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DOES THE CONTROL OF CUSTOMS
PROCEDURE 42 PREVENT AND DETECT
VAT EVASION?



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(pursuant to Article 287(4), second subparagraph, TFEU)

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GLOSSARY

Administrative cooperation: Exchange of information between Member States whereby tax authorities assist each other and cooperate with the Commission pursuant to Council Regulation (EC) No 1798/2003¹ in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods. Exchanges of information between Member States cover, as a rule, any information that may help effect a correct assessment of VAT, including any information relating to specific cases. They take place both on request and without prior request.

Anti Tax Fraud Strategy Group (ATFS): The expert group created by the Commission with Member States as a response to the ECOFIN Council conclusions of 28 November 2006, with a view to conducting the technical discussions on the conventional measures to reinforce the existing VAT system and to fight VAT fraud.

CCIP: Customs Code Implementing Provisions.

Customs controls: Specific acts performed by customs authorities in order to ensure the correct application of customs rules; such acts may include examining goods, verifying declaration data and the existence and authenticity of electronic or written documents, examining the accounts of undertakings and other records, inspecting means of transport, inspecting luggage and other similar acts.

Customs declaration: The act whereby a person indicates a wish to place goods under a given customs procedure.

Fiscalis: A Community action programme to finance initiatives from tax administrations to improve the operation of the taxation systems in the internal market through communication and information-exchange systems, multilateral controls, staff exchanges, seminars and other training activities.

Free circulation: The status of goods imported from third countries which have undergone all import formalities in order to be able to be sold or consumed on the EU market.

Intra-Community supply: Supply of goods dispatched or transported to a destination outside their respective territory but within the EU, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

Intra-Community acquisition of goods: The acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

Local Clearance Procedure: A simplified procedure whereby a trader receives the goods directly at his/her premises (or the designated place) and usually the customs declaration is lodged and the goods are released by means of an entry in the trader's own records.

Member State of importation: Member State where the goods are physically imported into the EU and released for free circulation.

¹ Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ L 264, 15.10.2003, p. 1).

Member State of destination: The Member State to which the goods are dispatched or transported other than that in which the importation takes place.

Recapitulative statement: A statement to be submitted by every taxable person identified for VAT purposes who makes intra-Community supplies. The recapitulative statement shall be drawn up each month and record the total value of goods supplied to each acquirer in other Member States, listed by VAT identification number.

Re-importation: Release for free circulation of goods previously temporarily exported in the framework of another customs procedure, e.g. outward processing.

Release of goods: The act whereby the customs authorities make goods available for the purposes stipulated by the customs procedure under which they are placed.

Risk profile: A combination of risk criteria and control areas (eg. type of goods, countries of origin) which indicates the existence of risk and leads to a proposal to carry out a control measure. When these criteria are developed at EU level following a common risk management framework they are known as EU risk profiles.

SAD: Single Administrative Document.

SCAC: The Standing Committee on Administrative Cooperation is a regulatory committee pursuant to Article 44 of Council Regulation (EC) No 1798/2003 assisting the Commission in matters as laid down in that regulation. It is composed of the representatives of the Member States and chaired by the representative of the Commission.

Transfer: The dispatch or transport of goods by or on behalf of the importer for the purposes of his business to a destination outside the territory of the Member State in which the importation takes place, but within the Community.

VAT: Value Added Tax.

VAT-based own resources: In 2009, VAT-based own resources amounted to 13,7 billion euro and made up 11,7 % of EU revenue. VAT own resources are computed on a harmonised VAT assessment base. The starting point for the calculation of the own resources accruing from VAT is the total net VAT revenue collected by each Member State during a given year. If less VAT is collected because of evasion or fraud, this would normally also lower VAT own resources paid to the Community budget, unless the assessment bases to be taken into account are capped at 50 % of GNI, as is the case for some Member States.

VAT identification number (VAT ID. No): An individual number given to each taxable person intending to make supplies of goods or services, or to make acquisitions of goods for business purposes. Each number has a prefix of two letters by which the Member State of issue is identified.

VIES: The VAT Information Exchange System is an electronic network for transmitting information relating to the validity of VAT identification numbers of companies registered in the Member States. Furthermore, information relating to (tax exempt) intra-Community supplies is also made available to Member States' administrations through VIES. The information relating to VAT-registration data is input by the national administrations and fed into national databases for remote consultation. This applies also to the intra-Community supplies declared on recapitulative statements. The system was set up to compensate for the elimination of customs formalities and checks.

EXECUTIVE SUMMARY

I.

Customs procedure 42 is the regime an importer uses in order to obtain a VAT exemption when the imported goods will be transported to another Member State. The VAT is due in the Member State of destination.

II.

The objective of the Court's audit was to assess whether control on customs procedure 42 and the related processes prevent and detect VAT evasion. Goods imported under this procedure risk either remaining untaxed in the Member State of importation or being consumed in the Member State of destination without VAT being charged. Thus there is a risk of loss of VAT revenue for Member States.

III.

The control activities and procedures of customs and tax authorities in one Member State can have a direct effect on the revenue of other Member States. Uncollected VAT also has an effect on the composition and incidence of the Union's Own Resources.

IV.

The Court found that the Commission has taken reasonable steps to improve the legislative framework by proposing to amend the VAT Directive. However, this framework needs to be improved further.

V.

The Court found that control of this procedure in seven selected Member States is deficient because:

- (a) customs authorities do not ensure the validity and completeness of key data,
- (b) essential information is not made available to tax authorities, and
- (c) cross-checking of key data is not carried out by tax authorities in all cases.

VI.

The Court found that the application of customs procedure 42 has led to significant losses. Based on the results of its sample testing, the extrapolated amount of the losses in 2009 is approximately 2 200 million euro, of which 1 800 million were incurred in the seven selected Member States and 400 million in the 21 Member States of destination of the imported goods in the sample. This represents 29 % of the VAT theoretically applicable on the taxable amount of all the imports made under customs procedure 42 in 2009 in these seven EU Member States.

VII.

The Commission should, in particular:

- (a) amend the CCIP to implement the compulsory and uniform communication of key data for the management of the VAT exemption from the trader to the customs authorities;
- (b) encourage the Council to act upon its proposal to amend the VAT Directive and hold the importer jointly and severally liable for the VAT loss in the Member State of destination where a complete and timely VAT recapitulative statement is not submitted by him/her;
- (c) encourage the automatic verification of the validity of VAT ID. Nos in the Member States' customs electronic clearance systems;

EXECUTIVE SUMMARY

- (d) create an EU risk profile so that Member States have a common approach to performing risk-oriented and random documentary checks on imports under customs procedure 42, in order to verify the transport to another Member State and other exemption conditions, and the correctness of the VAT taxable amount;
- (e) make a proposal to amend the VAT Directive in order to identify separately the intra-Community supplies following imports under this customs procedure in the traders' VAT recapitulative statements to facilitate a reconciliation between customs and tax data in the Member State of importation;
- (f) submit a proposal to set up a direct automatic exchange of information concerning risk-prone transactions under customs procedure 42 between the customs authorities of the Member State of importation and the tax authorities in the Member State of destination.

INTRODUCTION

1. Customs procedure 42 is the regime a trader uses in order to obtain a VAT exemption when the goods imported from outside the EU into the Member State of importation will be transported to a second Member State². The VAT is due in the latter, the Member State of destination.

2. In the absence of proper control, goods risk remaining in the Member State of importation without payment of VAT or being consumed in the Member State of destination without VAT being charged there.

3. Getting customs procedure 42 right depends on:

- (a) the importer³ providing complete and valid VAT information in the import declaration;
- (b) customs authorities checking this information before releasing the goods; and then
- (c) sending the information to the tax authorities;
- (d) tax authorities comparing this information with that included in the VAT recapitulative statement submitted by the importer. This statement lists all the importer's sales to other Member States;
- (e) the information therein being made available to other Member States' tax authorities using the VAT Information Exchange System (VIES);
- (f) tax authorities in the Member State of destination ensuring that VAT is charged there by comparing the acquirer's VAT return with the information available in VIES.

