KPMG Meijburg & Co
Tax & Legal

**The new Explanatory Notes to Table II: what are the main areas of concern?**

On December 22, 2023 the Ministry of Finance published the Explanatory Notes to Table II (the 'Explanatory Notes'). This Decree contains rules and policy on the application of the zero rate for VAT purposes. This rate is applied, among other things, to the export or intra-Community supplies of goods. The zero rate makes compliance significantly simpler and provides cash flow benefits for international trade. Moreover, it is very important to apply the zero VAT rate correctly. After all, wrongly applying the rate entails a material business risk.

The decree is a new version of the Table II Regulation (the 'Regulation'), which was due for replacement after several decennia and various updates. In the new decree, the terminology is again up-to-date and all newly rendered case law has been included. However, it also contains other changes. The new decree will take effect on **April 1, 2024**.

The new Explanatory Notes are far more comprehensive compared to the old Regulation. For example, practical examples and background has been added, new schemes (particularly in e-commerce) are described and the decree also incorporates several decrees that are now still separate decrees. A large part of the decree thus describes current practice. However, several policy positions have also been changed or are otherwise noteworthy. In addition, the text of several required forms (statements and declarations) has been updated, as we will discuss in the following sections. Please contact your tax advisor if you would like a copy of these new versions.

Below we discuss the in our view most important matters and changes. Given the large amount of detailed matters in the decree, it is not our aim to treat these exhaustively. The consequences of the new decree will also partly have to become clear in practice. We would of course be happy to help you assess which aspects of the new Explanatory Notes are relevant for your organization. In many cases, it is the details that are important when applying the zero rate.

We will now consecutively discuss the areas of concern in the following situations:

I. supply of goods awaiting import;
II. export of goods;
III. intra-Community supplies of goods;
IV. goods in excise warehouses, mineral oils and bulk goods;
V. goods and services relating to pleasure yachts;
VI. other observations.

*I. The zero rate for supplies of goods awaiting import*

**Overlap with intra-Community supply**

For supplies of goods awaiting import that are already on Dutch territory, the Netherlands allows the zero rate to be applied, subject to conditions (item a.1). It can sometimes be the case that the supply of non-imported goods is accompanied by transport to another EU Member State and thus there is also an intra-Community supply (item a.6). As before, the decree states that the application of the zero rate only

has to comply with the standard of proof for item a.1 and not with the stronger standard of proof of item a.6.

In that respect, it has now for the first time been explicitly approved that the supply therefore does not have to be reported as an intra-Community supply of goods in the VAT return or in the EC Sales List. The same applies for an intra-Community acquisition if a non-imported good is transported from another EU Member State to the Netherlands. This is currently also common practice. Please note that this may give rise to mismatches with other EU Member States if they apply another approach. The Explanatory Notes do not address this.

*II. The zero rate upon export*

**Proof for zero rate upon export**

The major area of concern when applying the zero rate to supplies accompanied by the export of goods is of course proof that the goods have actually been exported. The new Explanatory Notes discuss this proof in detail and are more in line with current trade practices, the generally available documentation and the increased digitalization of this proof. Worth noting in this respect is that for certain digital documents that may serve as proof (such as the e-CMR or the Confirmation of Exit) it seems that only a paper print can be used as proof. As this is repeated several times, it seems that recording these particular documents in a (secure) PDF for example, is not deemed adequate. In our view, this does not make things easier in practice, but we recommend that you adjust your processes to accommodate this or reach agreement with the Dutch tax authorities on how to document this digitally.

An (outdated) approach to prove export by regular mail by having a certificate of exit via a post office signed by Customs has been removed. The impact of this seems limited. In practice, the advances in digitalization mean there is now sufficient evidence available to prove export, even without this certificate of exit by regular mail. However, your internal processes may have to be adapted for this purpose.

**Proof for export and chain transactions: new version of the export order**

If the export of goods is part of a chain supply of goods (for example, a 'triangulation transaction'), the zero rate can be applied in each link of the chain, subject to conditions. One of the conditions is that each customer in the chain (except the final customer) must issue a signed export order (also called a Benedictus declaration) to their supplier. The new Explanatory Notes address this in far more detail than the old Regulation.

