Council Regulation (EU) 2018/1541 of 2 October 2018 amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax

COUNCIL REGULATION (EU) 2018/1541

of 2 October 2018

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The current system for the taxation of trade between Member States is based on transitional arrangements introduced in 1993 which have become outdated and prone to fraud in the context of a highly complex value added tax (VAT) system. In October 2017, the Commission put forward a legislative proposal setting out the principles for a definitive VAT system for cross-border business-to-business trade between Member States that would be based on the taxation of cross-border supplies in the Member State of destination. Given the fact that it could take several years for the definitive VAT system for intra-Union trade to be fully implemented, short-term measures are needed to combat cross-border VAT fraud more effectively and in a more timely manner. Improving and simplifying the administrative cooperation instruments, in particular Eurofisc, is also of significant importance in the fight against VAT fraud in general and to strengthen trust between tax authorities before the definitive VAT regime is introduced.

(2) Carrying out an administrative enquiry is often necessary to combat VAT fraud in particular when the taxable person is not established in the Member States where the tax is due. To ensure the proper enforcement of VAT and to avoid duplication of work and administrative burden of tax authorities and business, where at least two Member States consider that an administrative enquiry into the amounts declared by a taxable person not established on their territory but taxable therein is necessary, the Member State where the taxable person is established should undertake the enquiry unless it is able to provide the information requested. The requiring Member States should stand ready

to assist the Member State of establishment by taking part actively in the enquiry. As the officials of the requesting Member States might have better knowledge of the facts and circumstances of the case and where the requested Member State has not required officials from the requesting Member States the officials of the latter should be able to be present during the administrative enquiry in so far as conditions under national law of the requested Member State for such a presence are met. In this occasion the officials of the requesting Member States should have access to the same premises and documents as the officials of the requested Member State through their intermediation. Where the legislation of the requested Member State contains such conditions for providing the presence it should be assumed that the requested Member State shall undertake the necessary actions to satisfy these conditions. In any case, officials from the requesting Member States should, where they deem it necessary, have the possibility to be present for consultation on the enquiry in the requested Member State with its officials after informing them. The purpose of such consultation could be to exchange views and information about the development of the enquiry and to propose and discuss possible actions.

(3) Forwarding information without a prior request to the competent authorities of other Member States in accordance with Council Regulation (EU) No 904/2010[(3)] should be as simple and effective as possible. It is therefore necessary to allow competent authorities to forward information by means other than the standard forms when they deem other secure means more appropriate and agree to use them or when the information has been received from a third country.

(4) The VAT exemption for the imports of goods provided for in Article 143(2) of Council Directive 2006/112/EC[(4)] ('customs procedures 42 and 63') is often abused and goods are diverted to the black market without VAT having been paid. It is therefore essential that customs officials, when checking whether the requirements for applying the exemption are met, have access to the registry of VAT identification numbers and the recapitulative statements. Furthermore, the information collated by the customs authorities, as part of this procedure, should also be made available to the competent authorities of the Member State where the subsequent intra-Community acquisition should take place.

(5) In order to tackle fraud arising from the dual VAT regime applicable to cars, Eurofisc liaison officials should be able to access vehicle registration data in an automated way. It would allow them to identify swiftly who has committed the fraudulent transactions and where. Such access should be made available via the European Vehicle and Driving Licence Information System (EUCARIS) software application, whose use is mandatory for Member States under Council Decisions 2008/615/JHA[(5)] and 2008/616/JHA[(6)], as regards vehicle registration data.

(6) In order to ensure uniform conditions for the implementation of the provisions on automated access to information collated by the customs authorities and to vehicle registration data, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[(7)].

***Changes to legislation:** There are currently no known outstanding effects for the Council Regulation (EU) 2018/1541. (See end of Document for details)*

(7) For the purpose of ensuring the effective and efficient monitoring of VAT on cross-border transactions, Regulation (EU) No 904/2010 provides for the presence of officials in administrative offices and during administrative enquiries in other Member States. In order to strengthen the capacity of tax authorities to check cross-border supplies, there should be administrative enquiries carried out jointly enabling officials from two or more Member States to form a single team and actively take part in an administrative enquiry carried out jointly.

(8) In order to combat the most serious cross-border frauds, it is necessary to clarify and strengthen the governance, tasks and functioning of Eurofisc. Eurofisc liaison officials should be able to access, exchange, process and analyse all necessary information swiftly and coordinate any follow-up actions. However, such coordination does not imply a right for requiring any specific enquiry actions from the participating Member State. It is also necessary to strengthen the fight against VAT fraud at Union level, in particular by enabling Eurofisc working field coordinators to request targeted information from the European Union Agency for Law Enforcement Cooperation ('Europol') and the European Anti-Fraud Office ('OLAF'). Therefore, in order to receive relevant information in return held by Europol and OLAF, Eurofisc working field coordinators should be able to send as much information as necessary to Europol and OLAF.

(9) In order to ensure uniform conditions for the implementation of the provisions on Eurofisc, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.

(10) Organising the forwarding of requests for VAT refunds pursuant to Article 5 of Council Directive 2008/9/EC[(8)] offers an opportunity to reduce the administrative burden for the competent authorities to recover unpaid tax liabilities in the Member State of establishment.

