TAX EXECUTIVES INSTITUTE, INC.

24 September 2018

European Commission
Taxation and Customs Union DG
B-1049 Brussels
taxud-c1-sector-a@ec.europa.eu

RE: Public Consultation on the Evaluation of Invoicing Rules

Dear Sir or Madam:

We write in response to the European Commission's (Commission) Public consultation on the evaluation of invoicing rules (Consultation). Tax Executives Institute (TEI) appreciates the Commission's efforts to collect data and evidence to evaluate the invoicing rules introduced by Council Directive 2010/45/EU of 13 July 2010 (Second Invoicing Directive), which amended the invoicing rules set forth in Directive 2006/112/EC of 28 November 2006 (Principle EU VAT Directive). We welcome the opportunity to speak with you regarding the comments and recommendations in this letter.

About Tax Executives Institute

TEI is the preeminent association of in-house tax professionals worldwide and was founded in 1944 to serve the professional needs of business tax professionals. Today, the organization has 57 chapters in Europe, North and South America, and Asia, creating a global network where members from all over the world share thoughts and ideas about issues relevant to in-house tax departments. Our nearly 7,000 members represent 2,800 companies in Europe, the United States, Canada, Asia, and Latin America, including most of the largest companies and many small and medium-sized enterprises. In 1999, TEI chartered its European chapter, which today encompasses a cross-section of multinational companies with significant operations in the EU.

TEI members are in-house tax practitioners (accountants, lawyers and other corporate and business employees) responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity. TEI espouses organizational values and goals that include integrity, effectiveness, efficiency, and dedication to improving the tax system for the benefit of taxpayers and tax administrators. TEI believes it is critical to maintain a dialogue between businesses and revenue authorities when developing VAT rules to ensure such rules are workable and not overly burdensome to businesses or tax authorities.

Introduction

The Second Invoicing Directive contains several positive amendments to the VAT invoicing rules. It has not, however, brought the simplification or level of harmonization businesses expected. TEI hopes the examples below demonstrate that more work is required and welcomes the opportunity provide the Commission further explanation or input.

Article 178 - Input VAT & Invoice Formalities

Article 178(a) provides a taxable person must hold an invoice drawn up in accordance with sections 3 to 6 of Chapter 3 of Title XI to claim a deduction for VAT paid on goods and services. In contrast, taxable persons are not required to hold an invoice when claiming a deduction for VAT paid on services subject to a reverse charge (Articles 178(f)) or stock transfers (Article 178(b)). For such transactions, taxpayers must comply with formalities "as laid down by each Member State."

Allowing Member States to determine the formalities required to exercise the right of deduction on these transactions forces taxpayers to comply with burdensome requirements that vary among Member States and which may undermine the neutrality principle. For example, Bulgaria still requires "protocols for self assessments" of their taxpayers if taxpayers want to reclaim the VAT due on the reverse charge of services. This conflicts with the Court of Justice of the European Union's (Court of Justice) decisions in the Bockemuhl, EcoTrade, and C-Uszodaepito cases[1] and contrary to the rules established for intra-Community acquisitions of goods (Article 178(c)).

When an invoice is required to claim a VAT deduction, the Court of Justice has consistently favoured the principle that taxpayers cannot be deprived of their right of deduction when all material conditions are met, unless fraud is involved.[2] In contrast, some tax authorities impose strict invoicing requirements, which causes taxpayers to receive fines for small mistakes (e.g., incorrect references required by Article 226(11a)) or deprives taxpayers of their right to immediately deduct the input VAT. For instance, in Pannon Gep Centrum (C-368/09), the Authorities of Hungary denied a taxable person the right to deduct VAT because (1) the invoice included an incorrect completion date for the services received, and (2) the numbering of the corrected invoice and credit note reversing the original invoice were not sequential.

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[1] According to the IBFD Tax news of Sept 4, 2018, the Ministry of Finance has published a bill amending the VAT Act upon which "from 1 July 2019, a VAT-registered person will no longer issue protocols for self-assessment of VAT in cases of intra-Community acquisitions and receipt of services subject to reverse charge in Bulgaria."

