intra-CE acquisition taxed in the MS of arrival of the goods
- **Issue? Risks of fraud? MTIC & Carousel fraud**

# MTIC fraud



# Carousel fraud



Source: ASD group

# 3.1. Current and proposed rules & risks of fraud

## Risks?

- Abuse of current VAT rules (i.e. intra-Community exemption).
- Fraudsters being opportunistic when selecting targets:
  - High value goods and services (to increase the margin)
  - Highly interchangeable goods (difficult to track)
- Tendency of the MS to focus on third parties that ‘should have known’ than on real fraudsters (easier to catch)
- VAT gap estimated at around 150 billion EUR, up to 60 billion on account of carousel fraud (80% committed by organised crime bands)

# 3.1. Current and proposed rules & risks of fraud

- **Proposal as of 2022:**

- A single taxable supply in the MS of arrival of the goods
- The supplier liable to collect the VAT from the customer
- The supplier liable to remit the VAT via the OSS
- Concept of “CTP”

- **Evaluation?**

- Fixes the problem of carousel fraud
- No other opportunity for fraud?

## 3.1. Current and proposed rules & risks of fraud

Example of a new type of MTIC fraud (where the supplier and not the customer will be the missing trader) that will arise:

- Customer X in MS A pays 10 VAT to supplier Y in MS B and is immediately entitled to deduction/refund of 10 VAT to MS A.
  - Supplier Y in MS fails to declare and pay 10 VAT via the OSS in MS B (goes missing).
- How long before MS A realises that 10 has not been « paid back »?
  - What will MS B do to help MS A?
  - Is this new type of fraud going to arise in ‘all directions’? No! Only with VAT paid from high VAT rate MS!

## 3.1. Current and proposed rules & risks of fraud

Is this 'as bad as' carousel fraud?

- **No** because the 'circular feature' of the carousel fraud, with amounts growing at every rounds will be thwarted.
- **Yes** because the gains will depend on the margin and frequency of the transactions – fraudsters helped by the longer reaction time on the side of the Member State of consumption.

## 3.2. Additional thoughts regarding the OSS system

## 3.2. Additional thoughts regarding the OSS system

OSS to become the ultimate collection tool for cross-border VAT (also in the proposal for the definitive system).

However:

- Infrastructure cost? (current MOSS not robust enough).

## 3.2. Additional thoughts regarding the OSS system

+

- The issue of 'trust' is poisoning the OSS system
- The OSS is a decentralised model of VAT collection (VAT collection is 'outsourced').
- The risks related to cross-border payments of VAT is the crux of the problem (VAT of MS A being paid to a taxable person in MS B in the hope that it will be 'paid back').
- Building mechanisms of trust between the MS is positive - **'More EU' a positive approach but not without precautions.**

## 3.2. Additional thoughts regarding the OSS system

- Risks of tensions?
  - MS will have to trust that correct amounts are being paid.
  - In case of doubt, MSC will have to ask for assistance to MSI. Long time before fraud can be spotted. Will MSI act diligently (exporting v. importing MS and no collection fee)?
  - Issue of bankruptcies (VAT paid to suppliers but not remitted).
  - Little if no means to audit non EU suppliers.

## 3.2. Additional thoughts regarding the OSS system

### Same issue with the concept of “Certified Taxable Persons”

- Inspired from AEO which requires very burdensome controls and monitoring even if available only for very large companies.
- In spite of these controls, ECA warned about uncompliant AEO operators in CP42 fraud!
- Carousel fraud mainly carried out by organised crime groups. Little doubt they will manage to obtain CTP status.
- Again issue of trust between the MS. Procedural autonomy and mutual recognition of the status?

## 4. Final words

What to do before 2022?

- Because we lose 60 billions per year with carousel fraud
- Because businesses are sometimes struggling with formalities to obtain exemption of intra-CE supply or when using stocks in other MS

« Quick fixes » et « interim measures » have been adopted

# 4. Final words

## Quick fixes:

- VAT registration number as a substantive condition (remember Barlis & Senatex...).
- Harmonised evidence for intra-CE exemption
- Call off stocks rules
  - ! Initial proposal was to grant simplification for CTP only!

# 4. Final words

## **Interim measures:**

- Improved administrative assistance regulation
- More data and more cooperation with EUROFISC
  - See also development of TNA

## 4. Final words

No matter whether the definitive system will be adopted and implemented by 2021 I.

We need immediate action to limit the damages!

Thank you for your attention!

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