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**Intra-EU trade and chain transactions under EU VAT –
between simplification measures and inconsistent results**

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Abbreviations

EU	European Union
VAT	Value added tax
CoJEU	The Court of Justice of the European Union
VAT Directive	Council Directive 2006/112/EC of November 2006 on the common system of value added tax
Sixth Directive	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes
Commission	The European Commission
IC	Intra-Community
GST	Goods and service tax
TFEU	The Treaty on the Functioning of the European Union
ESL	EU Sales List
CMR	Dispatch note drawn up on the basis of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978
ECR	European Court Reports
I -	Volume I of European Court Reports – judgements and Advocate General opinions of the case law of the Court of Justice of the European Union
OJ L	Official Journal of the European Union, L (Legislation series)
OJ C	Official Journal of the European Union, C (Information and Notice series)

Abstract

After nearly 20 years ago when the transitional arrangements for the taxation of trade between Member States was introduced it made a significant improvement compare to the old exports and imports system. However, the new arrangements have not eliminated obstacles completely for proper trade between Member States and proper functioning of the single market. It is still extremely challenging for businesses to deal with cross-border supplies and especially with chain transactions.

One of the difficulties is to determine the place of supply for each transaction along the chain and which of transactions should be VAT exempt intra-Community supply. Risk is also suffered in order to support the application for VAT exemption of intra-Community supply. Despite that the Court of Justice of the European Union has shed some light on how to deal with these difficulties it does not make it easier for businesses to deal with cross-border supplies and chain transactions in practice.

To apply the simplified intra-Community triangulation rules in practice becomes very complicated task for businesses because of non-uniform interpretation of the rules. In some Member States the scope of simplified triangulation rules is applied only for three parties registered (established) in three different Member States and cannot be applied if there are more than three parties in the chain transaction involved. However, this is not the case in some other Member States. There are Member States which limit the scope of the simplified triangulation rules if the intermediary party has a VAT registration in one of the Member States where the other two parties are registered (established). Non-uniform interpretation of the same rules only leads to inconsistent results. The examples in the thesis shows how the parties involved in chain transactions can end with complicated scenarios instead of simplified one.

This thesis seeks to ascertain how the EU VAT rules together with the simplification measures and the case law of the Court of Justice of the European Union has impacted the intra-EU trade and especially chain transactions. Whether it created a simple and satisfactory functioning system or whether it created a complex and challenging system, without a uniform treatment by Member States, which has resulted in unsatisfactory inconsistencies.

The thesis starts with a short historical overview of intra-EU trade and the main rules in the VAT Directive which are applicable for cross-border supplies of goods and chain transactions. The following part of the thesis deals with intra-Community supplies of goods and the problems with chain transactions in the light of the case law of the Court of Justice of the European Union. Problems with intra-Community simplified triangular transactions are analysed in three specific scenarios. The thesis also concerns the problematic issues related to reporting obligations in chain transactions and the right to deduct/refund input VAT. The possible solutions and improvements for the current VAT system are overviewed in the light of the recent Commission's Green Paper on the future of VAT.

Keywords: Intra-EU trade, chain transactions, VAT, intra-Community supply, intra-Community acquisition, simplified intra-Community triangulation, transitional arrangements, reporting obligations, Intrastat.

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1. Introduction

1.1. Problem description

Global economy has influenced international trade significantly. As a result more and more businesses are involved in the international sale contracts of goods which plays an important role. Nowadays, it is usual that the international trade in goods involves more than two parties and the goods move from one country to another or even from one continent to another. Under the subsequent contracts the same goods are resold several times between different traders until they reach the final consumers. The movement of goods in so-called ‘chain transactions’ raise a number of difficulties and risks in indirect tax matters which particularly occur in the cross-border situations.

The OECD¹ International VAT/GST guidelines published in 2006 and 2011 pointed out that business should not bear the burden of VAT. It should be ensured that ‘the tax burden eventually rests with the final consumer rather than the business intermediaries in the supply chain.’² Furthermore, the international trade in goods based on destination principle is a way of achieving neutrality in VAT. Another commonly held principle for the international trade in goods is that exports should be exempted (with refund of input taxes) and imports should be taxed (on the same basis and with the same rates as local supplies).³

In 1993 in the EU exports and imports between Member States were replaced by exempt (zero-rated) intra-Community supply of goods in the Member State of dispatch and by taxed intra-Community acquisition of goods in the Member State of arrival. As a result, it allowed tax to continue to be collected in the Member State of destination of the goods at the rate and under the conditions of that country.⁴ What is more, new simplified intra-Community triangulation arrangements were introduced to make trade in the EU more effective and neutral for VAT purposes. However, even though new rules have been in effect for nearly 20 years intra-EU trade⁵ under the EU VAT rules still raise a number of issues and risks.

Dealing with cross-border supplies is problematic since the VAT treatment is complex and the arrangements for intra-EU trade under the VAT Directive are applied in a non-uniform way within 27 EU Member States.⁶ While the EU VAT rules for supplies

¹ Organization for Economic Co-operation and Development.

² OECD International VAT/GST guidelines on neutrality approved by the Committee on Fiscal Affairs on 28 June 2011, Chapter I para.15 *available at* <http://www.oecd.org/dataoecd/28/28/48331948.pdf> (accessed at 9.04.2012).

³ OECD International VAT/GST guidelines published in February 2006, Chapter I para.5, *available at* <http://www.oecd.org/dataoecd/16/36/36177871.pdf> (accessed at 9.04.2012); OECD International VAT/GST guidelines on neutrality, Chapter I paras. 5 and 16 see note 2.

⁴ Commission staff working document: Accompanying document to the Green Paper On the future of VAT Towards a simpler, more robust and efficient VAT system, SEC (2010) 1455 (1.12.2010) (hereinafter – Green Paper) p. 5 *available at* [http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/sec\(2010\)1455_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/sec(2010)1455_en.pdf) (accessed at 13.04.2012).

⁵ The term ‘intra-EU trade’ in the thesis is employed as a synonym for the term ‘intra-Community trade’.

⁶ Comments of Tax Executives Institute on Green Paper submitted to the European Commission 31 May 2011, *available at* http://www.tei.org/news/Pages/TEI_submits_comments_on_a_green_paper_consultation_on_the_future_of_the_VAT.aspx (accessed at 12.04.2012).

between a company in one Member State to a company in another Member State are relatively straightforward, things become more complicated when more than two companies are involved.⁷ Firstly, dealing with chain transactions⁸ there are still difficulties to determine the place of supply for each individual transaction along the chain. It is not absolutely clear how to attribute the transportation to a single supply in the chain transaction and which supply in the chain should be VAT exempted intra-Community supply.⁹ Secondly, despite that simplified intra-Community triangulation rules have been introduced in the Member States these rules are not applied consistently in reality. In some Member States the scope of simplified triangulations is applied only for three parties registered (established) in three different Member States and cannot be applied if there are more than three parties in the chain transaction involved. However, this is not the case in some other Member States. There are Member States which limit the scope of the simplified triangulation rules if the intermediary party has a VAT registration in one of the Member States where the other two parties are registered (established).¹⁰ Thirdly, the inconsistent application of rules results in reporting errors in intra-EU trade declaration system.¹¹ Despite the other problematic issues, the fundamental question is whether the current simplified EU VAT arrangements for intra-EU trade applicable in chain transactions are a matter of simplification or complication.