[2] Among others, Uszodaepito C-392/10 (deduction of VAT not conditional to amendment of invoices and submission of a supplementary tax declaration), Nidera C-385/09 (meeting substantive conditions for the right of deduction is sufficient to deduct the VAT), IDexx Laboratories Italia C-590/13 (failure to comply with formal requirements cannot result in the loss of the right of deduction), Senatex C-518/14 (missing VAT ID number of suppler) and Barlis 06 C-516/14 (description and date of invoice).

Consistent with the jurisprudence of the Court of Justice, TEI maintains a less formalistic approach should be taken for invoicing requirements. This approach would reduce the reassessments and disputes that consume significant resources for businesses and tax authorities.

As a matter of principle, measures should not go further than necessary when ensuring the collection of VAT and preventing the evasion of VAT. Any initiative to revamp the Second Invoicing Directive should balance what is necessary to ensure the proper functioning of the VAT system against the erosion of fundamental rights of businesses.

Article 218 – Electronic and Paper Invoicing Requirements

Article 218 requires Member States to accept electronic and paper documents and messages as invoices, provided they meet the conditions of Chapter 3 of the Principal EU VAT Directive.[3]

TEI is concerned about the recent Council Implementing Decision[4] allowing the Republic of Italy to require mandatory electronic invoicing for all taxable persons established in the territory of Italy, subject to certain exceptions. TEI's concerns are twofold:

1) Based on the information available, it appears the Italian requirements for mandatory electronic invoicing go much further than the derogation in the Council Implementing Decision allowed; and

2) The measure is not isolated, as it appears to be part of a trend for Member States to introduce individual measures to address VAT fraud. Other examples include Norway's Standard Audit File for Tax (SAF-T) format requirements, Spain's Immediate Supply of Information (SII) system, split payment mechanisms, and reverse charge mechanism requirements.

Although TEI encourages the Commission and Member States to strengthen the common VAT system and prevent possibilities for VAT fraud, the trend for Member States to enact individual national measures not aligned with other Member States has created an invoicing labyrinth. Businesses are struggling to comply with these measures, which often have tight deadlines and fierce penalty regimes. Complying with these different measures is very expensive and certain companies, particularly small and medium enterprises (SMEs), might cease conducting business in EU jurisdictions if compliance costs become disproportionally high.

TEI maintains this trend should be stopped, as the functioning of the common market is served with clear and harmonized invoicing rules that are easy to comply with. TEI encourages the Commission to see whether the current patchwork of measures can be replaced with a uniform approach that balances administrative burdens and the effectiveness of the EU VAT system.

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[3] Directive 2006/112/EC.

[4] Council Implementing Decision 2018/593 of 16 April 2018 authorising the Italian Republic to introduce a special measure derogating from Articles 218 and 232 of Directive 2006/112/EC on the common system of value added tax.

Article 219a – Applicable Invoicing Rules

Article 219a(1) provides that, as a default, invoicing shall be subject to the rules applicable to the Member State in which the supply of goods or services is deemed to be made. Derogating from this default rule, Article 219a(2)(a) provides that EU-based suppliers may abide by the invoicing rules of their country of establishment if the supplier is not established in the Member State where the supply is deemed to be made or the supplier's establishment in that Member State does not intervene in the supply within the meaning of Article 219a, and the person liable to pay the VAT is the person to whom the goods or services are supplied.[5] This exception is limited to taxpayers established in the EU.

TEI maintains Article 219a(2a) should be amended to allow non-EU suppliers to follow the invoicing rules of any country where they are EU VAT-registered in the name of fairness. This change would level the playing field for EU and non-EU companies. It would also make compliance with EU invoicing rules much easier and decrease the burdens created when complying with the invoicing rules of all EU jurisdictions in which they trade.

Alternatively, TEI maintains if such suppliers are not registered anywhere in the EU, they should be allowed to follow the invoicing rules of a Member State of their choice, as long as the supplier clearly states that decision on its invoices.