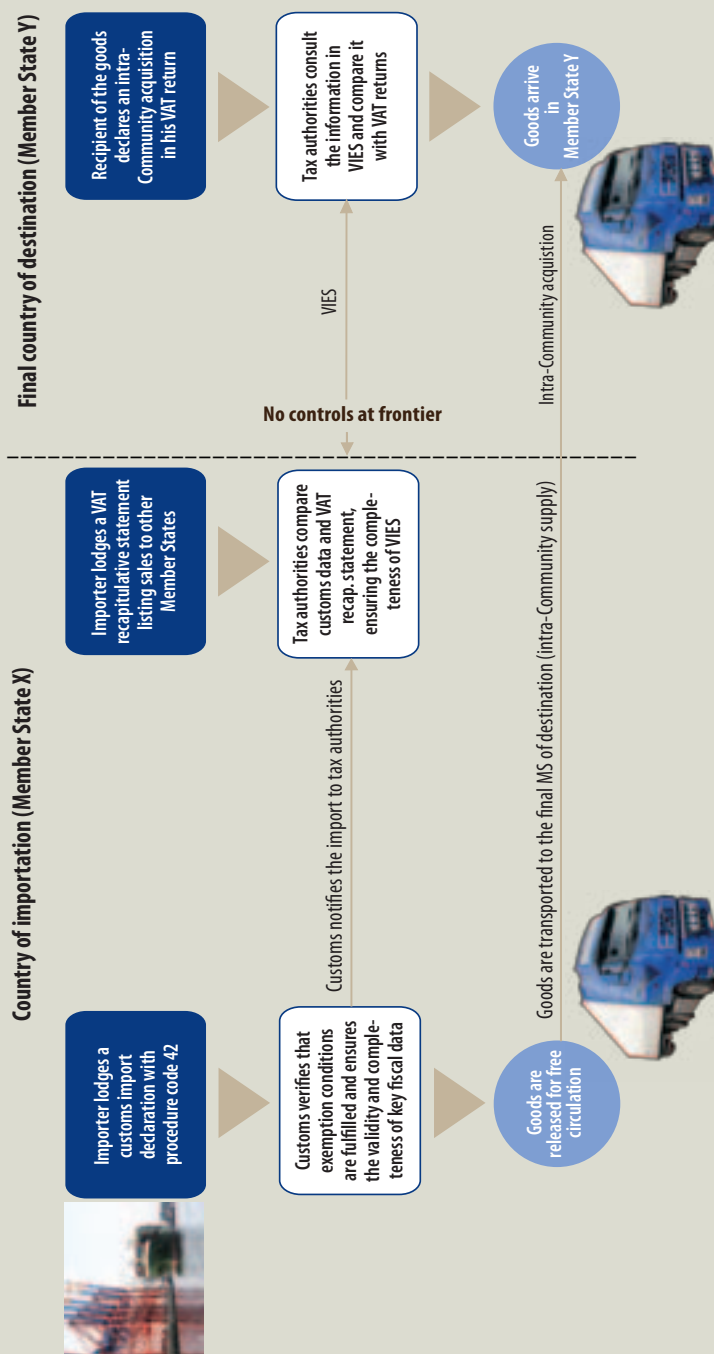
² This procedure is commonly known as customs procedure 42 because in such cases the importer of the goods must indicate in box 37 of the SAD a code starting with the digits 42. When goods are re-imported, code 63 should be indicated instead. For the purposes of this report, references to customs procedure 42 include customs procedure 63.

³ An importer who is not registered for VAT purposes in the Member State of importation can use a tax representative to fulfil his tax obligations.

4. The process is illustrated in the **Chart** and the legal framework governing this procedure is set out in **Annex I**.

CHART

FLOWCHART OF A COMPLIANT IMPORT UNDER CUSTOMS PROCEDURE 42



5. VAT evasion affects the financial interests of Member States. It has an impact on the EU budget as it leads to lower VAT-based Own Resources. This loss is compensated by the GNI-based own resource, distorting individual Member States' contributions to the EU budget. Moreover, tax fraud undermines the functioning of the internal market and prevents fair competition. The **Box** describes a typical, but fictitious, fraudulent use of customs procedure 42.

BOX

TYPICAL, BUT FICTITIOUS, FRAUDULENT USE OF CUSTOMS PROCEDURE 42

A yacht worth 6,6 million euro is imported in Member State 1 under customs procedure 42 with a declared immediate delivery of the yacht to Member State 2. Three years later the customs authorities of Member State 1 inspect the yacht in their territory and find that the ship's log shows that it has never been to Member State 2. Information sent by the tax authorities of Member State 2 demonstrates that the declared acquirer in that Member State has not accounted for the VAT. The amount of VAT evaded in Member State 1 is 1,3 million euro.

AUDIT SCOPE AND APPROACH

AUDIT QUESTIONS

6. The main objective of the audit was to assess whether the Commission and Member States have set up an effective regulatory and control framework in respect of this procedure and whether this control prevents and detects VAT evasion.
7. The key audit question at the Commission level was whether there is a sound regulatory framework in the fight against VAT evasion under customs procedure 42.
8. At the Member State level the audit assessed whether national customs and tax authorities carry out effective controls in respect of this procedure.

⁴ Fiscalis Project Group No 29 on the abuse of the VAT rules upon importation. This group is made up of experts from Member States.

⁵ Belgium, Denmark, Spain, France, Austria, Slovenia and Sweden.

⁶ Belgium, Bulgaria, Czech Republic, Denmark, Germany, Ireland, Spain, France, Italy, Lithuania, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia, Finland, Sweden and the United Kingdom.

AUDIT SCOPE AND APPROACH

9. The Court designed a control model (**Annex II**) based largely on the recommendations of best practice produced by the Fiscalis Project Group No 29⁴. The implementation of this control model would help ensure the sound management of this VAT exemption. The Court carried out an assessment of the regulatory framework drawn up by the Commission. It also assessed the operation of the control approaches in seven selected Member States⁵ against the ECA's control model. These Member States reported a combined taxable amount of goods imported under customs procedure 42 in 2009 of over 40 billion euro and accounted for 68 % of the value of EU imports under this procedure in 2009.
10. This assessment was done by testing a random sample of a minimum of 30 imports per Member State (219 in total) made in 2009 under customs procedure 42.
11. The Court also sought confirmation whether VAT was indeed charged in the 21 Member States of destination⁶ of the goods imported in the sample.

OBSERVATIONS

THE COMMISSION HAS PROPOSED IMPROVEMENTS TO THE EU REGULATORY FRAMEWORK BUT MORE NEEDS TO BE DONE

12. The Commission has⁷ as a specific objective 'to create a framework for EU tax administrations to enable them to efficiently combat fraud in order to increase their revenue'. In the customs area, one of its specific objectives is 'to ensure effective management of the Customs Union for the benefit of European citizens, economic operators and customs administrations by ensuring uniform application of legislation, equal treatment of economic operators and by greater computerisation'. The Court reviewed the activities undertaken by the Commission in order to achieve these objectives in the context of customs procedure 42.
13. The Commission has encouraged the exchange of best practices for control of this procedure using the available fora⁸ and proposed to improve the legislative framework by initiating the amendment to Article 143 of the VAT Directive. This amendment makes the communication of the VAT ID. Nos. and the evidence of the intended transport to another Member State, which are essential for the management of this VAT exemption by customs authorities, compulsory from 1 January 2011⁹. However, the requirements of the amended directive were already in force in 2009 in the seven selected Member States under national customs rules.

THE REGULATORY FRAMEWORK DOES NOT ENSURE THE UNIFORM AND SOUND MANAGEMENT OF THIS VAT EXEMPTION BY MEMBER STATES' CUSTOMS AUTHORITIES ...

14. The customs authorities of the 27 Member States should act as 'if they were one' and economic operators importing goods under customs procedure 42 should be granted equal treatment no matter where the import takes place.

⁷ DG TAXUD's activity statement of operational expenditure accompanying the preliminary draft budget for 2010.

⁸ Fiscalis experts groups, SCAC, Customs Code Committee-Data Integration and Harmonisation section and ATFS.

⁹ Council Directive 2009/69/EC of 25 June 2009 amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to imports (OJ L 175, 4.7.2009, p. 12).