1.2. Purpose and method

This thesis seeks to ascertain how the EU VAT rules together with the simplification measures and the case law of the Court of Justice of the European Union has impacted the intra-EU trade and especially chain transactions. Whether it created a simple and satisfactory functioning system or whether it created a complex and challenging system, without a uniform treatment by the Member States, which has resulted in unsatisfactory inconsistencies.

The traditional legal (dogmatic) method will be applied for the purpose of the research. In order to answer the questions that have been raised the author discusses the background issues, reviews and systemizes applicable VAT rules. What is more, the author analyses the case law of the Court of Justice of the European Union and relevant literature like commentaries and articles to ascertain legal and practical significances for possible scenarios in chain transactions. The comparative legal method is applied for the purpose of comparison of similarities and differences of the VAT rules applicable to chain transactions in some Member States.

1.3. Disposition

This thesis consists of the five parts. The introduction is followed by the second part presenting a short historical overview of intra-EU trade and the main rules in the VAT

⁷ EU Tax Advisers Discuss VAT Improvements, by David S. Stewart. 25 July 2011 www.TaxAnalysts.com, Tax Analyst Document Number: Doc 2011-15559.

⁸ The transaction of the same goods with at least three parties when the goods are transported from the first party directly to the last party.

⁹ Taxpayers left on their own by the EU in chain supply issue, Press release, International VAT meeting 2011, WTS Group Aktiengesellschaft Steuerberatungsgesellschaft Gabriele Felder M.A. *available at* <http://press.wts.de/en/VAT-WTS-Joachim-Strehle-tax-chain-transactions-Incoterms-EU-Switzerland-export-962.vgi> (accessed at 17.04.2012).

¹⁰ Comments of Tax Executives Institute on Green Paper see note 6. See also Michael van de Leur, "Triangulation or Strangulation?" International VAT Monitor November/December 2010 p. 398.

¹¹ Comments of Tax Executives Institute on Green Paper. See also Patrick Vettenburg and Lodewijk Reijts, "Intrastat and the link with in VAT" Tax Analysts August 2011 www.TaxAnalysts.com pp. 363-364.

Directive which are applicable for cross-border supplies of goods and chain transactions. The third part focuses on intra-Community supplies of goods and the problems with chain transactions. This part explains the case law of the CoJEU. The Court has shed some light on how law should be interpreted in order to determine the place of supply for each transaction within the chain. Also, what conditions should be fulfilled to support the application for exemption of intra-Community supplies. The fourth part concerns the complications in chain transactions connected with the simplified intra-Community triangulation rules in some specific scenarios. It also analyses the problematic issues related to reporting obligations in chain transactions and the right to deduct/refund input VAT. The last paragraph of the fourth part takes a look at the recent Commission's Green Paper on the future of VAT for possible solutions. The final part provides the concluding remarks.

1.4. Delimitation

The main focus in this thesis will concern VAT treatment of cross-border supplies of goods and chain transactions between taxable persons or non-taxable legal persons acting as such. For the purpose of the thesis it does not include special cases in which goods are supplied to non-taxable legal persons or to private persons. Furthermore, this paper does not include supplies of new means of transport, distance sales, transfer of goods for assembly or installation or goods supplied through distribution systems. Chain transactions described in the thesis will be limited to a three party contract.

2. Overview of intra-EU trade

2.1. Short historical review

Article 26 of the TFEU defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.¹² Following this concept in the early 90's it was obvious that in order to have the well-functioning internal market requested the abolition of fiscal frontiers between Member States. For this reason the Council Directive 91/680/EEC for the common system of VAT with the abolition of fiscal frontiers was adopted and published on 16 December 1991 and had to be implemented until 1 of January 1993 for all transactions between Member States.¹³ These amendments were a cornerstone of the new VAT transitional system that determined important changes which have been made to the Sixth VAT Directive and the EU VAT system as a whole.¹⁴ The Council Directive 91/680/EEC introduced necessary provisions for abolition of all the checks and formalities crossing the internal frontier of the Union. Transitional arrangements for the taxation of trade between Member States were introduced. As a result, importation and exportation procedures were abolished for all transactions between Member States and applying only for transactions with the third countries. New concepts of intra-Community supply (IC supply) and intra-Community acquisition (IC acquisition) of goods were introduced.¹⁵ What is more, it was introduced that transitional arrangements for the

¹² Treaty on the Functioning of the European Union (TFEU) Article 26 (2) OJ C 83 of 30.3.2010.

¹³ Council Directive of 16 December 1991 91/680/EEC supplementing the common system of value added tax and amending Directive 77/388 EEC with a view to the abolition of fiscal frontiers OJ L 376, 31.12.1991 (hereinafter – Council Directive 91/680/EEC).

¹⁴ Rita de la Feria, *The EU VAT system and the internal market*, IBFD 2009, p. 70.

¹⁵ Council Directive 91/680/EEC. See also Rita de la Feria, *The EU VAT system and the internal market*, IBFD 2009, p. 71.

taxation of trade between Member States will derogate from the principle of taxation in Member State of origin and that the principle of destination will be applicable for transactions between Member States i.e., goods must be taxed in the Member State of destination where the final consumption takes place.¹⁶ Under the introduced transitional arrangements for the taxation of trade between the Member States an IC supply of goods was exempted (with the right for the supplier to deduct input tax) from the VAT in the Member State of departure. Nevertheless, in the Member State of destination an IC supply resulted in a taxable transaction an IC acquisition of goods and was subject to VAT but the purchaser can immediately deduct the tax.¹⁷ This mechanism enabled to transfer the tax revenue to the Member State of final consumption. It was one of the main purposes of the introduced transitional arrangements.¹⁸

Under Article 28(1) of the Council Directive 91/680/EEC the transitional regime had to be in effect for four years until 31 December 1996 and then should be replaced by the origin system. For that reason, it has always been referred to as the ‘transitional system’. However, the transitional regime could be extended on an annual basis if agreement on the definitive system could not be reached.¹⁹