The Explanatory Notes place a lot of importance (in our view, too much in some cases) on this document as proof. It is therefore advisable to ensure that in export chain transactions a signed version of this document is, where possible, part of the supply process and is documented as proof.

A new version of the export order (*Government Gazette* 2023, 34571) was published at virtually the same time as the new Explanatory Notes. Although the changes are not

substantive, but clarifications and updates of terminology, it is recommended to use the new version of the export order from now on.

**Temporal and material link between supply and export**

More than before, the Explanatory Notes discuss the application of the zero rate in cases where the export does not take place immediately at the time of supply. The Explanatory Notes seek to link up with case law on intra-Community supplies and state that there must be a temporal and material link between the supply and the export. If the supplied goods are used within the Union before their export, the temporal and material link between the supply and the export is broken. Examples of where the zero rate cannot be applied include the supply of a horse that was ridden in competitions before its export and goods that will be handled or processed (more than only packaged) after the supply and before the export.

On the one hand, this policy appears logical, but on the other hand we believe it does not necessarily follow from case law as it currently stands. In practice, this can lead to ambiguity and unexpected outcomes. We recommend looking carefully at the application of the zero rate if some time has elapsed between the supply and the export of a good.

**Supplies to crews on seagoing vessels**

It is also worth paying additional attention to the temporal and material connection with regard to supplies to crews on ships (crew and captain of seagoing vessels). The old Regulation explicitly confirmed that the zero rate applied to supplies of goods to crews on board a ship for which a valid certificate of export had been received. This confirmation has been removed from the new Explanatory Notes. However, the new decree also notes that supplies of goods for personal use to crews on ships may fall under the zero rate if they are supplied in the context of export. From now on, this will therefore have to be assessed on a case-by-case basis and will have to be sufficiently substantiated with evidentiary documents. Especially with regard to goods that can already be used immediately before the ship has left Dutch territory, providing proof may be problematic.

*III. The zero rate for intra-Community supplies of goods*

**Attention paid to new requirements resulting from quick fixes**

It is no surprise that many of the additions to the new Explanatory Notes regarding the application of the zero rate to intra-Community supplies of goods (ICSs) relate to the new rules that were introduced on January 1, 2020 as part of the quick fixes. For example, attention has been expressly paid to the material requirement of a valid VAT identification number of the customer issued by another EU Member State and the obligation to include the ICS in the EC Sales List. With regard to both requirements, it has now been stated that a wrong VAT identification number can be retrospectively corrected ('within a period determined by the tax inspector') in order to retain the right to apply the zero rate. The decree states without reservation that due care (see also below) requires that a VAT identification number is verified via the online VAT Information Exchange System (VIES).

**Temporal and material link between supply and transport**

As is the case with export, the decree pays far more attention than before to the required temporal and material link between supply and transport in order to be able to apply the zero rate as a result of an ICS. The handling and processing of goods in the Netherlands before they are transported breaks the material link and makes it impossible to apply the zero rate. If the handling and processing of the goods occurs in transit before arrival in the EU Member State of final destination, the transport will also be interrupted. The contractual provisions between parties play a decisive role in order to establish how the supply takes place and whether the processing must be attributed to the supplier or the customer. After all, the goods can only be supplied to the customer after they have been brought into the condition agreed with the customer.

Moreover, there must be some continuity in the transport. However, this continuity is not interrupted by transport through a third country under a Customs regime or by transferring the goods to another means of transport (not even if this is accompanied with a waiting period).

In our view, these guidelines logically ensue from case law, but the detailed attention paid to them in the Explanatory Notes indicates increased attention for this issue at the Dutch tax authorities. We therefore recommend (re-)examining the application of the zero rate in cases where some time has elapsed and/or processing of the goods has occurred between the contractual supply and the transport to the destination.

