Introduction

1. This document describes good practice with regard to the use of voluntary disclosure schemes in the field of VAT, outside situations of VAT fraud.

   This agenda point has been raised for discussion, taking into account the wish to promote an environment where businesses are encouraged to disclose errors.

2. The participants agreed that voluntary disclosure programmes could be beneficial for business and Member States.

3. The features and conditions of voluntary disclosure schemes – in so far as they exist in the Member States – are quite different.

4. Part 1 of this document contains an overview of general considerations concerning the features and conditions of a voluntary disclosure programme, based on the information collected so far and the discussions held during the TABECFAF meetings of 17 November 2014 and 13 January 2015 and the EU VAT FORUM meeting of 11 May 2015.

5. The above meetings paid a lot of attention to national practices with regard to sanctions imposed in case of voluntary disclosure. On the basis of these discussions, part 2 of this document provides a more detailed list of good practices with regard to sanctions in relation to the use of voluntary disclosure programmes.
Part 1

General considerations concerning the features and conditions of voluntary disclosure programmes

1. Voluntary disclosure of errors as an incentive for a correct application of the VAT rules

1.1. The VAT legislation is complex and multiple obligations are imposed on taxable persons. Even attentive taxable persons can make mistakes (just as attentive VAT officials).

1.2. As taxable persons play a key role in the collection of VAT, they should be encouraged in their efforts to be compliant with the VAT rules. A voluntary disclosure scheme, encouraging taxable persons to correct previous mistakes on their own initiative, contributes to a climate of good cooperation between taxable persons and the VAT authorities.\(^1\)

1.3. Voluntary disclosure schemes should be clearly distinguished from tax amnesty measures.

1.4. The principle of equal treatment does not require that a taxable person applying a voluntary disclosure scheme should automatically be treated in exactly the same manner as a taxable person who has been consistently compliant, since these persons are not in a comparable situation.\(^2\)

1.5. Voluntary disclosure schemes should not be abused. Therefore, they shouldn’t discharge taxable persons from their VAT obligations in general (due diligence) and they should ensure that taxpayers cannot unduly obtain an advantage from their earlier non-compliance.

1.6. It is for the internal legal order of each Member State to lay down the conditions and consequences relating to voluntary disclosure. But when determining these conditions and consequences, it is a good practice to take into account the principle of proportionality and to distinguish different situations, taking account of (e.g.) the behaviour of the taxable person concerned in relation to the mistake and over a period of time, the type of mistake committed (genuine errors or gross negligence), and the financial impact on the Member State’s revenue (interest).

It appears that some Member States have chosen not to impose any sanction in the case of voluntary disclosure (of ‘genuine’ errors), while others seem to apply a (small or a larger) penalty, interest or a fee for late disclosure in all circumstances.

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\(^{2}\) Cf. EUCJ 17.09.2014, C-3/13, Baltic Agro, point 44 (concerning customs).

Taxud-EU-VAT-Forum@ec.europa.eu
Imposing a compensation for extra costs incurred by the tax authorities – respecting the principle of proportionality – may be considered as an incentive to promote compliant behaviour, taking into consideration the specific circumstances of the case, the actions taken by the taxpayer and whether there was any revenue impact for the Member States and if so to which extent.

2. **Time frame for making a voluntary disclosure?**

2.1. Some Member States do not allow the benefit of the voluntary disclosure scheme after (the announcement of) a tax audit or a tax assessment being issued for a certain tax period. It is considered that in the case of prompted disclosures, triggered by an audit (announcement) or a tax assessment, Member States can refuse a (full) waiver of penalties. One Member State however indicated that taxable persons under investigation can in any case sign an agreement acknowledging non-compliance elements and obtain a reduced penalty or interest charge (under the condition of full settlement in one month’s time).

In other situations where the person detecting an error did not report it without unjustified delay, it would be a good practice to take into account the circumstances of the voluntary disclosure in any decision about applying measures that go beyond the recovery of the tax loss.

2.2. At the same time, it has been observed that errors (or a misinterpretation by the taxpayer of the law) can remain unnoticed for years, both for the taxpayer acting in good faith as for the tax authorities. For instance, errors can be revealed by a judgment delivered much later. Therefore, the fact that a voluntary disclosure is made a long time after the occurrence of the error should not automatically exclude the benefit of the voluntary disclosure scheme.

2.3. This question is also influenced by the following aspects:
- the length of the VAT return periods in each Member State;
- the fact that when tax authorities and business have regular electronic exchanges, also in certain cases with a specific account for each taxpayer, correction of errors is part of the electronic return and payment process. So, changes in the tax return would not be considered as part of a voluntary disclosure scheme but as part of the “normal” business process.
Part 2
Voluntary disclosure and sanctions

1. General considerations

1.1. In the absence of the harmonisation of European Union legislation in the field of penalties applicable in cases where conditions laid down by arrangements under such legislation are not complied with, Member States retain the power to choose the penalties which seem to them to be appropriate (see EUCJ 06.02.2014, C-424/12, Fatorie, point 50).

1.2. When exercising this competence, it is a good practice to ensure that sanctions have a deterrent effect, depending on the circumstances. This implies that voluntary disclosure schemes are not meant to mitigate sanctions in case of fraud.

1.3. When exercising this competence to determine and fix the levels of penalties, it is a good practice to ensure that the penalty system encourages taxable persons to be compliant.

At the same time, it was noted that voluntary disclosure schemes are not meant to put a taxable person in a better position than if he would have been compliant from the start.