These new rules for the taxation of trade between Member States were a significant improvement compared to the old export and import system because it abolished customs procedures and reduced administrative obligations for business.²⁰ However, before these rules came into effect on 14 December 1992 additional provisions were introduced under the Council Directive 92/111/EEC²¹ known as ‘the first simplification directive’. The purpose of the additional Directive was to simplify taxation procedure for the traders and Member States administrations.²² One of the problems was the unsolved situation than the three parties (A, B and C) established in three different Member States (1, 2 and 3) entered into chain transaction i.e., A sells goods to B and afterwards B sells to C, but eventually the goods are delivered by the first supplier (A) from Member State 1 to the final purchaser (C) in the Member State 3. Such chain transactions are also known as ‘ABC-transactions’ or ‘triangulations’.²³ There was no substantial benefit, for an intermediary party involved in a triangulation, of the rules introduced by the Directive 91/680/EEC (abolition of fiscal frontiers) because the new rules have not eliminated the necessity for an intermediate party (B) to register either in Member States 1 or in Member States 3. This situation occurred because an intermediate party (B) would be deemed to have made an IC supply in Member State

¹⁶ Council Directive 91/680/EEC 10th recital in the preamble.

¹⁷ Council Directive 91/680 EEC Title XVIa transitional arrangements for the taxation of trade between Member States.

¹⁸ Case C-245/04 *EMAG*, ECR [2006] P. I-03227. paras. 31 and 40, joint cases C-536/08 and C-539/08 *X and Facet BV/Facet Trading BV*, OJ C 63, 13.3.2010 para. 30.

¹⁹ Council Directive 91/680/EEC Article 28 (1) third subparagraph. See also E. Verwaal and S. Cnossen, “Europe’s New Border Taxes”, *Journal of Common Market Studies* Vol. 40, 2002 p. 310, available at <http://repub.eur.nl/res/pub/828/rm0008.pdf> p. 7 (accessed at 24.04.2012); Joep Swinkels, “Zero Rating Intra-Community Transactions”, *International VAT Monitor* May/June 2005, p. 187 and reference no. 2.

²⁰ Michael van de Leur, “Triangulation or Strangulation?”, *International VAT Monitor* November/December 2010 p. 397.

²¹ Council Directive 92/111/EEC of 14 December 1992 amending directive 77/388/EEC and introducing simplification measures with regard to valued added tax OJ L 384, 30.12.1992 (hereinafter – Council Directive 92/111/EEC).

²² Proposal for a Council Directive 92/111/EEC amending directive 77/388/EEC and introducing simplification measures with regard to valued added tax.

²³ Ben Terra and Julie Kajus, *A Guide to the European VAT Directives Volume 1 Introduction to European VAT 2011*, IBFD 2011, p. 574.

1 or performed an IC acquisition in Member State 3 followed by a domestic supply in Member State 3. The end result of these rules was that an intermediate party (B) had to pay VAT in Member States where it was not established and had to reclaim that VAT by submitting a refund claim.²⁴ To improve the situation the Directive 92/111/EEC provided the simplification measures for ABC transactions whereby for an intermediate party (B) it was not necessary anymore to register for VAT in Member States of departure (1) or in Member States of destination (3). (See Section 2.2.4.)

In order to control the transitional system VAT information exchange procedures were introduced by the Council Regulation EEC No 218/92.²⁵ Under these rules all VAT registered persons were given a VAT identification number and were obliged to report the IC supplies and also the IC acquisitions to their national tax authorities.²⁶ Furthermore, by the Council Regulation (EEC) No 3330/91²⁷ Intrastat system had been introduced as additional source of statistical information for intra-EU trade between the Member States.²⁸ (See Section 4.3.)

After nearly 20 years when the transitional regime was introduced it is still in place. Even when the VAT Directive (Council Directive 2006/112/EEC²⁹) was drafted and published the Council of the EU has not made any positive decision as regards the entry into force of the definitive system.³⁰ Article 402(1) of the VAT Directive still provides that the arrangements for the taxation of trade between Member States are transitional and are to be replaced by definitive arrangements, based on the principle on taxation of supplies of goods or services in the Member State of origin. However, if the Council would conclude that the conditions for transition to the definitive arrangements are met, it unanimously shall adopt the provisions necessary for the entry into force and for the operation of the definitive arrangements.³¹ Every four years starting from the adoption of the VAT Directive the Commission is responsible to present a report on the operation of the common system of VAT in the Member States and, in particular, on the operation of the transitional arrangements for taxing trade between Member States.³²

²⁴ Michael van de Leur, "Triangulation or Strangulation?" *International VAT Monitor* November/December 2010 p. 397.

²⁵ Council Regulation EEC No 218/92 of January 1992 on administrative cooperation in the field of indirect taxation (VAT) OJ L 24, 1.2.1992 later amended by the following measures of Council Regulation (EC) 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, subsequently replaced by Council Regulation No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) OJ L 268, 12.10.2010.

²⁶ Council Regulation (EEC) No 218/92 Article 4. See also Rita de la Feria, *The EU VAT system and the internal market*, IBFD 2009, p. 71.

²⁷ Council Regulation (EEC) No 3330/91 of 7 November 1991 on the statistics relating to the trading of goods between Member States OJ L 316, 16.11.1991 later amended by the following measures: European Parliament and Council Regulation (EC) No 1182/99 of 10 May 1999 OJ L 144, 9.6.1999, Council Regulation (EC) No 1624/2000 of 10 July 2000 OJ L 187, 26.7.2000, subsequently replaced by Regulation (EC) No 638/2004 of March 31 2004 OJ L 102, 7.4.2004.

²⁸ *A Guide to VAT in the EU of 27 Countries*, PricewaterhouseCoopers 2007 p. 10 *available at* [https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/\\$File/Executive%20summ.pdf](https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/$File/Executive%20summ.pdf) (accessed at 10.04.2012).

²⁹ Council Directive 2006/112/EC of November 2006 on the common system of value added tax OJ L 347, 11.12.2006.

³⁰ Rafał Lipniewicz and Paweł Selera, "Intra-Community Supplies of Goods under Polish VAT Law", *International VAT Monitor* January/February 2011 p. 22.

³¹ Article 402(2) of the VAT Directive. See also Ben Terra and Julie Kajus, *A Guide to the European VAT Directives Volume 1 Introduction to European VAT 2011*, IBFD 2011 p. 1269.

³² Article 404 of the VAT Directive.

However, the VAT Directive has made some changes related to the transitional arrangements compared to the Council Directive 91/680/EEC and the Sixth Directive. Under the VAT Directive the IC acquisition was included under scope of VAT³³ further the transitional arrangements were incorporated and spread out over the whole VAT Directive and were no longer grouped together under the heading ‘transitional arrangements’.³⁴ Hence, the period of nearly 20 years of continual operation of the transitional arrangements and the structural changes in the VAT Directive makes these arrangements more ‘definitive’ than ‘transitional’.