**Proof for cross-border transport: due care required**

The Explanatory Notes to the zero rate for ICSs have been most radically reworked in the sections on the standard of proof for cross-border transport. This is the most important area of concern and discussion in practice, certainly in part due to the fraud risk associated with the zero rate for ICSs. The expanded explanations again partly relate to the aforementioned quick fixes. A 'safe harbor standard of proof' for the transport has also been incorporated into these new rules. These EU rules are discussed in addition to the national evidentiary rules. After all, the latter remains in effect alongside the new evidentiary rules.

What stands out is the way in which the required due care by the supplier has been included in the discussion of the national evidentiary rules. The Explanatory Notes put it this way: "The supplier meets the burden of proof resting on them if they show that they have acted with due care." Due care thus seems to have become an additional requirement for substantiating the zero rate and not merely a standard against which to weigh the proof provided, if it has been shown that there is involvement in fraud. In order to comply with the national evidentiary rules, the first test that should be carried out is to assess whether a sufficiently careful process has been implemented. In our view, this is wrong.
In most cases this will involve a theoretical distinction, but the way this has been formulated and the attention that has repeatedly been paid to due care indicate that the assessment of this is a strategic priority in the (monitoring) policy of the Dutch tax authorities. The degree of due care required is influenced by the type of goods supplied and the type of customer. For ordinary transactions, a reasonably careful administrative

process for assessing and storing a relevant combination of evidentiary documents will suffice. An increased fraud risk requires more extensive control measures.

As a result of the new Explanatory Notes, we recommend that you examine your internal processes for the provision of proof in respect of the zero rate and how those processes are kept secure and, where necessary, ramp them up to prevent the zero rate being wrongly applied (in the eyes of the Dutch tax authorities).

## Collection transactions (ex works): more stringent standards in new version of collection declaration

Providing proof of the zero rate for ICSs is difficult if the customer arranges the transport themselves (ex works or collection transactions). In that case, additional control measures are necessary and in almost all cases, besides other proof, a collection declaration signed by the recipient is required, or if the customer hires a transport company, the (e-)CMR from the transport company. The new Explanatory Notes include a new amended version of the collection declaration, which is stricter on some points than before:

- In the new model, the customer is consistently referred to as the "regular customer", which emphasizes that the collection declaration can only contribute to proof for applying the zero rate if there is a permanent supplier relationship.
- The requirement of a valid VAT identification number in another EU Member State has been made more explicit.
- The collection declaration may now only be signed by the customer themselves or an employee of the customer, where previously "the person who took receipt of the goods" was allowed to sign.
- The collection declaration must be signed at the time the goods are picked up. Only in special cases ("to be determined by the Dutch tax authorities") can the collection declaration be signed at a later moment.

We recommend that you start using the new text of the collection declaration as soon as possible and adjust your processes accordingly. Collection transactions require the cooperation of the customer. It is easier to arrange this beforehand than afterward. If the stricter requirements do not fit in with your processes, an alternative would be to use the quick fixes evidentiary rules for collection transactions, which offer more scope in certain respects, for example, to prepare the declaration afterwards.

## Approval transfer of own goods followed by local supply curtailed

Old, still applicable policy contains an approval to opt to first report a transfer of own goods and then a local supply in the country of arrival, instead of having to report an ICS to the customer.[1] It was noted that this can be particularly desirable for groupage shipments. This approval is regularly used in practice.

The old policy will be repealed and the new Explanatory Notes provide a less expansive regulation.

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[1] Decree of March 11, 1993, VB 93/666 (Notification 1).

- The approval can (now explicitly) only be applied to groupage shipments.
- For outgoing shipments, the approval only applies if all the conditions for transferring own goods have been met in the Netherlands *and the other EU Member State involved*.
- For incoming shipments, the approval can only be applied if the EU Member State of departure also consents to this.