Article 222 - Time Limits for Issuing Invoices

The time limits for issuing invoices vary among Member States. In some countries, invoices must be issued immediately. For example, in Italy, invoices must be issued on the date of supply, with the general exception for intra-Community supplies and acquisitions of goods and cross-border services subject to a reverse charge, which are subject to a uniform time limit expiring on the 15th day of the month following the month the taxable event takes place.

Imposing different time limits for issuing invoices for domestic transactions creates significant administrative burdens for businesses. TEI proposes that the EU follow the examples of Spain[6] and the Netherlands,[7] which provide a standardized common time limit as contained in Article 222 for every business-to-business transaction.

Article 223 - Summary Invoices

Article 223 provides Member States shall allow summary invoices detailing several separate supplies of goods or services, provided the VAT on the supplies mentioned in the summary invoice becomes chargeable during the same calendar month.

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[5] The default rule shall apply where the customer self-bills.

[6] Article 11.3 of Royal Decree 1619/2012 of 30 November, as amended by Royal Decree 828/2013 of 25 October 25, effective 1 January 2014.

[7] Article 34g of Wet op de omzetbelasting 1968.

Several questions revolve around the content of such invoices, including whether they should include the tax point date for each item or whether it is possible to include only the last day of the month as the tax point date and, with that, whether the same exchange rate should apply to all the supplies included on summary invoices. In practice, Member States are deciding on all these conditions, which is not clearly permitted in the provision.

TEI proposes that Article 223 be amended to clarify such questions.

Article 224 – Self Billing

Article 224 provides that customers may draw up invoices where there is a prior agreement between the customer and supplier and a procedure exists for the acceptance of each invoice by the taxable person supplying the goods or services. It also provides that Member States may require such invoices to be issued in the name and on behalf of the taxable person.

In the report "*Explanatory notes: VAT invoicing rules,*"[8] the Directorate-General for Taxation and Customs Union (Directorate-General) interpreted this provision to mean that "Member States cannot prescribe the type of agreement between the two parties." Nevertheless, Croatia, Cyprus, Estonia, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovak Republic, Slovenia, and Spain require that the initial agreement be explicit and in writing.[9] The Directorate-General further states in the report that the "acceptance procedure of each invoice can be explicit or implicit." However, in Cyprus, Estonia, Hungary, Ireland, Lithuania, Luxembourg, and Poland, the supplier must explicitly accept the invoices issued by his customer, in writing.[10]

Self-invoicing can be used to artificially increase the customer's deductible input VAT for fraudulent purposes. However, prior agreement between the supplier and customer regarding self-invoicing and acceptance procedures, which is tacit in the other Member States, provides little meaningful control over such risks.

Absent agreements and procedures, the tax authorities can still verify the validity of invoices drawn up by the customer using information in the customer's business records, such as corresponding payments, purchase orders, and delivery notes. Additionally, if the supplier failed to react to an incorrect invoice drawn up by the customer, the tax authority has sufficient means to correct the consequences of the incorrect invoice and punish the parties.

TEI proposes that Article 224 be amended to abolish the requirements for a prior written agreement and acceptance procedures and simply require that the clause "self-billing" be stated on the invoice, in the language(s) of the customer's choice. This change would greatly ease self-billing in the EU while creating no meaningful increase for VAT fraud.

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[8] https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/traders/invoicing_rules/explanatory_notes_en.pdf.

[9] *See* EU VAT Compass 2018/2019 (IBFD, Amsterdam 2018), p. 833.

[10] *Id*. at p. 834.

Article 226 – Sequential Numbering

Article 226(2) requires invoices issued pursuant to Articles 220 and 221 to be "sequential number, based on one or more series, which uniquely identifies the invoice." In the report "*Explanatory notes: VAT invoicing rules,*"[11] the Directorate-General stated "[t]he choice of using a different series of numbers lies with the business and it may be used for instance for each branch, or for each type of supply or for each customer, and covers as well self-billed invoices or invoices issued by third parties."

Member States are not aligned on whether sequences must be maintained at the legal entity level or VAT registration level. This is predominantly a concern where one legal entity has VAT registrations in other EU-countries outside their country of establishment. Although this sounds like a simple requirement, certain IT systems will struggle with such requirements. We are not aware of any of Member States imposing penalties when the sequence is not maintained on VAT registration level.