2.2. Main rules in the VAT Directive

2.2.1. Supply of goods

Supply of goods for consideration is one of the transactions subject to VAT under Article 2(1)(a) of the VAT Directive.

Under Article 14(1) of the VAT Directive a ‘supply of goods’ means ‘the transfer of the right to dispose of tangible property as owner’. The CoJEU pointed out in the case law that supply of goods for VAT purpose means ‘any transfer of tangible property by one party that empowers the other party actually to dispose of it as if he were the owner of the property.’³⁵ The transfer of legal ownership of the property is not a decisive factor.³⁶ The mere economic conveyance of goods is a sufficient factor to treat the transaction as supply of goods for VAT purposes.³⁷ The Common VAT system and civil law concept in this case does not necessarily have to coincide with transfer of legal ownership under civil law.³⁸

The VAT Directive makes a distinction between supply of goods with and without transport. Under Article 31 of the VAT Directive the place of supply of goods without transport is deemed to be the place where the goods are located at the time when supply takes place. In the case of supply of goods with transport under Article 32 of the VAT Directive the place of supply is deemed to be the place where the goods are located at the time when dispatch or transport begins.

2.2.2. Intra-Community supply of goods

If the goods do not leave the particular Member State’s territory and there is only one tax jurisdiction involved the place of supply rules functions straight forward. Therefore, there are no bigger problems to determine the place of supply.³⁹ Nonetheless, the situation changes when the goods cross the border and the place of supply is located following the principle of destination in another country (tax jurisdiction).

³³ Article 2(1)(b) of the VAT Directive. See also Ben Terra and Julie Kajus, *A Guide to the European VAT Directives Volume 1 Introduction to European VAT 2011*, IBFD 2011, p. 484.

³⁴ *A Guide to VAT in the EU of 27 Countries*, PricewaterhouseCoopers 2007 p. 12 see note 28.

³⁵ Case C-320/88 *Safe* ECR [1990] P. I00285, para. 7, Case C-185/01 *Auto Lease Holland BV*, ECR [2003] P. I-01317, para. 32, Case C-435/03 *British American Tobacco International Ltd*, ECR [2009] P. II-02097, para. 35.

³⁶ Case C-320/88 *Safe* para. 9.

³⁷ Ben Terra and Julie Kajus, *A Guide to the European VAT Directives Volume 1 Introduction to European VAT 2011*, IBFD 2011, p. 443.

³⁸ Case C-320/88 *Safe* para. 7. See also Dr Redmar Wolf, “VAT pitfalls in Intra-EU Commodity trade”, *EC Tax Review 2012-1*, 2012 Kluwer Law International BV, The Netherlands, p. 33.

³⁹ Ben Terra/Julie Kajus, *Place of taxable transactions*, e-book published by Cajus media, Series on International Tax Law, School of Economic and Business Management, Lund University 2011, p. 9.

If the goods are dispatched or transported in another EU Member States it is classified as an IC supply of goods exempt under Article 138(1) of the VAT Directive. The transfer of goods from a taxable person in the Member State of dispatch to another taxable person in the Member State of arrival is in principle a deemed IC supply in the Member States of dispatch. The transaction is exempted (zero rated) and the supplier is entitled to deduct VAT paid on purchases connected with the supply under Article 169(1)(b) of the VAT Directive.

According to Article 138 of the VAT Directive the IC supply of goods are exempted (zero rated) if the following conditions are fulfilled:

- The goods must be dispatched or transported, by or on behalf of the vendor or the person acquiring the goods;
- The goods must be transported from one Member State to another;
- The supply must be effected for another taxable person or non-taxable person acting as such in a Member State other than that in which dispatch or transport of the goods began.

In terms of the VAT Directive to support exemption a taxable person performing an IC supply is required to have a VAT identification number of the customer in another Member State and have a sufficient proof that the goods have been dispatched or transported to another Member State.⁴⁰ Clearly none of the provisions of the VAT Directive states directly how a taxable person has to support the application of exemption in such cases. Article 131 of the VAT Directive merely provides that it is for the Member States to determine the conditions in which they will exempt IC supplies of goods.⁴¹ This means that Member States can have the different rules for applying exemption (zero-rate) for IC supplies. However, even if the VAT Directive grants a power for the Member States to determine the conditions in which they will exempt IC supplies of goods, Member States must comply with general principles of EU law, which include, in particular, the principles of legal certainty and proportionality, when they exercise their powers.⁴² In such a situation the principle of proportionality means that in order to support exemption for IC supply a taxable person cannot be expected to produce more evidence than which is reasonably available in the framework of the commercial transaction.⁴³ (See Sections 3.2., 3.3. and 3.4.)

2.2.3. Intra-Community acquisition of goods

Intra-Community acquisition of goods for consideration is one of the transactions subject to VAT under Article 2(1)(b) of the VAT Directive. If the goods have physically left the territory of the Member State of supply and were dispatched or transported in another Member State this IC supply triggers a taxable event – an IC acquisition in the Member State where the goods have arrived and this IC acquisition is subject to VAT.

Intra-Community acquisition of goods under Article 20 of the VAT Directive is:

- Acquisition of the right to dispose of movable tangible property;

⁴⁰ Joep Swinkels, “Zero Rating Intra-Community Transactions”, *International VAT Monitor* May/June 2005, p. 187.

⁴¹ Case C-184/05 *Twoh International BV*, ECR [2007] P. I-07897, para. 25, Case C-146/05 *Albert Collée*, ECR [2007] P. I-07861, para. 24.

⁴² Case C-184/05 *Twoh International BV* para. 25.

⁴³ Joep Swinkels, “Zero Rating Intra-Community Transactions”, *International VAT Monitor* May/June 2005, p. 188.

- Where the goods are dispatched or transported from one Member States to another;
- To the person acquiring the goods;
- By or on behalf of the vendor or the person acquiring goods.