2. Proportionality of sanctions

2.1. Principle: all sanctions imposed must respect the principle of proportionality.

- EUCJ 06.02.2014, C-424/12, Fatorie:

50 Concerning the default interest, it must be observed that, in the absence of harmonisation of European Union legislation in the field of the penalties applicable in cases where conditions laid down by arrangements under such legislation are not complied with, Member States retain the power to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles, and, consequently, in accordance with the principle of


2.2. It is a good practice to have a voluntary disclosure scheme allowing taxable persons to correct errors, committed in good faith, without incurring a sanction. However, the following restrictions could be applied:

   a) This should not be guaranteed in situations of gross negligence, fraud or evasion or abuse (e.g. if a taxable person regularly makes the same errors, leading to a late payment of the VAT due on his transactions).

   b) It should not prevent the authorities from imposing interest at a reasonable rate, in so far as the error led to a financial disadvantage for the authorities (e.g. such a financial disadvantage could result from the deduction of non-deductible input VAT or the erroneous application of a reduced VAT rate).

2.3. It is a good practice that sanctions take account of the gravity of the offence. In this regard, the following should be observed:

   a) Sanctions can be more severe if the same offence is repeated or if there are multiple offences. Sanctions should however not necessarily be increased due to repeated/multiple offences if the previous "offences" related to situations where the rules were not clear, precise and foreseeable, or where the taxable person could rely on his legitimate expectations. A "continued" offence (e.g. a reporting error with regard to specific transactions that is always repeated) should not automatically be considered as a situation of "repeated or multiple" errors, implying an accumulation of sanctions for each of these offences or the automatic exclusion of the taxpayer from the voluntary disclosure scheme.

   b) The amount of the VAT at stake should not be the (only) decisive criterion to assess the gravity of the offence.

   c) The precise circumstances of the case and the actions of the person concerned should be taken into account (simple error in good faith by a person (cf. supra) vs. situations of negligence, tax fraud or evasion or abuse). If the tax authorities are not required to make this distinction on their own initiative, the person concerned should at least have the right to demonstrate that he was acting in good faith.

2.4. In the light of the need to ensure proportionality, it is a good practice that tax authorities possess the authority to exercise discretion and waive penalties in duly justified circumstances, in order to guarantee fairness, and that the same competence is attributed to the judge who is competent to control the validity and the proportionality of the administrative sanctions.
3. No sanction if the legislation is not clear

3.1. **Principle**: sanctions should not, as a rule, be imposed if the rules of law are not clear and precise or if their application is not foreseeable.

- **EUCJ 21.02.2006, C-255/02, Halifax:**

  93 It must also be borne in mind that a finding of abusive practice must not lead to a penalty, for which a clear and unambiguous legal basis would be necessary, but rather to an obligation to repay, simply as a consequence of that finding, which rendered undue all or part of the deductions of input VAT (see, to that effect, Emsland Stärke, paragraph 56).

- **EUCJ, 14.12.2000, C-110/99, Emsland-Stärke:**

  56. Contrary to the assertions of Emsland-Stärke, the obligation to repay refunds received in the event that the two constituent elements of an abuse are established would not breach the principle of lawfulness. The obligation to repay is not a penalty for which a clear and unambiguous legal basis would be necessary, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the Community rules were created artificially, thereby rendering the refunds granted undue payments and thus justifying the obligation to repay them.

3.2. It is good practice not to penalise a taxable person if he demonstrates his good faith (= the criterion "he didn't know and he didn't have to know", implying that he conducted his business with appropriate due diligence, sincerely believing that he was acting in accordance with the law).

3.3. It is good practice not to penalise a taxable person if he informed the authorities about a discrepancy or an uncertainty in the law, and took a reasonable provisional position, waiting for the authorities' instructions or guidance.

4. No sanction where the taxpayer is entitled to rely on the principle of legitimate expectations

4.1. **Principle**: tax authorities have to respect the legitimate expectations of the taxpayers that the administrations have created themselves. This applies in situations where the conduct of the authorities gives rise to a legitimate expectation in the mind of a prudent taxpayer. The legislation and the tax authorities' guidance to the economic operators must be precise and clear and their application must be foreseeable.

- **EUCJ 9 October 2014, C-492/13, Traum EOOD:**

  28 The principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them (judgment in Plantanol, C-201/08, EU:C:2009:539, paragraph 46 and the case-law cited).
29 It must be pointed out that that principle is to be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the obligations which such rules impose on them. It follows that it is necessary that taxable persons be aware, before concluding a transaction, of their tax obligations (see judgment in Teleos and Others, EU:C:2007:548, paragraph 48 and the case-law cited).

- EUCJ 14.09.2006, C-181/04 to C-183/04, Elmeka:

31 Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives (see in particular Case C-381/97 Belgocodex [1998] ECR I-8153, paragraph 26, and Case C-376/02 ‘Goed Wonen’ [2005] ECR I-3445, paragraph 32). It follows that national authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents.

32 As regards the principle of protection of the legitimate expectations of the beneficiary of the favourable conduct, it is appropriate, first, to determine whether the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent (see, to that effect, Joined Cases 95/74 to 98/74, 15/75 and 100/75 Union nationale des coopératives agricoles de céréales and Others v Commission and Council [1975] ECR 1615, paragraphs 43 to 45, and Case 78/77 Lührs [1978] ECR 169, paragraph 6). If it did, the legitimate nature of this expectation must then be established.

4.2. It is a good practice not to impose a sanction if the taxable person was in a position where he could rely on his legitimate expectation that he was acting in accordance with the law.