(11) Member States may also communicate to OLAF relevant information where they consider it appropriate. This would enable OLAF to fulfil its mandate to carry out administrative investigations into fraud, corruption and other illegal activities affecting the financial interests of the Union, and to provide assistance to the Member States in order to coordinate their action to protect the financial interests of the Union against fraud.

(12) The Commission may have access to the information communicated or collected pursuant to Regulation (EU) No 904/2010 only in so far as it is necessary for care, maintenance and development of the electronic systems hosted by the Commission and used by the Member States for the purpose of this Regulation.

(13) Regulation (EU) 2016/679 of the European Parliament and of the Council[(9)] applies to the processing of personal data for the purpose of Regulation (EU) No 904/2010. Regulation (EC) No 45/2001 of the European Parliament and of the Council[(10)] applies to the processing of personal data by the Union institutions and bodies for the purpose of that Regulation. The fight against VAT fraud is recognised as an important objective of general public interest of both the Union and its Member States. For the purposes

of achieving the objectives of Regulation (EU) No 904/2010, namely the objective to cooperate and to exchange information that helps to effect a correct assessment of VAT, to monitor correct application of VAT, particularly on intra-Community transactions, and to combat VAT fraud, it is appropriate to provide for specific and limited restrictions on certain rights and obligations laid down by Regulation (EU) 2016/679.

(14) More specifically, full application of the rights and obligations foreseen in Regulation (EU) 2016/679 would seriously undermine the effectiveness of the fight against VAT fraud as it would in particular allow the data subjects to obstruct ongoing investigations and risk profiling. This would jeopardise official or legal enquiries, analyses, investigations or procedures that are carried out in accordance with Regulation (EU) No 904/2010. It would also disable the administrative cooperation between the competent authorities which is a key instrument for the purpose of combating VAT fraud. Consequently, restrictions should be provided as regards the right for transparent information, the right to receive information where personal data are collected from the data subject, the right to receive information where personal data have not been obtained from the data subject, the right of access by the data subject, the right to erasure, the right to object to processing of personal data and the right concerning automated individual decision-making, including profiling. Exercise of these rights should be restricted only as long as it is necessary in order not to undermine the purposes pursued under Article 1 of Regulation (EU) No 904/2010. This restriction should only apply as regards certain categories of data referred to in Articles 1, 14 and 17 of that Regulation to the extent it is strictly necessary in order to ensure compliance with VAT legislation, and the relevant provisions of this Regulation.

(15) As the objective of preventing, investigating and detecting VAT evasion and VAT fraud cannot be achieved by other less restrictive means of equal effectiveness, these restrictions are strictly necessary for the purpose of achieving the specific purpose in question. They are also proportionate in view of the loss of revenue for the Union and the Member States and the crucial importance of making information available in order to combat fraud effectively. The processing and the storage of information collected and exchanged under this Regulation is limited to the objectives of fight against VAT fraud. Information collected and exchanged under this Regulation does not concern sensitive data. It may not be further processed in a way that is incompatible with such purposes, including prohibition to process it for commercial purposes. As regards the safeguards to prevent abuse or unlawful access or transfer, Regulation (EU) No 904/2010 already provides detailed conditions concerning the access of the competent national authorities to the data and their subsequent use in order to achieve the general aim of that Regulation. The data retention period should be limited to what is necessary for the purpose of achieving the objectives pursued.

(16) As Council Regulation (EU) 2017/2454[(11)] has also amended Article 17 of Regulation (EU) No 904/2010, with application from 1 January 2021, it is necessary to amend Regulation(EU) 2017/2454 in order to update the relevant cross-references to that Article. As Regulation (EU) 2017/2454 has also amended Annex I to Regulation (EU) No 904/2010, with application from 1 January 2021, it is necessary to amend

Regulation (EU) 2017/2454 as Annex I is no longer necessary and therefore should be deleted.

(17) As the implementation of the provisions on the automated access to the information collated by the customs authorities and to vehicle registration data will require new technological developments, it is necessary to defer their application to allow the Member States and the Commission to carry out those developments.

(18) Since the objectives of this Regulation, namely improving the cooperation instruments between Member States and combating cross-border fraud in the field of VAT, cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(19) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered its formal comments on 21 March 2018.

(20) Regulation (EU) No 904/2010 and Regulation (EU) 2017/2454 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) No 904/2010

Regulation (EU) No 904/2010 is amended as follows:

(1) Article 7 is amended as follows:

(a) paragraph 3 is deleted;

(b) paragraph 4 is replaced by the following:

4. The request referred to in paragraph 1 may contain a reasoned request for a specific administrative enquiry. The requested authority shall undertake the administrative enquiry in consultation of the requesting authority where necessary. If the requested authority takes the view that no administrative enquiry is necessary, it shall immediately inform the requesting authority of the reasons thereof.

Notwithstanding the first subparagraph, an enquiry into the amounts declared or those that should have been declared by a taxable person established in the Member State of the requested authority, in connection with supplies of goods or services which are made by this taxable person and which are taxable in the Member State of the requesting authority, may be refused solely on any of the following grounds:

a on the grounds provided for in Article 54(1), assessed by the requested authority in conformity with a statement of best practices concerning the interaction of this paragraph and Article 54(1),