As the CoJEU pointed out ‘the intra-Community supply of goods and their intra-Community acquisition are, in fact, one and the same financial transaction, even though the latter creates different rights and obligations both for the parties to the transaction and for the tax authorities of the Member States concerned.’⁴⁴ It follows that the exemption of an intra-Community supply corresponding a taxable transaction an intra-Community acquisition enables to avoid double taxation and, therefore, infringement of the principle of fiscal neutrality inherent in the common system of VAT.⁴⁵ Advocate General Ruiz-Jarabo Colomer pointed out that ‘the tax-raising powers must be coordinated in such a way that, in any intra-Community transaction, where the authority of one Member State ends the authority of the other begins.’⁴⁶

Article 40 of the VAT Directive states the main rule that the place of an IC acquisition of goods is the place where the goods are at the time of dispatch or transport of the goods to the person acquiring them ends. However, things can become complicated if the first Party A in Member State 1 is involved in a chain transaction and is not aware of the final destination of the goods. It can be too complicated for Party A to discover that the goods going to be delivered in another Member State other than the VAT identification number was issued by Party B from the Member State 2.⁴⁷ The solution to this, without prejudice to the main rule under Article 40, was made in Article 41 of the VAT Directive providing as a starting point the place of IC acquisition of goods is deemed to be within the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition. For example, the IC acquisition of goods is also considered to take place in Sweden if the purchaser has used the VAT identification number issued in Sweden and transportation of the goods has begun in Germany but ended in a Member State other than Sweden.⁴⁸

However, the main rule under Article 40 of the VAT Directive must be applied by the Member State of final destination of the goods. If the purchaser shows that IC acquisition was taxed in the Member State in which transport ended when under Article 41 second subparagraph of the VAT Directive the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number.

Under Article 68 of VAT Directive the chargeable event occurs when the IC acquisition of goods is made i.e., when the supply of similar goods is regarded as being effected within the territory of the relevant Member State. In the case of IC acquisition of goods, normally, the VAT becomes chargeable on the 15th day of the month following the

⁴⁴ Case C-409/04 *Teleos plc and Others*, ECR [2007] P. I-07797, para. 23.

⁴⁵ *Idem* para. 25.

⁴⁶ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 2004 01 13 in Case C-68/03 *D. Lipjes*, ECR [2004] P. I-05879, para. 35.

⁴⁷ Ben Terra/Julie Kajus, *Place of taxable transactions*, e-book published by Cajus media, Series on International Tax Law, School of Economic and Business Management, Lund University 2011, p. 28 and footnote 13.

⁴⁸ *Idem* p. 28.

month in which the chargeable event occurs. Regardless of this, if an invoice is issued before that day VAT becomes chargeable already upon issue of the invoice.⁴⁹

Under Article 200 of the VAT Directive any person making a taxable IC acquisition of goods is liable for VAT in the Member State of arrival. Such person has to declare the value of IC acquisition and is liable for VAT on the acquisition of goods at the appropriate rate in its own Member State. As a rule, if such person is entitled to full deduction and if all IC acquisitions are made for business use the VAT payable on the IC acquisition is deductible as the input tax under Article 168(c) following the requirement stated in Article 178(c) of the VAT Directive.

2.2.4. Simplified intra-Community triangulation

The simplification arrangements applicable to IC triangulations are compulsory under Article 141 of the VAT Directive and must be applied throughout the EU. The simplified rules applicable to IC triangulation (three parties) chain supply which involves three Parties (A, B and C) registered (established) in three different Member States (1, 2 and 3). Party A sells the goods to another Party B which in turn sells the goods to Party C, but the goods are directly transported from Party A (in Member State 1) to Party C (in Member State 3). See Figure 1 below.

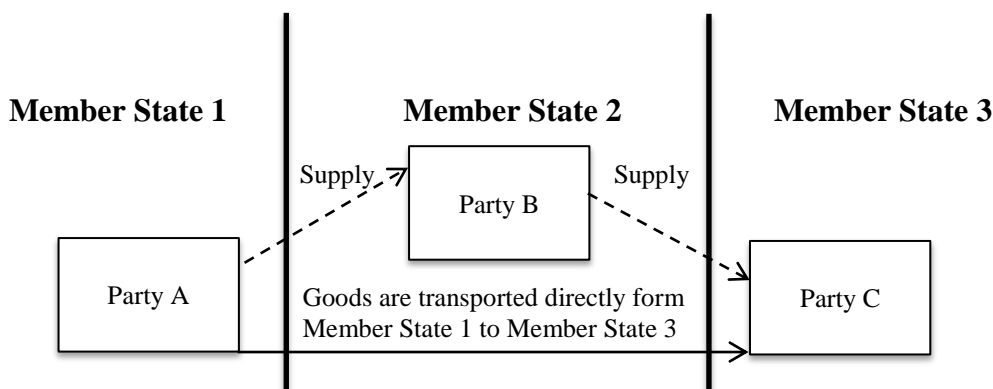


Figure 1: Simplified intra-Community triangulation

However, no simplification is possible if Party B is not identified for VAT purposes or identified only in the Member State of departure (Member State 1). What is more, the simplification measures do not apply to a trader from a third country who takes part in a triangular transaction without yet having a VAT identification number.⁵⁰

Simplified intra-Community triangulations works as follows:

1. Party B provides its VAT identification number to Party A which issues the invoice to Party B with a zero rate as it is a straightforward IC supply of goods and goods leave the Member State 1. Party A has to report an IC supply in its Member State in EU Sales List (ESL).⁵¹

⁴⁹ Article 69 of the VAT Directive.

⁵⁰ Report from the Commission to the Council and the European Parliament on the operation of the transitional arrangements charging VAT in intra-Community trade 1994 11 23 COM (94) 515 paras. 252 and 253, p. 63.

⁵¹ Chris Platteeuw, Quick Reference to European VAT Compliance, Kluwer Law International BV, The Netherlands 2010, p. 5-7.

2. The goods are transported directly from Member State 1 to Member State 3. Strictly speaking in a normal situation, Party B performs an IC acquisition in Member State 3 and has to register there and afterwards Party B performs a domestic supply to Party C. However, under the simplification measures the IC acquisition of Party B is deemed to have been subject to VAT and the liability to account and pay VAT is shifted by Party B to Party C.⁵²
3. Party B issues an invoice to Party C showing usual information (Party B's and Party C's VAT identification number, description of the goods, etc.). Furthermore, Party B does not charge VAT on the invoice (supply) but has to indicate adoption of the simplified IC triangulation arrangements and that Party C is liable to account for VAT due on the supply under Article 197 of the VAT Directive.⁵³
4. Party B has to fulfil its obligations for declarations under Article 265 of the VAT Directive i.e., Party B include the supply on the ESL in Member State 2 quoting Party C's VAT identification number (as if it was an IC-supply) and indicate the code (T) to denote a triangulation case.⁵⁴ Party C has to account VAT for the purchase from Party B by the reverse charge mechanism.⁵⁵
5. Party A and Party C are responsible for submitting Intrastat reports respectively in Member State 1 and in Member State 3. In a triangulation case there is only one movement which takes places between Member State 1 and Member State 3. According to this situation, Party B can avoid Intrastat reporting obligations as the goods do not physically cross the border of Member State 2 depending in which country Party B is registered (established).⁵⁶

However, there are different conditions across Member States where party B can use these simplified rules depending if Party B is registered in Party's C Member States or Party's A Member State or has appointed a tax representative in Party's C Member States.⁵⁷ (See Section 4.1.)