**Areas of concern with regard to application of simplified triangulation supply**

A special arrangement applies to ICSs whereby the goods are supplied across two links in the chain (triangulation supplies) – the simplified triangulation scheme – which in certain cases avoids a registration obligation for the intermediary (party B) in the EU Member State of arrival. The new Explanatory Notes contain several areas of concern with regard to this arrangement:

- Not new, but nevertheless important to reiterate, is that application of the simplified triangulation scheme has a material invoice requirement.[2] The invoice in the B-C link must state 'VAT reverse charged' on the invoice. Previously, the supply was also allowed to be classified as an ICS, but this option was canceled in response to the Luxury Trust judgment (CJEU, November 8, 2022, C-247/21).
- The simplified triangulation supply can only be applied if the transport can be allocated to the first link in the chain. If B arranges the transport, it must be assessed in which link B performs the transport. The new Explanatory Notes rightly connect this issue to the new allocation rules that are part of the quick fixes (see our alert on this). An old, but still applicable decree seems to allow a somewhat more flexible allocation for transport by B.[3] That decree will be repealed as of July 1, 2024. As of that date, it will therefore no longer be possible to rely on that policy.
- The position taken in the Explanatory Notes is that the simplified triangulation supply is not allowed to be applied if B has a fixed establishment *involved in the transaction* in the EU Member State of arrival. Not all Member States feel the same way about this. It also seems that by repealing the policy referred to in the preceding bullet point (as of July 1, 2024), the mere VAT registration of B in the Member State of arrival will from now on preclude application of the rule. We wonder whether this is what was intended.

We recommend using the publication of the Explanatory Notes as reason to establish whether the processes with regard to the simplified triangulation supply are (still) correctly set up in your systems.

**Tightening of approvals for refused ICSs and returns of goods under guarantee**

If a customer returns supplied intra-Community goods or these are forwarded to another EU Member State, for example because the customer has refused the goods or because the goods must be replaced or repaired under a guarantee, then according to the letter of the law, this will often lead to the supplier having to register for VAT purposes in the customer's country. Because this was considered undesirable, the

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[2] This change had already been introduced by Decree of August 30, 2023, no. 2023-17125.
[3] Decree of March 29, 1993, 1993, no. VB 98/837 (Notification 3).

Member States had in 1994 unanimously agreed that such a registration could, under certain conditions, be omitted.

In the Netherlands, these approvals, which are frequently used in practice, have to date been laid down in a decree.[4] That decree will be repealed and the approvals have been included in the new Explanatory Notes. The new text of the approvals will be accompanied by several tightened measures:

- The approvals for returning goods may now only be applied if the supplier does not have any information to indicate that the other Member State rejects this approach (i.e. the supplier knows that the other Member State requires a registration for an ICS). This is an important change, if only because the majority of the current Member States were not yet members of the EU in 1994 and thus were not involved with the previous unanimous agreements.
- The new Explanatory Notes include a more explicit condition for applying the approvals, i.e. that the accounts and records must show where the goods are located.
- The approvals in the event of a subsequent termination of the purchase agreement (instead of a direct refusal by the customer) have no longer been included separately. We assume that this is not intended as a change in policy.

*IV. Goods in excise warehouses, mineral oils and bulk goods*

To reduce the administrative burden for the international trade in excisable goods (including mineral oils) and bulk goods that are stored in the Netherlands, a zero rate applies here. This is subject to the condition that if the VAT taxable person/supplier or the VAT taxable person/customer is established outside the Netherlands (within or outside the EU), they must appoint a tax representative for the intended supply in the Netherlands.

*Special provision*

Both the regime for mineral oils (item a.7) and for certain designated bulk goods (item a.8) have a special provision. This means that as long as the goods are stored at a specially designated location for this in the Netherlands, the VAT taxable person/supplier or the VAT taxable person/customer that is established outside the Netherlands (within or outside the EU) does not have to register for VAT purposes in the Netherlands for the intended supply or appoint a tax representative. This applies as long as the goods related to the supply remain stored at the designated location. However, once the storage of the goods ends, VAT will be charged (at the general rate of 21%) on the supply prior to the storage ending. The VAT is charged to the VAT taxable person for whom the supply was performed.