15. Customs legislation¹⁰ has not been amended to reflect the new requirements of the VAT Directive. Thus the uniform implementation by customs authorities of the communication of the information in paragraph 13 is not ensured.
16. The boxes of the customs import declaration (usually known as the SAD) which the importer must fill in to indicate the VAT ID. Nos above are used differently from Member State to Member State. This lack of standard treatment causes an administrative burden for an importer who operates in more than one Member State. The indication of the country of destination code and other evidence of the intended transport to another Member State is not required by the CCIP.
17. The VAT Directive requires the importer to communicate the VAT ID Nos at the moment of import as a condition for the exemption. However customs legislation does not require these to be communicated at that moment when the local clearance procedure is used. Under this simplified procedure the VAT ID Nos. are only communicated at a later stage when the goods have been released.

... AND THE REGULATORY FRAMEWORK DOES NOT ENSURE THAT THE INFORMATION CONCERNING THESE TRANSACTIONS IS ALWAYS MADE AVAILABLE TO THE TAX AUTHORITIES IN THE MEMBER STATE OF DESTINATION

18. Swift transmission of information to the tax authorities of the Member State of destination concerning intra-Community supplies following imports under customs procedure 42 is essential for the early detection of VAT evasion.

¹⁰ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1).

19. The Council, at the initiative of the Commission, has reduced the reporting period of the recapitulative statements and the time limit for exchanging information thereof between Member States. As a result, since the beginning of 2010, recapitulative statements should be submitted monthly¹¹ and a deadline of one month for their exchange between Member States¹² has been set. This has been implemented in six of the Member States audited. However the Commission has not been able to avoid the situation found by the Court in Denmark whereby traders are still lodging VAT recapitulative statements quarterly in 2011.
20. The Commission's proposed amendment to the VAT Directive to hold the trader jointly and severally liable for the VAT losses caused when the latter fails to submit the VAT recapitulative statement has not yet been taken up by the Council. Non-submission of the recapitulative statement prevents the information concerning these transactions from reaching the Member State of destination.
21. In the Court's view, when the customs authorities of the Member State of importation consider an import to be particularly risky¹³, they should send the VAT ID. Nos and VAT taxable amount immediately after the importation takes place directly to the tax authorities in the Member State of destination, a form of 'early warning system'.
22. No such system concerning imports under this procedure exists, despite the fact that the Council requested the Commission to come forward with the necessary legislative proposal by the end of 2010¹⁴.
23. The Commission issued guidelines to customs authorities on the audit of these imports. These guidelines advise them to use 'mutual assistance' in order to request further information from other Member States instead of using the administrative cooperation arrangements in force¹⁵.

¹¹ Pursuant to Article 3 of Council Directive 2008/117/EC of 16 December 2008 amending Directive 2006/112/EC on the common system of value added tax to combat tax evasion connected with intra-Community transactions (OJ L 14, 20.1.2009, p. 7).

¹² Council Regulation (EC) No 37/2009 of 16 December 2008 amending Regulation (EC) No 1798/2003 on administrative cooperation in the field of value added tax, in order to combat tax evasion connected with intra-Community transactions (OJ L 14, 20.1.2009, p. 1).

¹³ For example imports made by a suspicious trader or sensitive goods.

¹⁴ Council's second statement in Annex II to Council doc. 10430/09: 'The Council invites the Commission to promptly examine the setting up of an automatic exchange between Member States of the information collected in accordance with Articles 143(2) (a) and (b) of Directive 2006/112/EC and to come forward, when appropriate, with the necessary legislative proposals by the end of 2010'.

¹⁵ Council Regulation (EC) No 1798/2003.

- 24.** As a result two of the audited Member State customs authorities¹⁶ sent mutual assistance requests¹⁷ to their counterparts in the Member State of final destination when they had concerns about the reality of the transport of goods to the latter. In parallel, they should have used VAT administrative cooperation arrangements. Under mutual assistance customs authorities do not necessarily send the information to the tax authorities and so there is the risk that the latter are not aware that goods remain untaxed in their territory.

CONTROL IN MEMBER STATES IS DEFICIENT ...

- 25.** The previous section shows that the regulatory framework needs to be improved further as it did not fully ensure that the right information is made available to the tax authorities in the Member State of destination. Member States are primarily responsible for the prevention, deterrence, detection and correction of VAT fraud. In the case of customs procedure 42, the actions of one Member State can have a direct effect on the VAT received in another Member State.
- 26.** The following section describes how the seven Member States whose arrangements for customs procedure 42 the Court audited have fulfilled their responsibilities. The observations are based on:
- (a) a comparison between their arrangements and the Court's control model (see **Annex III**);
 - (b) an analysis of Member States' respect of the substantive requirements of this procedure (see **Annex IV**);
 - (c) information obtained from 21 Member States of destination (see footnote 6) about whether VAT had been charged in their territory (see **Annex V**).

¹⁶ Spain and Slovenia.

¹⁷ Pursuant to Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997, p. 1).

CUSTOMS AUTHORITIES IN THE AUDITED MEMBER STATES DO NOT ENSURE THE VALIDITY AND COMPLETENESS OF DATA AND THE FULFILMENT OF OTHER EXEMPTION CONDITIONS

IMPORTERS SHOULD PROVIDE VALID VAT ID. NOS TO CUSTOMS AUTHORITIES AT THE MOMENT OF IMPORT

27. If VAT ID. Nos are not provided, customs authorities cannot make the tax authorities in the Member State of importation aware of imports under this procedure. If they are not valid, the information concerning these transactions will not be accepted by VIES and thus will not reach the tax authorities in the Member State of destination.
28. In 2009, the indication of these VAT ID. Nos in the SAD was already compulsory in the seven selected Member States in accordance with their national customs rules. However, the importer's VAT ID. No was in many cases not indicated in the SAD in Spain, France and Austria, and the VAT ID. No of the final recipient of the goods was not shown in the SAD in all the imports selected in the sample in Belgium, Denmark and France (see points 1 and 3 of **Annex III**).
29. The customs electronic clearance system performs an automatic verification in VIES of the validity of the importer's VAT ID. No in Denmark and Slovenia only. The same verification is only made in respect of the final recipient's VAT ID. No. in Spain. However, this verification is not performed in any of the visited Member States before the goods are released for free circulation when they are imported under the Local Clearance Procedure. In Belgium it was possible to import goods under customs procedure 42 showing a dummy VAT ID. No in the SAD (see points 2, 3 and 4 of **Annex III**).

30. As a result, cases in which the importer's VAT ID. No was not valid at the time of the import were found in 17 of the 219 imports in the sample. These imports were made in Spain and Austria (see point 1 of **Annex IV**). The final recipient's VAT ID. No was not valid at the time of the import in another 12 of the 219 imports in the sample. These imports were in Belgium, Denmark, France and Austria (see point 2 of **Annex IV**).

THE GOODS SHOULD PHYSICALLY LEAVE THE TERRITORY OF THE IMPORTING MEMBER STATE

31. At the moment of importation it must already be certain that the goods are intended to be transported from the importing Member State to another Member State. In the Court's view¹⁸ the goods should be transported after the import without being processed into goods of a different nature. The evidence that the imported goods are intended to be transported (for example the transport document number) should be provided to customs authorities by the importer upon request. This could be ensured by referring to this evidence in the SAD and by the indication of the country of destination code therein.
32. The SAD was accepted and yet contained no reference to the evidence of the intended transport to another Member State in 205 out of the 219 imports in the sample. Even in Spain, where it is obligatory to record in the SAD the number of the transport document to the Member State of destination, this was not done in 20 out of the 30 imports audited (see points 5 and 6 of **Annex III**).
33. As ruled by the Court of Justice¹⁹, the exemption from VAT of the intra-Community supply of goods becomes applicable only when the importer demonstrates that the goods have physically left the importing Member State.

¹⁸ Based on Article 143(1)(d) of the VAT Directive.

¹⁹ Judgment of the Court of 27 September 2007 in Case C-409/04 Teleos and Others [2007] ECR I -7797, paragraph 42; Judgment of the Court of 27 September 2007 in Case C-184/05 Twoh International [2007] ECR I-7897, paragraph 23; Judgment of the Court of 18 November 2010 in Case C-84/09 X [2010] ECR I-0000, paragraph 27; Judgment of the Court of 7 December 2010 in Case C-285/09 Generalbundesanwalt beim Bundesgerichtshof, paragraph 41; and Judgment of the Court of 16 December 2010 in Case C-430/09 Euro Tyre Holding BV, paragraph 29, on the application of the first subparagraph of Article 28c(A)(a) of the Sixth Directive, which has been replaced by Article 138 (1) of the VAT Directive in force.