3. Intra-Community supplies and the problems with chain transactions

3.1. Overview of the case law of the CoJEU in chain transactions

3.1.1. Case C-245/04 (EMAG)

The case deals with the VAT treatment of chain transactions where during 1996 and 1997 Austrian company EMAG entered into the sale contract of the metals with another Austrian company K for regular supplies. Company K in turn purchased the metals from companies established in the Netherlands and Italy. EMAG did not know who K's suppliers were. The delivery of the goods was arranged by company K and directly transported from warehouses in the Netherlands and Italy to EMAG's premises in Austria or to those of EMAG's customers, also in Austria, in accordance with the

⁵² Idem.

⁵³ Idem.

⁵⁴ Code (T) in many Member States denote a triangulation case.

⁵⁵ Chris Platteeuw, Quick Reference to European VAT Compliance, Kluwer Law International BV, The Netherlands 2010, p. 5-7.

⁵⁶ Idem p. 5-8.

⁵⁷ Walter van Corput and Fabiola Annacondia (eds), EU VAT Compass 2011/2012, IBFD 2011, p. 601.

instructions given to K by EMAG.⁵⁸ The suppliers from the Netherlands and Italy zero-rated their supplies as the IC supplies to K because the goods were transported from those countries. In turn K accounted VAT for IC acquisition in Austria and charged Austrian VAT on its sale to EMAG.⁵⁹ However, EMAG was refused to deduct the Austrian VAT charged as input tax. The Austrian tax administrator took the view that both the supply from the suppliers in the Netherlands and Italy to K and also the supply from K to EMAG should qualify as VAT-exempt IC supplies. See Figure 2 below.

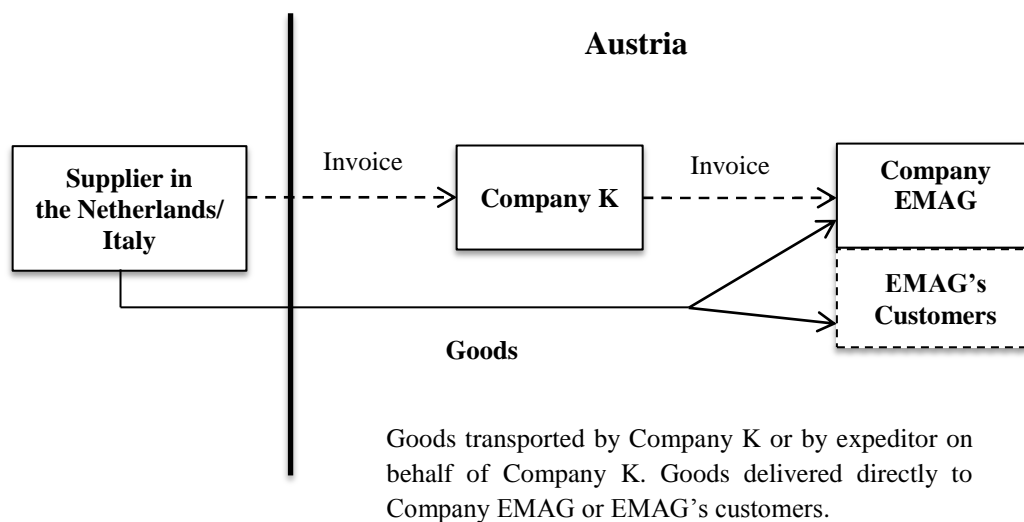


Figure 2: EMAG case

The main question was how to determine which transaction in the chain can be effectively zero-rated as an IC supply and which one constitutes a domestic supply.

Advocate General Kokott concluded that there can be only one exempted IC supply that results in IC acquisition by the purchaser when a chain involves several successful transactions of the same goods but there is only a single cross-border movement of the goods.⁶⁰ Furthermore, the AG pointed out that the place of supply rule under Article 32 of the VAT Directive (where the goods are located at the time when dispatch or transport begins) is not relevant to the assessment of both supplies when there are successive transactions within a chain and those transactions are implemented by way of a single cross-border movement of goods.⁶¹ On the other hand, supplies forming part of the chain which precede or follow IC acquisition are domestic supplies in the Member State of dispatch or in the Member State of destination, whose place of supply is to be determined in accordance with Article 32 of the VAT Directive.⁶²

Moreover, the AG stated that, if there has already been an IC acquisition within the chain the place of supply of subsequent transactions must be in the Member State of destination of the goods. As a result, the place of supply rule (the place where the goods are located at the time when dispatch or transport begins) cannot be applied and the

⁵⁸ Case C-245/04 EMAG paras. 14 and 15.

⁵⁹ Idem para. 16.

⁶⁰ Opinion of Advocate General Mrs. Kokott delivered on 2005 11 11 in Case C-245/04 EMAG, ECR [2006] P. I03227 para. 35.

⁶¹ Idem para. 38.

⁶² Idem para. 41.

country of destination must also be regarded as the place of the supply that follows this acquisition.⁶³ Finally, the AG concluded that the right to dispose of the goods as the owner and the passage of the goods cross the border are the essential factors in an IC acquisition.⁶⁴ In the absence of other indicators the person who arranges the transportation of the goods and therefore directly or indirectly exercises power of disposal over the goods during the cross-border movement is the person who should be effecting an IC acquisition.⁶⁵ This conclusion the AG based on the fact that such person is best informed about the places of departure and destination.⁶⁶ However, if the person arranging the transport is established or has VAT identification number in the Member State of dispatch of the goods or if the transport is arranged by the first supplier in the chain when in such case an IC acquisition can be effected only by one of the subsequent customers.⁶⁷

The CoJEU in its judgement pointed out that ‘if two successive supplies give rise only to a single movement of goods, they must be regarded as having followed each other in time. The intermediary acquiring the goods can transfer the right to dispose of the goods as owner to the second person acquiring the goods only if it has previously been transferred to him by the first vendor and, therefore, the second supply can take place only after the first supply has been effected.’⁶⁸

Furthermore, the CoJEU explained that ‘where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax.’⁶⁹ Additionally the CoJEU added ‘that interpretation holds good regardless of which taxable person — the first vendor, the intermediary acquiring the goods or the second person acquiring the goods — has the right to dispose of the goods during that dispatch or transport.’⁷⁰

The CoJEU reached the logical conclusion that the transport should be linked to one of the successive supplies and that transactions must follow each other. In this case if the first of two supplies is an IC supply following an IC acquisition in the Member State of arrival the second supply must be regarded as a domestic supply and take place in the Member State of arrival or vice versa. If the second of the two successive supplies is an IC supply than the first supply is a domestic supply which, necessarily, occurred before the goods were dispatched or transported and is deemed to occur in the Member State of the departure.⁷¹

3.1.2. Case C- 430/09 (*Euro Tyre Holding BV*)

In this case Euro Tyre Holding BV (Party A) a Dutch tyre supplier which supplied goods to its Belgian purchasers Miroco and VBS (Party B) under ‘ex warehouse’ conditions. Those conditions of supply meant that Party A would deliver the goods to its

⁶³ Opinion of Advocate General Mrs. Kokott in Case C-245/04 *EMAG* para. 48.