Because such goods are often traded across several links in the chain until the storage ends, of relevance for practical purposes is that it must be clear which supply is meant with 'the supply prior to the storage ending'. In practice, the literal text is sometimes disputed. The Explanatory Notes now clearly confirm in its text and in two examples

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[4] Decree of December 19, 1995, 1993, no. VB 95/3635 (Notification 28).

that this concerns the supply as a result of which the storage of the goods ends. When the storage ends, the VAT payable on the supply that took place prior to the storage ending is levied on the VAT taxable person that ended the storage of the goods. The examples show that this is the VAT taxable person who wishes to receive the goods away from the storage location. In effect, this concerns reverse-charging the VAT to that customer. If this is a foreign VAT taxable person, a tax representative must be appointed.

*V. Zero rate for transactions with regard to pleasure yachts*

**New versions of model collection declarations**

The new Explanatory Notes reproduce the text of the decrees published in 2002 and 2003 on (proving) the export and intra-Community supply of pleasure craft. This does not involve any substantive policy changes.

However, new versions of the model declarations to be provided and signed by the customer have been included if there is a collection transaction for a pleasure craft (delivery under its own steam). This includes several textual changes compared to the current declarations. However, these are not substantive changes. Nevertheless, suppliers of yachts, such as shipyards, must use the new text and, where necessary, have it translated into English.

**The provisioning of pleasure craft**

In the explanatory notes to item a.2, the provisioning of pleasure craft is always exempted from the zero rate. In the corresponding provision, Article 146 EU VAT Directive, this provisioning is however only exempted from the zero rate if the goods are transported by the customer. For example, if a yacht in the Netherlands is provisioned as part of a repair or refitting order and the yacht is subsequently (re-)exported to international waters by or for the account of the shipyard itself, then in our view the (Dutch) zero rate should still apply to the goods with which the yacht was provisioned.

**Pleasure craft that temporarily return to the Netherlands for work carried out under guarantee**

It is not uncommon for exported pleasure yachts to temporarily return to the Netherlands for work to be carried out under guarantee. Both the current Regulation and the new Explanatory Notes include as policy that such a temporary return does not affect the zero rate applied upon export. However, the new Explanatory Notes seem to maintain stricter conditions:

- Where in the old text the use of the pleasure yacht in the context of the work to be carried out under guarantee had to stay within the bounds "of what is customary in the sector", the new text excludes any use other than what is necessary for carrying out the work under guarantee.
- The old text also included the following: "The tax obligations in respect of the aforementioned return of the pleasure craft primarily rest on the owner or the user

of the pleasure craft. The shipyard stands apart from this." These sentences do not appear in the new text. It is unclear whether this is intended as a change in policy.

In our view, the zero rate applied by the builder after the export has been completed and proven by the builder, can no longer be disputed if the pleasure craft in question later returns to the EU. In that case, it can be processed under a Customs temporary import or inward processing arrangement.

*VI. A selection of some of the other matters included in the Explanatory Notes*

- It has now been stipulated for an ICS of a new means of transport that the application of the zero rate is not subject to the condition that the purchaser of the means of transport is established or resident in the EU Member State of destination of the means of transport. It is also not possible to refuse the application of the zero rate, because the new means of transport is only temporarily registered in the EU Member State of destination. This is in accordance with EU case law.
- The distinction between when a supply to customers with no VAT recovery right (difference between a customer who purchases more or less than EUR 10,000 annually) qualifies as distance selling and when as an ICS is explained in more detail, including the applicable evidentiary rules.
- What stands out is that despite new case law, there are little or no changes in policy on adjacent services to which the zero rate applies. The Netherlands seems to be maintaining its relatively flexible policy here.
- By repealing the Decree of March 26, 1979, no. 27-604919, the approval given for applying the zero rate tor futures trading in coffee stocks already imported by warehousing companies will end. The new decree states that that decree is outdated. It is unclear whether repealing the old decree will lead to practical changes in futures trading in coffee.

**Closing remark**

As noted above, in this memorandum we have focused on what we consider to be the most important issues and changes. However, the new Explanatory Notes to Table II contain a multitude of (detailed) technical VAT issues that could be important for your organization. We would of course be happy to help you assess which aspects of the new Explanatory Notes could apply in your case. Also feel free to contact us if you would like the new text of the mandatory forms and (collection) declarations.

KPMG Meijburg & Co
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