- 34.** No evidence was provided by the importer that the goods have physically left the territory of the importing Member State in 36 out of the 219 imports of the sample. This was particularly the case in Belgium (see point 3 of **Annex IV**). Moreover, in two cases in Belgium and one case in Spain the declared goods were car parts while the goods supplied to the Member State of destination were finished cars. In such cases it is very difficult to ensure that all the imported goods have actually been transported to another Member State (See point 4 of **Annex IV**).

²⁰ Belgium, Denmark, Spain, Slovenia and Sweden.

EX POST CHECKS WOULD FURTHER ENSURE THAT EXEMPTION CONDITIONS ARE FULFILLED

- 35.** Random and risk-based ex post checks on the fulfilment of these and other exemption conditions (see points 1 to 5 of **Annex IV**) help ensure that payment of VAT is not evaded. Such checks were absent in Belgium and Denmark (see point 9 of **Annex III**).

ESSENTIAL INFORMATION IS NOT MADE AVAILABLE

DATA ON IMPORTS UNDER CUSTOMS PROCEDURE 42 SHOULD BE MADE AVAILABLE TO THE TAX AUTHORITIES OF THE MEMBER STATE OF IMPORTATION

- 36.** The relevant information recorded in the customs electronic clearance system should, in the Court's view, be automatically sent to the tax authorities in the Member State of importation. All the imports selected in the sample were notified to tax authorities in five²⁰ of the seven Member States audited but not in Austria and, in particular, France (see point 10 of **Annex III**). However the usefulness of the data transmitted has serious limitations in Belgium and Sweden.

- 37.** The Court noted that in Belgium there are cases in which the SAD only records one item for goods destined for onward shipment to a number of other Member States, without breaking down the amount relating to each of them. This prevents the tax authorities from performing a meaningful comparison between the data received from the customs authorities and the VAT recapitulative statement.

²¹ Cf. Article 86 of the VAT Directive.

- 38.** In Sweden tax authorities were not able to identify the tax representative's VAT ID. No in the information received from the customs authorities. Here too, a comparative analysis of customs data with the VAT recapitulative statement cannot be performed.

THE INTRA-COMMUNITY SUPPLY SHOULD BE REPORTED IN THE VAT RECAPITULATIVE STATEMENT AND THE INFORMATION MADE AVAILABLE TO THE TAX AUTHORITIES OF THE MEMBER STATE OF DESTINATION VIA VIES

- 39.** The tax authorities should ensure that complete, timely and accurate information concerning the intra-Community supplies or transfers following imports under this procedure is made available to the Member State of destination using VIES.
- 40.** In Austria, Slovenia and Sweden traders systematically report the statistical value or the customs value of the import preceding the intra-Community supply in the VAT recapitulative statement. These values are lower than the VAT taxable amount of the import as the latter includes other charges such as transport costs, customs and excise duties²¹. Therefore, understated amounts are transmitted in VIES to other Member States who are not able to assess the correct VAT base.

WHEN INFORMATION CONCERNING TRANSACTIONS CANNOT BE TRANSMITTED THROUGH VIES, IT OUGHT TO BE EXCHANGED BY OTHER MEANS

- 41.** In Spain 15 out of the 30 items selected in the sample were imported by companies established in another Member State not identified for VAT purposes²² and who had not appointed a tax representative. The intra-Community supplies or transfers following such imports could therefore not be reported in a VAT recapitulative statement/VIES.
- 42.** The Spanish tax authorities did not inform other Member States using 'exchange of information without prior request' because such exchanges are either not compulsory²³ or have not been specifically foreseen for transactions following imports under customs procedure 42²⁴.

²² In contravention of Spanish tax law.

²³ Cf. Article 19 of Council Regulation (EC) No 1798/2003.

²⁴ Pursuant to Article 3 of Commission Regulation (EC) No 1925/2004 of 29 October 2004 laying down detailed rules for implementing certain provisions of Council Regulation (EC) No 1798/2003 concerning administrative cooperation in the field of value added tax (OJ L 331, 5.11.2004, p. 13).

CROSS-CHECKING OF KEY DATA IS NOT CARRIED OUT IN ALL CASES

- 43.** In order to detect cases of non-submission of the recapitulative statement and to ensure its completeness, tax authorities could implement a systematic automated comparison between the VAT taxable amount of imports recorded by the customs authorities with the amount of the intra-Community supplies or transfers declared in the recapitulative statement. The amounts in the latter should be at least equal to the former. If this is not the case a further investigation would be necessary, having regard to the risk factors arising in the case.
- 44.** Slovenia is the only Member State which has implemented an effective reconciliation. It uses IT tools to automatically compare customs data with data in the relevant VAT recapitulative statements. Differences are highlighted and assigned to a tax inspector for further investigation. However, this takes into account the statistical amount and not the VAT taxable amount (see point 11 of **Annex III**).

- 45.** In the Court's view tax authorities in the Member State of destination should cross-check the data received from other Member States via VIES with the VAT return submitted by the recipient of the goods.
- 46.** In 10 cases of the sample the intra-Community supply was reported to the Member State of destination via VIES but these Member States of destination informed the Court that the subsequent intra-Community acquisition had not been reported by the trader in his VAT return. A cross-check between VIES and the VAT return would have alerted the Member States to the discrepancy.

... AND CREATES LOSSES IN VAT COLLECTION

- 47.** Errors detected in the tests listed in **Annex IV** carried out by the Court on the sample of 219 imports made in 2009 either have a direct financial impact in the Member State of importation or a potential impact in the VAT collection of the Member State of destination. The extrapolated amount of the losses is approximately 2 200 million euro, of which 1 800 million were incurred in the seven audited Member States²⁵ and 400 million in the 21 Member States of destination of the goods imported in the sample²⁶. In the seven Member States this represents 29 % of the VAT theoretically applicable²⁷ on the taxable amount of all the imports made under customs procedure 42 in 2009.
- 48.** The extrapolated loss of 400 million euro arose in the Member States of destination for two reasons:
- Incomplete information was received from the Member State of importation²⁸. This accounts for more than 150 million euro of the extrapolated loss, and
 - the information received from the Member State of importation was not properly used: it was not cross-checked with the recipients' VAT returns. This accounts for approximately 250 million euro of the extrapolated loss.

²⁵ The VAT exemption conditions were not fulfilled in more than 10% of the items selected in the sample of Belgium, Spain and Sweden (see **Annex IV**, points 1 to 5).

²⁶ An extrapolation based upon the rates of error found by the Court in the sample of imports audited in each of the seven Member States.

²⁷ Using the average VAT rate (18,67%) applicable in the Member States of importation if all the goods imported in the sample remain there.

²⁸ The information reported in the VAT recapitulative statement was not complete in more than 10% of the items selected in the sample of Belgium, Spain, Austria and Slovenia (see **Annex IV**, point 7).

- 49.** The imports of the sample selected in the seven Member States of importation should have been followed by intra-Community supplies or transfers to 21 Member States. The Court requested these 21 Member States of destination to confirm that the goods imported were indeed supplied or transferred to a second Member State and that the corresponding intra-Community acquisitions have been declared to the tax authorities by the respective recipient of the goods. Out of the 213 items²⁹ sent for confirmation, replies were received in respect of 175³⁰. In 20 (11 %) of these it was reported that VAT had not been charged in the Member State of destination. Further details are provided in **Annex V**.

²⁹ Out of the total of 219 goods imported, 213 items were sent for confirmation. In six cases the information available on the spot did not allow the follow-up of the physical flow of the goods.

³⁰ Germany refused to reply to the Court's request. The Court notes that on 25 May 2011 the Advocate General in Case C-539/09 European Commission v Federal Republic of Germany has highlighted the close connection between the Member States' VAT revenue and the Union's revenue from own resources accruing from VAT and that the Court of Auditors has the power to review administrative cooperation in the field of VAT.