⁶⁴ *Idem* para. 59.

⁶⁵ *Idem* para. 60.

⁶⁶ *Idem* para. 61.

⁶⁷ *Idem* para. 60 – 64.

⁶⁸ Case C-245/04 *EMAG* para. 38.

⁶⁹ *Idem* para. 38.

⁷⁰ *Idem* para. 45.

⁷¹ *Idem* para. 50.

warehouse in the Netherlands and that the transport from the warehouse would be on behalf of and at the risk of Party B. When the sales agreements were concluded Party B informed Party A that the goods would be transported to Belgium. Party A issued invoices to Party B and applied the zero VAT rate for intra-Community supplies. Before the goods were delivered pursuant to the sales agreements, Party B sold the goods to Banden Decof NV (Party C), a company established in Belgium, subject to the conditions of supply that the transport of the goods to Party C's premises was on behalf of and at the risk of Party B. Representatives of Party B picked up the goods at Party A's warehouse in the Netherlands. The goods were transported directly to Party C's premises in Belgium by means of a lorry and driver supplied for consideration by Party C to Party B.⁷² See Figure 3 below.

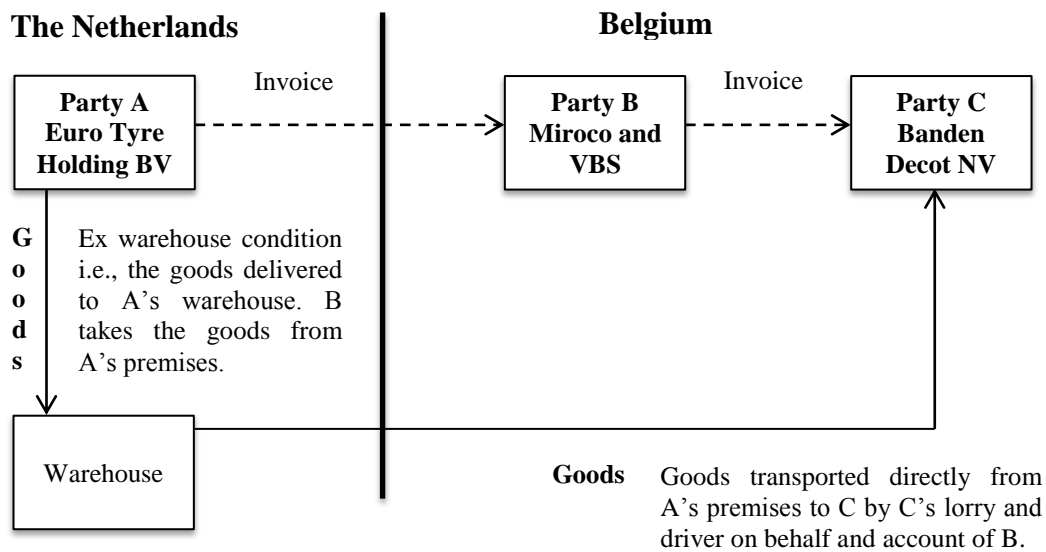


Figure 3: *Euro Tyre Holding BV* case

The question was whether the supply from the Dutch company (Party A) to Belgian purchasers (Party B), or the supply from Party B to Party C should be considered to be the zero-rated intra-Community supply.

The CoJEU following judgement in *EMAG* case pointed out that the collection of the goods from Party A's warehouse by the representative of the first person acquiring the goods must be regarded as the transfer to that person of the right to dispose of the goods as owner, in such case an IC supply should be ascribed to the first supply.⁷³ However, according to the CoJEU it did not mean that it leads to conclusion that the first supply constitutes an IC supply.⁷⁴ If the power to dispose of the goods as owner is transferred by Party B to Party C in the Netherlands before the intra-Community transport has occurred then the IC supply should be ascribed to the second supply.⁷⁵ As a result the transaction between Party B and Party C should be ascribed as an IC supply and the transaction between Party A and Party B should be ascribed as a domestic supply and Party A would have to charge Dutch VAT.

⁷² Case C-430/09 *Euro Tyre Holding BV*, OJ C 24, 30.1.2010, paras. 12-15.

⁷³ *Idem* para. 32.

⁷⁴ *Idem* para. 33.

⁷⁵ *Idem* paras. 33-34.

Further the CoJEU considered the situation where Party A may assume that the supply to the intermediary Party B is an IC supply. If Party B, as the first persons acquiring the goods, expressed its intention to transport the goods to Member State other than the Member State of supply and presented its VAT identification number attributed by that other Member State.⁷⁶

Nevertheless, when Party A transfers the right to dispose of the goods as owner to Party B, Party A effecting the first supply might be held liable to VAT on that transaction. In the situation when Party A had been informed by Party B of the fact that the goods would be sold on to another taxable person Party C before the goods left the Member State of supply. In such a case the supply between Party A to Party B cannot be ascribed as an IC supply, Party A has to issue the invoice with the local VAT of the Member State of dispatch.⁷⁷

3.1.3. Joined cases C-536/08 and C-539/08 (*X and Facet BV/Facet Trading BV*)

The case concerned the company X established in the Netherlands. X purchased goods from suppliers having their registered offices in Member States other than the Netherlands and Spain. The goods were transported directly from suppliers to Spain and sold to customers established in Spain. X issued its Netherlands VAT identification number and the suppliers did not charge any VAT. In turn X issued invoices to its customers with the reference to simplified triangulation arrangements and also did not charge VAT. In its tax return under the period of 1 January 1998 until 30 September 1998, X did not account for VAT due in respect of IC acquisitions in the Netherlands. It did not make any recapitulative statements on IC supplies under Article 262 of the VAT Directive. In contrast, as regards from the period 1 October 1998 until 30 June 1999, X accounted for VAT on its IC acquisitions in the Netherlands and it deducted that VAT. X also made recapitulative statements on IC supplies referred to Article 262.⁷⁸ See figure 4 below.