TEI acknowledges the importance of sequentially numbered invoices, however, TEI maintains the taxable person should be able to decide whether to maintain this sequence on a legal entity level or for every single VAT registration. TEI proposes that Article 226(2) be amended to incorporate this clarification.

Article 226 – Name and Address

Article 226(5) requires invoices issued pursuant to Articles 220 and 221 to contain "the full name and address of the taxable person and of the customer."

The Court of Justice recently ruled[12] it is sufficient for an invoice to contain the postal address as the address where the supplier is contactable. TEI maintains this ruling should extend to customers and proposes that Article 226(5) be amended to incorporate these clarifications.

Article 226 – Date of Supply

Article 226(5) requires invoices issued pursuant to Articles 220 and 221 to contain "the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice."

Member States do not always agree on the date a supply has been made. This could be because the Principal EU VAT Directive does not contain many provisions, other than Articles 14 and 24, on this concept. It is not always obvious when the right to dispose as an owner has been transferred, especially for goods.

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[11]https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/traders/invoicing_rules/explanatory_notes_en.pdf.

[12] Combined cases C-374/16 and C-375/16.

TEI members have seen situations where the supplier arranges transport for the intra-Union supply of goods and one Member State maintains the moment of departure is the date of supply, while another Member State maintains the date of supply is the moment the goods actually arrive at the buyer. Although this may sound academic, in practice, it has led to some challenging situations whereby:

- The invoice could not be issued earlier than the moment the goods were acknowledged for receipt. Usually, the issuance of the invoice cannot be automated at this point, hence leading to unnecessary administrative costs;
- With longer transit times, there could be a disparity in reporting between Member States, leading to mismatches in the VAT Information and Exchange System; and
- There is uncertainty about the correct foreign exchange rate to use when invoices are issued in a currency other than the currency of the country where VAT is due.

The need for clarity (or alignment between Member States) will become even more important if the Commission's Proposal for a Council Directive (Proposal")[13] is adopted by the Council. According to Article 138(1)(c) of the Proposal, the VAT exemption for intra-Union supplies will be granted only if transactions are properly reported on the periodic listing.

Article 226 – Cash Accounting

The Second Invoicing Directive clarifies Member States should have the option to provide a cash accounting scheme allowing the supplier to pay VAT to the competent authority when he receives payment for a supply and establishing the supplier's right of deduction when he pays for a supply. Under Article 226(7a), suppliers utilizing this scheme must state "cash accounting" on their invoices.

TEI supports the goal of supporting SMEs by allowing Member States to enact cash accounting schemes. Unfortunately, Members States have enacted cash accounting schemes in diverse ways, making it hard to comply with them. Some Member States require participating suppliers to apply cash accounting on their input VAT, while other Member States want customers of participating suppliers to postpone the deduction of VAT until the related invoice is paid. Applying different methods to determine the time at which VAT is deductible complicates the administrative process and creates a high risk for compliance errors.

TEI maintains the neutrality of the VAT system should not be affected by suppliers' decisions to enroll in a cash accounting scheme. TEI recommends that the deduction of input VAT be allowed as soon as the invoice has been received.

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[13] Proposal for a Council Directive amending Directive 2006/112/EC as it regards harmonising and simplifying certain rules in the VAT system and introducing the definitive system for the taxation of trade between Member States, COM (2017) 569 Final.

Article 226 – Obligatory Phrases

Article 226 requires certain phrases to be mentioned on invoices when certain conditions are met. For example, paragraph (7a) requires reference to "cash-accounting," paragraph (10a) requires reference to "self-billing," paragraph (11a) requires reference to "reverse charge," paragraph (13) requires reference to "margin scheme – travel agents," and paragraph (14) requires reference to "margin scheme – collector's items and antiques." Taxable persons may choose the language in which they draw up their invoices. Per Article 248a, Member States may not impose a general requirement that invoices be translated.

TEI members have encountered Member States that require the specific phrases referenced in Article 226 to be translated into in their national language, regardless of the language in which the invoice was drawn up. TEI maintains businesses should be permitted to include the obligatory phrases in any official language of the EU.