CONCLUSIONS AND RECOMMENDATIONS

- 50.** The Court found that the Commission has improved the regulatory framework but that more needs to be done. It also found that control in Member States is deficient.
- 51.** The application of customs procedure 42 has led to significant losses. Based on results of the sample tests, the extrapolated amount of the losses in 2009 is approximately around 2 200 million euro, of which 1 800 million were incurred in the seven audited Member States and 400 million in the Member States of destination of the goods imported in the sample. This represents 29 % of the VAT theoretically applicable on the taxable amount of all the imports made under customs procedure 42 in 2009 in these seven EU Member States (see paragraph 47).
- 52.** The regulatory framework allows for the collection of key data for the management of this VAT exemption at the time of importation. However further effort should be made to ensure the necessary degree of uniformity in the management of the granting of this VAT exemption by customs authorities between Member States in order to achieve the goal to 'act as if they were one'. The differences can be exploited by fraudsters (see paragraphs 14 to 17).

RECOMMENDATION 1

The Commission should amend the CCIP to implement the compulsory and uniform communication at the time of importation of the relevant VAT ID. Nos, the reference to the evidence of the intended transport to the Member State of final destination, the identification of the latter and of the VAT taxable amount of the import. This should apply equally to Local Clearance Procedures.

- 53.** The introduction of joint and several liability for not reporting information relating to intra-Community transactions following imports under this procedure would enable earlier detection of VAT evasion (see paragraph 20).

RECOMMENDATION 2

The Commission should encourage the Council to act upon its proposal to amend the VAT Directive in order to hold the importer (or his tax representative) jointly and severally liable for the VAT loss in the Member State of destination where a complete and timely VAT recapitulative statement is not submitted by him.

- 54.** The co-existence of two channels of communication (mutual assistance in the customs field and administrative cooperation for VAT purposes) between Member States and authorities of different kinds (customs and tax) hinders the seamless and streamlined communication between the competent authorities, and impedes the charging of VAT in the Member State of final destination (see paragraphs 23 and 24).

RECOMMENDATION 3

The Commission should provide guidance to Member States' competent authorities in order to clarify when to use mutual assistance or administrative cooperation.

- 55.** Customs and tax controls are not working effectively when dealing with the VAT exemption upon importation using the customs procedure 42. Cases of non-compliance with VAT exemption conditions, e.g. use of invalid VAT ID. Nos and other substantive requirements, such as the correctness of the VAT taxable amount or the submission of complete, correct and timely recapitulative statements, were found in all Member States visited (see paragraphs 27 to 35, 39 and 40).

RECOMMENDATION 4 AND 5

4. The Commission should encourage the automatic verification of the validity of VAT ID. Nos in VIES in the Member States customs electronic clearance systems.
5. The Commission should create an EU risk profile so that Member States have a common approach to performing risk-oriented and random documentary checks on imports under procedure 42 in order to verify the reality of the transport to another Member State and other exemption conditions, and the correctness of the VAT taxable amount.

- 56.** The management of the VAT exemption by two different authorities (customs and tax) hinders the effectiveness of the controls as there is no seamless communication between them concerning imports under this procedure. (see paragraphs 36 to 38).
- 57.** Automated exchange of complete and accurate information between Member States' tax authorities through VIES depends on the importer's willingness to submit a complete VAT recapitulative statement to tax authorities. The audit found little systematic cross-checking of information between customs and tax data in the Member State of importation (see paragraphs 43 and 44).

RECOMMENDATION 6

The Commission should make a proposal to amend the VAT Directive in order to identify separately the intra-Community supplies following imports under this procedure in the traders' VAT recapitulative statements. This would allow an effective reconciliation between customs and tax data in the Member State of importation.

- 58.** When it is discovered ex post that the importer is not registered for VAT purposes and has not appointed a tax representative in the Member State of importation, the information concerning the intra-Community supplies will reach the tax authorities of the Member State of destination only if those in the Member State of importation are willing to send it without prior request because currently this exchange of information is not compulsory (see paragraphs 41 and 42).

RECOMMENDATION 7

The Commission should submit a proposal to change the legislation so that Member States are obliged to exchange the information necessary for the correct charging of VAT in the Member State of destination without prior request.

- 59.** The charging of VAT in the Member State of destination also depends upon the final consignee's willingness to declare the intra-Community acquisition in the VAT return. Complete and relevant information is not always sent under administrative cooperation to tax authorities in the Member State of destination or the latter do not systematically cross-check the information received under administrative cooperation with VAT returns (see paragraphs 45 and 46).

RECOMMENDATION 8

The Commission should submit a proposal to set up a direct automatic exchange of information concerning risk-prone transactions under customs procedure 42 between the customs authorities of the Member State of importation and the tax authorities in the Member State of destination (early warning system).

This Report was adopted by Chamber IV, headed by Mr Igors LUDBORŽS, Member of the Court of Auditors, in Luxembourg at its meeting of 11 October 2011.

For the Court of Auditors



Vítor Manuel da SILVA CALDEIRA
President

DESCRIPTION OF THE PROCEDURE

When goods are imported and released for free circulation in a Member State, VAT is payable in that Member State¹. However, when at the time of importation it is already certain that the imported goods are intended to go to another Member State, the VAT is due in the Member State of final destination. This is an exemption on VAT at importation based on the fact that the import is followed by an exempt intra-Community supply or transfer of goods to another Member State².

This procedure is commonly known as 'customs procedure 42' because in such cases the importer of the goods must indicate in box 37 of the SAD a code starting with the digits 42, signifying that this is an import with 'simultaneous release for free circulation and home use of goods which are the subject of a VAT-exempt supply to another Member State³'. When goods are re-imported, code 63 should be indicated instead.

The procedure is relatively straightforward for the applicant, who submits the standard import SAD to the customs authorities of the importing Member State and indicates customs procedure code 42 (for imports) or 63 (for re-importations) in box 37. At the moment of importation it must already be certain that the goods are intended to be conveyed from the importing Member State to another Member State.

Customs authorities in the importing Member State are responsible for granting the VAT exemption. Article 131 of the VAT Directive empowers this Member State to lay down the conditions governing this exemption with a view to ensuring its correct and straightforward application and preventing any evasion, avoidance or abuse.

¹ Article 201 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) (OJ L 347, 11.12.2006, p. 1).

² Article 143(1)(d) of the VAT Directive.

³ Cf. Annex 38 of Commission Regulation (EEC) No 2454/93.

After goods have been released for free circulation in the importing Member State, they should be either supplied to a customer or directly transferred to the importer in another Member State. This supply or transfer of goods is an intra-Community transaction exempted of VAT pursuant to Articles 17 and 138 of the VAT Directive.

The importer or his tax representative must fulfil some obligations in the importing Member State, in addition to the obligations imposed on every taxable person⁴:

- (a) To be identified for VAT purposes in the importing Member State or to appoint a fiscal representative there⁵,
- (b) Either to be identified for VAT purposes in the Member State of destination in the case of transfer or to supply the goods to a customer duly identified there, and
- (c) To include this intra-Community supply or transfer in a recapitulative statement submitted to the tax authorities of the importing Member State⁶.

⁴ VAT Directive 2006/112/EC — **Article 242** 'Every taxable person shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities'. **Article 220** 'Every taxable person shall ensure that ... an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party'. **Article 250 (1)** 'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions'.

⁵ Article 214 and 204 of the VAT Directive.

⁶ Article 262 of the VAT Directive.

From the beginning of 2011⁷, the exemption shall apply only if at the time of importation the importer has provided to the competent authorities of the Member State of importation at least the following information:

- (a) his VAT identification number issued in the Member State of importation or the VAT identification number of his tax representative, liable for payment of the VAT, issued in the Member State of importation;
- (b) the VAT identification number of the customer to whom the goods are supplied in accordance with Article 138(1), issued in another Member State, or his own VAT identification number issued in the Member State in which the dispatch or transport of the goods ends when the goods are subject to a transfer in accordance with Article 138(2)(c);
- (c) the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

However, Member States may provide that the evidence referred to in point (c) be indicated to the competent authorities only upon request.

The tax authorities the Member State of importation enter the information contained in the recapitulative statement in the VIES database, making this data available for checking by the tax authorities in the Member State of destination.

The customer (supply) or the importer himself (transfer) must declare to the tax authorities an intra-Community acquisition in the Member State of destination, a taxable event that makes the VAT become chargeable in this final country of destination.

⁷ Pursuant to Articles 1 and 2 of Council Directive 2009/69/EC.

ECA CONTROL MODEL FOR CUSTOMS PROCEDURE 42

- I. Compulsory indication in box 44 of the SAD of a valid VAT ID. No of both the importer (or his tax representative) and the final consignee (customer or the importer himself in the case of transfers) in the Member State of destination. VIES verification of the validity of these VAT ID. Nos prior to the release of goods for free circulation. Otherwise, VAT is due upon importation (Cf. expected key controls Nos 1 to 4 in **Annex III**).
- II. A reference to the evidence of the intended transport to the Member State of destination, e.g. transport document No, and the country of destination code are shown, respectively, in boxes No. 44 and 17 (a) of the SAD. Otherwise the customs declaration is not accepted (Cf. expected key controls Nos 5 to 8 in **Annex III**).
- III. Customs authorities verify ex post using proper risk management techniques that transport to the Member State of destination indicated in box 17(a) of the SAD was actually carried out shortly after the import, that the goods supplied to the Member State of destination are the same as the goods imported, that the importer and the supplier of goods are the same person, and that the customs valuation and the VAT taxable amount are correct. If the requirements above are not fulfilled VAT is recovered ex post. When there is an understatement of the taxable amount, the trader is requested to correct the value of the corresponding intra-Community supplies or transfers of goods in the recapitulative statement, if necessary (Cf. expected key control No 9 in **Annex III**).

- IV. Automatic exchange of information between the customs and tax authorities of the Member State of importation concerning these imports (Cf. expected key control No 10 in **Annex III**).
- V. Tax authorities compare the information received from the customs authorities with the VAT recapitulative statement lodged by the importer (or his tax representative) in order to ensure the completeness/accuracy of the latter. If the amounts reported herein are less than the VAT taxable amount of the imports, the tax risk management system should decide whether further investigation of the difference is needed having regard to the risk factors arising in the case (Cf. expected key control No 11 in **Annex III**).
- VI. Where the recapitulative statement is not submitted or the information therein is not complete/accurate, tax authorities in the Member State of destination are informed using administrative cooperation arrangements (Cf. expected key controls Nos 12 and 13 in **Annex III**).
- VII. Tax authorities in the Member State of destination compare the information received from other Member States with the VAT returns submitted by the customer (acquirer) or the importer himself in the case of transfers (Cf. **Annex V**).

BENCHMARKING OF MEMBER STATES AGAINST THE ECA CONTROL MODEL

No	Expected key controls by customs authorities	BE	DK	ES	FR	AT	SI	SE	Grand total sample	Expected key control cannot be relied upon when:
1	Importer's (or his/her tax representative) VAT ID. No is indicated in box 44 (or elsewhere in the SAD)	Yes	Yes	No (30/30)	No (27/35)	No (13/30)	Yes	Yes	No (70/219)	2 deviations are found or 1 systematic deviation is found
2	Validity of this No was verified by customs before the release of goods and the exemption was rejected if this No was not valid	No (34/34)	Yes	No (30/30)	No (35/35)	No (29/30)	No (2/30)	No (30/30)	No (160/219)	2 deviations are found or 1 systematic deviation is found
3	Final consignee's (customer or the importer himself in the case of transfers) VAT ID. No in the MS of destination is shown in box 44	No (15/34)	No (25/30)	Yes	No (16/35)	Yes	Yes	Yes	No (56/219)	2 deviations are found or 1 systematic deviation is found
4	Validity of this No was verified by customs before the release of goods and the exemption was rejected if this No was not valid	No (32/34)	No (30/30)	No (1/30)	No (35/35)	No (30/30)	No (30/30)	No (30/30)	No (188/219)	2 deviations are found or 1 systematic deviation is found
5	Transport document No to the MS of destination is shown in box 44	No (34/34)	No (30/30)	No (20/30)	No (35/35)	No (29/30)	No (27/30)	No (30/30)	No (205/219)	2 deviations are found or 1 systematic deviation is found
6	Declaration is not accepted if transport document No is not indicated in box 44	No (34/34)	No (30/30)	No (30/30)	No (35/35)	No (30/30)	No (30/30)	No (30/30)	No (219/219)	2 deviations are found or 1 systematic deviation is found
7	Country of destination code is shown in box 17 (a)	No (13/34)	No (12/30)	Yes	No (35/35)	Yes	Yes	No (30/30)	No (90/219)	2 deviations are found or 1 systematic deviation is found
8	Declaration is not accepted if country of destination code is not shown in box 17 (a)	No (34/34)	No (30/30)	Yes	No (35/35)	Yes	Yes	No (30/30)	No (129/219)	2 deviations are found or 1 systematic deviation is found
9	Customs has ex post verified using proper risk management techniques the fulfilment of the VAT exemption conditions	No (34/34)	No (30/30)	Yes (28/30)	Yes (1/35)	Yes (2/30)	Yes (18/30)	Yes (1/30)	No (169/219)	Control is not performed on a minimum of 2 % of the sample items
10	Imports were notified to tax authorities	Yes	Yes	Yes	No (35/35)	No (4/30)	Yes	Yes	No (39/219)	2 deviations are found or 1 systematic deviation is found
No	Expected key controls by tax authorities	BE	DK	ES	FR	AT	SI	SE	Grand total sample	Expected key control cannot be relied upon when:
11	Tax authorities have verified the completeness and accuracy of the recapitulative statement by comparing the information received from customs with it	No (34/34)	No (30/30)	No (30/30)	No (35/35)	No (30/30)	No (12/30)	No (29/30)	No (200/219)	2 deviations are found or 1 systematic deviation is found
12	The information collected in the recapitulative statement is fully shown in VIES	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	2 deviations are found or 1 systematic deviation is found
13	Where the recapitulative statement is not submitted or the information thereof is not complete tax authorities in the MS of destination are informed using administrative cooperation arrangements	No (4/34)	Yes	No (15/30)	Yes	No (28/30)	No (12/30)	Yes	No (59/219)	2 deviations are found or 1 systematic deviation is found

RESULTS OF THE TESTING OF EXEMPTION AND OTHER SUBSTANTIVE CONDITIONS

No	Are the following exemption conditions fulfilled?	BE	DK	ES	FR	AT	SI	SE	Grand total sample	Substantive testing
1	The importer's (or tax representative's) VAT ID. No was valid at the moment of the importation	Yes	Yes	No (15/30)	Yes	No (2/30)	Yes	Yes	No (17/219)	Error has a direct financial impact in the MS of importation
2	The final consignee's VAT ID. No was valid at the moment of the importation	No (6/34)	No (1/30)	Yes	No (4/35)	No (1/30)	Yes	Yes	No (12/219)	Error has a direct financial impact in the MS of importation
3	There is evidence that the transport to the MS of destination shown in box 17 (a) was actually carried out shortly after the import	No (20/34)	No (1/30)	No (2/30)	Yes	Yes	No (1/30)	No (12/30)	No (36/219)	Error has a direct financial impact in the MS of importation
4	The goods supplied to the MS of destination are identical to the goods imported	No (2/34)	Yes	No (1/30)	Yes	Yes	Yes	Yes	No (3/219)	Error has a direct financial impact in the MS of importation
5	The importer and the supplier of goods are the same person (but a tax representative can be appointed to act on his/her behalf)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Error has a direct financial impact in the MS of importation
No	Other substantive requirements	BE	DK	ES	FR	AT	SI	SE	Grand total sample	Substantive testing
6	Customs valuation and VAT basis for taxation are correct	No (1/34)	Yes	Yes	Yes	Yes	No (4/30)	No (2/30)	No (7/219)	Error has a potential financial impact in the MS of destination
7	A complete recapitulative statement including the intra-Community supply or transfer following the imports above has been submitted	No (8/34)	No (2/30)	No (16/30)	Yes	No (28/30)	No (13/30)	No (3/30)	No (70/219)	Error has a potential financial impact in the MS of destination

CONFIRMATION OF VAT TAXATION IN THE MEMBER STATES OF DESTINATION

GROUPED BY MEMBER STATE OF IMPORTATION

VAT charged?	BE	DK	ES	FR	AT	SI	SE	Grand total
Yes	18	19	28	25	14	24	27	155
No	2	2	2	4	7	3	0	20
No reply	8	9	0	6	9	3	3	38
Grand total	28	30	30	35	30	30	30	213
% of replies Yes	90 %	90 %	93 %	86 %	67 %	89 %	100 %	89 %
% of replies No	10 %	10 %	7 %	14 %	33 %	11 %	0 %	11 %