Article 233 - Electronic Invoicing

The second subparagraph of Article 233(1) permits businesses to determine the method they use to ensure the authenticity of the origin, integrity of the content, and legibility of invoices by using "any business controls which create a reliable audit trail between an invoice and a supply of goods or services." Article 233(2) offers examples of technologies businesses may use to meet these requirements, specifically advanced electronic signatures or electronic data interchange (EDI).

Although Article 233(2) refers to these technologies as examples, Member States could use Article 233(2) to require the use of an advanced electronic signature or EDI to ensure these criteria are met. Consequently, businesses may be confronted with different rules in different Member States. It seems likely that certain Member States will follow the relatively easy route of retaining the previous requirements for electronic invoicing, thus limiting businesses' ability to apply new methods to meet these requirements. In this respect, the criticism of some authors that Member States will define which business controls are acceptable, and which are not, is justified.[14]

As the Directorate-General stated in the "*Explanatory notes on invoicing*," "[b]oth the supplier and customer are free to choose how to ensure the authenticity of the origin, the integrity of the content and the legibility of the invoice. The choice should not be restricted by Member States. Where Member States provide guidance it should be made clear that this only represents guidance and it does not restrict the choice of the taxable person."

[14] *See* Wouter Brackx and Ine Lejeune,"*Equal Treatment of Paper and Electronic Invoices in the European Union – Finally!*," International VAT Monitor 4 (2010), pp. 260-265.

TEI proposes that Article 233 be amended to incorporate this exact wording to reinforce that Member States may not define what is and what is not a correct method to ensure the authenticity of the origin, integrity of the content, and legibility of any invoice.

Articles 245 and 247 - Place of Storage

Article 245(1) permits businesses to decide the place of storage for invoices received and copies of invoices issued, provided the business will make the invoices available to the competent authorities without undue delay whenever they so request. Article 245(2) allows Member States to require businesses established in their territory to notify the tax authority if the business stores the invoices outside the Member State. That provision also allows Member States to require taxable persons established in their territory to store invoices within that territory if the storage is not by electronic means, guaranteeing full online access to the data concerned. Likewise, under Article 247(3), Member States may impose specific conditions prohibiting or restricting the storage of invoices in a country outside the EU with which no legal instrument exists relating to mutual assistance.

The requirement to notify the tax authorities that invoices are stored outside the Member State of establishment and to store sent and received invoices in the Member State of establishment under Article 245(2) if there is no guarantee of full online access is unnecessary. Businesses must make their invoices available, without undue delay, to the competent tax authorities, at their request.

In addition, it is impossible to control what servers are used and their physical location when working with external IT service providers. These locations may change frequently and may be outside of the EU. Furthermore, the option for Member States to require physical invoices to be archived in-country contradicts the trend of centralized shared service centers that process all invoices received and archive original paper invoices in a single location.

TEI proposes that Articles 245(2) and 247 be amended to eliminate the in-country storage requirements. Article 245(1) already requires businesses to make invoices available, without undue delay, at the request of the tax authorities. This requirement is more than sufficient to guarantee timely audits.

Article 247 - Medium of Storage

Article 247(2) provides each Member State the option to require that invoices be stored in the original form they were issued. Any Member State electing this option can require taxpayers to archive the invoices in paper form if they were originally issued in paper or electronically if they were created and sent by electronic means. Member States may also require that the data guaranteeing the authenticity of the origin of the invoices and integrity of their content, as provided for in the first paragraph of Article 246, also be stored.

TEI proposes that Article 247(2) be amended to remove the requirement to store invoices in their original format. This change would allow for the digitalization of paper invoices and would facilitate the storing of e-invoices without the digital certificates that some electronic invoices include.

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TEI's comments were prepared under the aegis of TEI's European Indirect Tax Committee, whose chair is Gorka Echevarria and whose legal staff liaison is Pilar Mata. If you have questions about our recommendations, please call Mr. Echevarria at + 34 912 15 05 88 or email him at gorka.echevarria-zubeldia@dxc.com or Ms. Mata at + 1 202 464 8346 or pmata@tei.org.

Respectfully submitted,

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