GROUPED BY MEMBER STATE OF DESTINATION

VAT charged?	BE	BG	CZ	DK	DE	IE	ES	FR	IT	IT	HU	MT	NL	RO	AT	PL	PT	SK	FI	SE	UK	Grand total
Yes	7	2	4	2	0	1	12	31	25	2	6	0	8	1	8	10	13	7	2	0	14	155
No	3	0	0	0	0	0	2	2	2	0	2	1	1	0	0	0	2	4	0	1	0	20
No reply	0	0	0	0	34	0	0	0	0	0	0	0	2	0	0	0	0	0	0	1	1	38
Grand total	10	2	4	2	34	1	14	33	27	2	8	1	11	1	8	10	15	11	2	2	15	213
% of replies Yes	70 %	100 %	100 %	100 %	NA	100 %	86 %	94 %	93 %	100 %	75 %	0 %	89 %	100 %	100 %	100 %	87 %	64 %	100 %	0 %	100 %	89 %
% of replies No	30 %	0 %	0 %	0 %	NA	0 %	14 %	6 %	7 %	0 %	25 %	100 %	11 %	0 %	0 %	0 %	13 %	36 %	0 %	100 %	0 %	11 %

REPLY OF THE COMMISSION

EXECUTIVE SUMMARY

I.

In the area of VAT, the legal basis for adopting new legislation is covered by Article 113 of the Treaty on the Functioning of the European Union, whereby new legislation proposed by the Commission needs to be adopted unanimously by the Council.

Furthermore, the subsidiarity principle does not allow the Commission to regulate on the way the Member States control and collect the payment of VAT. The examples provided in the observations in this report fall mainly, if not exclusively, under the Member States' competence.

On the other hand, insofar as a Member State encounters difficulties with respect to the collection of VAT, the Commission is always prepared to engage into discussions with that Member State in order to try and find EU solutions to these problems in the various fora available (e.g. the Standing Committee for Administrative Co-operation (SCAC), Fiscalis working groups, the Anti Tax Fraud Strategy Group (ATFS), Customs working groups, etc).

As concerns the specific exemption of VAT payment upon importation (so called 'customs procedure 42'), the Commission became aware of this problem since 2006. It has set up a Fiscalis project group to investigate the problem and come forward with recommendations for solutions. This led to the modification of Article 143(2) of the VAT Directive, where the conditions for applying the exemption were specified in a more detailed manner. This revised Article 143(2) is applicable as of 1 January 2011.

To support the implementation of the VAT Directive the customs authorities agreed in an administrative arrangement on a harmonised approach as regards completing customs declarations with VAT numbers. Taking into account the need to change the national IT customs declarations' systems the arrangement will be applicable in all Member States by 1 January 2013 at the latest.

IV.

Since 2011 several initiatives to improve the situation have been implemented with the aim to permit more targeted information on transactions in the field of customs procedure 42 between the Member States concerned. The Commission will evaluate the effectiveness of these measures together with the Member States and is prepared to take appropriate action (including proposals to change the legislation).

V. (a)

The tables in Annexes III and IV show that customs authorities ensured the validity and completeness of some key data.

V. (b)

See reply to paragraph IV above.

VI.

The audits carried out by the Court in Member States cover the period before the new legislation entered into force and before the administrative arrangement has been implemented by all Member States. The Commission expects an improvement in the situation.

REPLY OF THE COMMISSION

VII. (a)

Since 2011 several initiatives to improve the situation have been implemented. The Commission will evaluate the effectiveness of these measures together with the Member States and is prepared to take appropriate action (including proposals to change the legislation) if necessary.

VII. (b)

The Commission agrees to encourage the Council to resume the discussions as soon as possible.

VII. (c)

The Commission agrees to encourage Member States to provide automatic access for customs to VAT Information Exchange System (VIES) in order to ensure an effective control of the customs procedure 42.

VII. (d)

The Commission will actively support any initiative (in the MS) that could lead to the creation of an EU risk profile, however until now the Member States agreed to work within the anti-fraud network Eurofisc where the risk analysis is kept at national level.

VII. (e)

The Commission has explored this possibility with Member States, who prefer a targeted exchange of information via Eurofisc. An amendment of the VAT Directive does therefore not seem foreseeable nor does it find the unanimous support by Member States that is necessary for legislative proposals in taxation.

VII. (f)

The Commission considers that such automatic communication between customs of the Member State of importation and tax authorities of the Member State of destination would be highly complex due to two different legal bases in the Treaty. A more pragmatic solution would therefore be that the flow of information takes place in the Member State of importation between the national customs and tax authorities. Tax authorities in the Member State of importation would subsequently communicate to tax authorities in the Member State of destination under the existing administrative cooperation rules.

Information on imports using the customs procedure 42 should be closely monitored through a separate working field within Eurofisc where it is already targeted and transmitted faster than via the VAT recapitulative statement. An amendment of the VAT Directive or of the Regulation on administrative cooperation and combating fraud in the field of value added tax¹ does therefore not seem necessary nor is it supported by Member States.

¹ Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) (OJ L 368/1, 12.10.2010).

REPLY OF THE COMMISSION

INTRODUCTION

3. (a)

Whereas Article 143(2) of the VAT Directive sets out the framework for the exemption, it is up to Member States to implement it.

3. (b)

The VAT Directive requires that information is provided to the competent authorities of the Member State. In practice, information is usually provided to customs authorities.

3. (f)

The comparison of the acquirer's VAT return with the information available in VIES is part of the normal domestic control procedures.

Box

In the fictitious example chosen by the Court the VAT can be reclaimed according to the principles laid down in the VAT Directive either in Member State 1, i.e. the Member State of importation, because the exemption was granted unduly or in Member State 2 because it has been indicated as the country of destination.

OBSERVATIONS

12.

The audits carried out by the Court in Member States covered the period before the new Article 143(2) of the VAT Directive, which specifies the conditions for applying the exemption of VAT payment in a more detailed manner than in the past, entered into force. In addition, the administrative arrangement between customs authorities which will be implemented by all Member States at the latest by 1 January 2013 is expected to substantially improve the situation. The Commission will carefully monitor the implementation.

15.

In order to reflect the new requirements of the VAT Directive in the customs area a unanimously agreed administrative arrangement for the Single Administrative Document was made and will be implemented by all Member States at the latest by 1 January 2013. This enables harmonised information to be provided in a customs declaration when customs procedure 42 is applied. The Commission will evaluate the effectiveness of this measure together with the Member States and is prepared to take appropriate action (including proposals to change the legislation, where necessary).

REPLY OF THE COMMISSION

16.

The Commission Regulation 312/2009 provides standards for the SAD boxes used to indicate the person and its identification numbers to be used in a customs declaration. Having noticed that national arrangements for the implementation of code 42 were divergent, the administrative arrangement agreed with Member States further harmonised rules on filling the requested VAT numbers in box 44 of the customs declaration. The advantage of having this obligation in an administrative arrangement — which has been agreed upon by all Member States — is to ensure harmonisation while providing the possibility to amend it quickly. This arrangement will be implemented at the latest by 1 January 2013.

As regards the indication of the code for the country of destination the Commission has already discussed with Member States the idea to make it mandatory in the framework of the implementation of the Modernised Customs Code.

See also reply under 31.

17.

The Commission is of the opinion that a special reporting requirement to communicate VAT ID numbers at the moment of importation would not meet trade facilitation purposes intended by the simplified procedures. VAT ID numbers are, however, available and communicated at the moment when supplementary declaration is lodged. In addition, simplified procedures are available only to the reliable traders, i.e. economic operators fulfilling some of the Authorised Economic Operator's criteria (Article 253c CCIP) and having been subjected to an audit (Article 253b (4) CCIP). Rules are laid down also for the reassessment of every authorisation for simplified procedures (Article 253 (8) CCIP).

19.

The Commission in the course of 2009 and 2010 raised and discussed the problem of Denmark in ATFS (Anti Tax Fraud Strategy Group) and SCAC (Standing Committee on administrative cooperation).

As of 1 July 2011 the situation for Denmark has been remedied and Denmark is now also applying the community *acquis* in this field.

21.

Eurofisc is intended to cover this.

The Commission considers that communication between customs (in the Member State of importation) and tax authorities (in the Member State of destination) as suggested by the Court would be highly complex due to two different legal bases. The Commission is of the opinion that a more pragmatic solution would therefore be that the flow of information takes place in the Member State of importation between customs and tax authorities. Tax authorities in the Member State of importation would subsequently communicate to tax authorities in the Member State of destination under the existing VAT administrative cooperation rules.

22.

The Commission considers that the need to respond to the request from the Council was made obsolete by the creation of the working field on customs 4200 imports under Eurofisc, which is an early warning system for these transactions.

REPLY OF THE COMMISSION

23.

The Commission will propose to amend the Customs Audit Guide. To this end a Customs 2013 project group is being created with participation of Member States' auditors who will also look at the recommendations for audit on customs procedure code 42.

24.

In addition to the formalised automatic exchange of information, Member States can also spontaneously exchange information with their counterparts from other Member States.

27.

The Commission has encouraged Member States to grant their customs authorities automatic access to VIES and will keep doing so.

28.

The Commission has confirmed in April 2011 with Spain, France and Austria that they have now implemented the requirement to provide VAT numbers in customs declarations. Belgium and Denmark were going to take measures to better implement the requirements for collecting of the VAT ID. No of the final recipient of the goods.

Joint reply to 31 and 32

The Commission will reflect on the possibility to indicate the existence of the evidence of the intended transport in the SAD.

As regards the indication of the code for the country of destination the Commission has already discussed with Member States to make it mandatory in the framework of the implementation of the Modernised Customs Code.

37.

The current rules foresee that for each item (i.e. goods falling under the same tariff sub-heading) there is one customs declaration.

41.

In the case mentioned by the Court, if no tax representative is appointed the Member State of importation should refuse the exemption for VAT. According to the information of the Commission, the situation in Spain has since been addressed.

42.

Under the provisions of the newly adopted legislation in the field of Article 143, a Member State should refuse the exemption. If irregularities have been identified today, this could best be communicated to other Member States concerned using Eurofisc.

43.

This checking (comparison between the VAT taxable amount of imports by customs authorities with the amount of the intra-Community supplies or transfers declared in the recapitulative statement) would be fully effective only provided recommendation 6 were implemented.

45.

The Commission agrees with the Court.

46.

As mentioned in the introduction, Member States are responsible for controlling and collecting the VAT. VIES is a tool offered to Member States to better exchange information in the field of VAT for cross border transactions and assist them in the before mentioned tasks.

REPLY OF THE COMMISSION

CONCLUSIONS AND RECOMMENDATIONS

Joint reply 47 and 48

The Commission notes that the sample tested by the Court concerned 2009, whereas the amended legislation entered into force only in 2011 in order to improve the collection system.

50.

The EU regulatory framework is the responsibility of the Commission, the Council and the Member States.

Since 2006 the Commission has made several proposals to improve the regulatory framework².

51.

With amended Article 143 entering into force on 1 January 2011 the legislation has improved considerably. Customs and tax administrations are fully aware of the problem concerning the need to cooperate in order to ensure a correct application of the exemption for VAT payment and consequently have started to cooperate better: Member States have set up in November 2010 a specific working field under Eurofisc in order to monitor transactions under customs procedure 42 closely.

Recommendation 1

Since 2011 several initiatives to improve the situation have been implemented (see above). The Commission will evaluate the effectiveness of these measures together with the Member States and is prepared to take appropriate action (including proposals to change the legislation) if necessary.

² **Council Directive 2008/117/EC** of 16 December 2008 amending Directive 2006/116/EC on the common system of VAT to combat tax evasion connected with intra-Community transactions. This reduced the timeframes for submitting recapitulative statements; **Council Directive 2009/69/EU** of 25 June 2009 amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to imports. This proposal is also still on the table of Council for the part relating to the joint and several liability; **Council Directive 2010/24/EU** of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. The directive intends to improve the capacity of Member States in cross border collection of taxes; **Council Regulation 904/2010/EU** of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT and repealing Regulation 1798/2003. The regulation aims to strengthen administrative cooperation between Member States. Some of the new measures that are incorporated in this regulation are: a legal base for setting up Eurofisc, common minimum standards for the registration and deregistration of taxable persons, an improvement of the VIES system and automated access to data.

REPLY OF THE COMMISSION

Recommendation 2

The Commission agrees to encourage the Council to resume the discussions as soon as possible.

54.

The two channels of communication are the result of different articles of the EU Treaty created for different purposes and reflecting different EU powers in customs and taxation.

Recommendation 3

The Commission provides guidance under different fora (e.g. in Fiscalis project groups, SCAC, etc.) The Commission will also propose to amend the Customs Audit Guide.

Recommendations 4 and 5

4.

The Commission has been informed recently by Member States that they are working on granting the customs authorities access to the VIES system where this is not the case yet.

5.

The Commission will actively support any initiative that could lead to the creation of an EU risk profile. However, until now, Member States agreed to work within Eurofisc, whereas the risk analysis continues to be kept at national level. The results are shared with all other Member States.

56.

Cooperation between customs and tax authorities in this field is improving following the efforts undertaken by the Commission in this field, e.g. Fiscalis Project Group 29, Customs Code Committee, SCAC, ATFS, joint customs and tax seminars.

57.

This checking (comparison between the VAT taxable amount of imports by customs authorities with the amount of the intra-Community supplies or transfers declared in the recapitulative statement) would be fully effective only provided recommendation 6 were implemented.

Recommendation 6

The Commission has explored this possibility with Member States who prefer a targeted exchange of information via Eurofisc. An amendment of the VAT Directive does therefore not seem foreseeable nor does it find the unanimous support by Member States that is necessary for legislative proposals in taxation.

58.

The Commission would like to point to its answers under paragraphs 41 and 42.

Recommendation 7

The Commission is currently revising the transactions for which Member States are obliged to automatically exchange information. Member States are however reluctant to include transactions under customs procedure 42 as these transactions are intended to be dealt with more efficiently through Eurofisc.

REPLY OF THE COMMISSION

Recommendation 8

The Commission considers that such automatic communication between customs of the Member State of importation and tax authorities of the Member State of destination would be highly complex due to two different legal bases in the Treaty. A more pragmatic solution would therefore be that the flow of information takes place in the Member State of importation between the national customs and tax authorities. Tax authorities in the Member State of importation would subsequently communicate to tax authorities in the Member State of destination under the existing administrative cooperation rules.

Information on imports using the customs procedure 42 should be closely monitored through a separate working field within Eurofisc where it is already targeted and transmitted faster than via the VAT recapitulative statement. An amendment of the VAT Directive or of the Regulation on administrative cooperation and combating fraud in the field of value added tax does therefore not seem necessary nor is it supported by Member States.

European Court of Auditors

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CUSTOMS PROCEDURE 42 IS THE REGIME AN IMPORTER USES IN ORDER TO OBTAIN A VAT EXEMPTION WHEN THE IMPORTED GOODS WILL BE TRANSPORTED TO ANOTHER MEMBER STATE. IN THE ABSENCE OF PROPER CONTROL, GOODS RISK REMAINING IN THE MEMBER STATE OF IMPORTATION WITHOUT PAYMENT OF VAT OR BEING CONSUMED IN THE MEMBER STATE OF DESTINATION WITHOUT VAT BEING CHARGED THERE. THE REPORT FOUND THAT CONTROL OF THIS PROCEDURE IN SEVEN SELECTED MEMBER STATES IS DEFICIENT AND HAS LED TO SIGNIFICANT VAT LOSSES. THE REPORT RECOMMENDS, INTER ALIA, IMPROVING THE COMMUNICATION OF KEY DATA WITHIN AND BETWEEN MEMBER STATES, ENCOURAGING THE AUTOMATIC VERIFICATION OF VAT IDENTIFICATION NUMBERS, CREATING A COMMON EU RISK PROFILE FOR IMPORTS UNDER PROCEDURE 42 AND ENCOURAGING ACTION ON A PROPOSED AMENDMENT OF THE VAT DIRECTIVE.



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