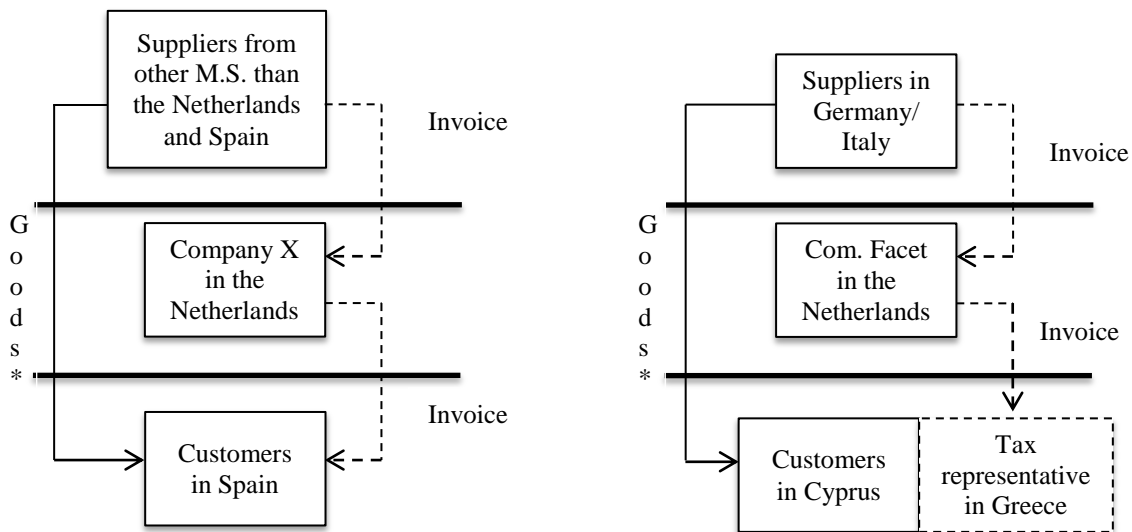
Facet, a single taxable unit established in the Netherlands, marketed computer parts. It purchased the goods from undertakers in Germany and Italy and sold them to customers who were established in Cyprus and had a tax representative in Greece. The goods were transported directly from Germany and Italy to Cyprus. The suppliers from Germany and Italy mentioned Facet's Dutch VAT identification number and did not charge VAT on their invoices. Facet also did not charge any VAT to its customers in Cyprus. It mentioned on its invoices the Greek VAT identification numbers that the customers had given. Through its tax return in the Netherlands, Facet accounted for VAT due on IC acquisitions of the goods and it deducted that VAT. It also classified the supplies to its customers as IC supplies, referring to the Greek VAT identification numbers of its customers or their tax representatives.⁷⁹ See Figure 4 below.

⁷⁶ Case C-430/09 *Euro Tyre Holding BV* para. 35.

⁷⁷ *Idem* para. 36.

⁷⁸ Joint cases C-536/08 and C-539/08 *X and Facet BV/Facet Trading BV*, OJ C 63, 13.3.2010, paras. 14-17.

⁷⁹ *Idem* paras. 21-23.



*There was no proof that the goods reached the destination Member State.

Figure 4: Joint cases *X and Facet BV/Facet Trading BV*

In both cases the customers in the Member States of the destination of goods did not fill out any declarations of IC acquisitions in their countries and in the Facet case it appeared that the customers were not even registered in Cyprus for VAT purposes. As X and Facet claimed VAT deductions on their tax returns, the Dutch tax authorities disallowed the deductions on the ground that the goods had been acquired within the terms of Article 41 of the VAT Directive.⁸⁰

The question was asked whether the companies performing the IC acquisitions of goods have the immediate right to deduct the tax declared in the Member State which issued the VAT identification number (Article 41), but where the IC acquisitions tax had not been declared in the Member State where the dispatch to the acquirer ended (Article 40).⁸¹

First of all the CoJEU recalled that the right to deduct VAT immediately is ‘an integral part of the VAT system and a fundamental principle underlying the common system of VAT and in principle may not be limited.’⁸² Furthermore, that the purpose of the taxation of trade between Member States introduced by transitional arrangements is to transfer the tax revenue to the Member State in which final consumption of the goods supplied takes place.⁸³

The CoJEU explained that Article 41 of the VAT Directive seeks to ensure that the intra-Community acquisition is subject to tax and to prevent double taxation in respect of the same acquisition.⁸⁴ When the conditions for simplified triangulations are met each Member State is required to ensure that VAT is not charged on IC acquisitions of goods effected, within the meaning of Article 40 under the VAT Directive, within its territory.⁸⁵

⁸⁰ Joint cases C-536/08 and C-539/08 *X and Facet BV/Facet Trading BV* paras. 18, 23 and 24.

⁸¹ *Idem* para. 27.

⁸² *Idem* paras. 28-29.

⁸³ *Idem* para. 30.

⁸⁴ *Idem* para. 35.

⁸⁵ *Idem* para. 38.

According to the CoJEU deduction of the input VAT charged on intermediary goods and services acquired by a taxable person is subject to the condition that the goods and services thus acquired are to be used for the purpose of the taxable person's taxable transactions.⁸⁶ However, if the goods, which are taxed as IC acquisitions deemed to have been made in the Member State which issued the identification number, do not actually enter into that Member State, such transactions cannot be regarded as giving rise to a right to deduct under Article 168 of the VAT Directive.⁸⁷ The CoJEU pointed out that the general regime under Article 168 and 169 for the deduction of VAT is not intended to replace the specific regime referred to in the second paragraph of Article 41 for reducing taxable amount in order to make it possible to correct the double taxation.⁸⁸

Furthermore, the CoJEU added, that granting immediate the right of deduction in a triangular situation would risk undermining the effectiveness of the Article 42(a) and (b), because the taxable person having the right to deduct VAT in the Member State which issued the identification number, would not be incentive to declare that the acquisition had been taxed in the Member State of arrival. Such a solution could ultimately jeopardize the application of the basic rule that, in an IC acquisition, the place of taxation is considered to be the Member State of final consumption.⁸⁹

Based on this ground the CoJEU stated that Article 41 of the VAT Directive must be interpreted as meaning that a taxable person has no immediate right to deduct input VAT charged on an intra-Community acquisition, where the dispatch to the acquirer ended in a different Member State.⁹⁰

3.1.4. Consequences of the case law of the CoJEU

EMAG and *Euro Tyre Holding BV* (hereinafter – *Euro Tyre*) cases together lead to the situation that depending on business practices between the parties also contract conditions and obligations in chain transactions parties are free to determine the possible tax scenarios. Therefore, the circumstances of each individual case are decisive.

If transport is arranged by Party A or Party C it is clear how to attribute the transportation to a single supply in the chain. If transport is arranged by Party A which holds the power to dispose of the goods during the transport when the supply A to B is an exempted IC supply and the supply B to C is a domestic supply in the destination Member State. But if transport is arranged by Party C i.e., goods are taken by Party C (on its behalf and account) in the Member State of departure when the supply A to B is a domestic supply in the country of departure and the supply B to C is an IC supply which triggers an IC acquisition in the destination Member State.⁹¹

However, things are much more complicated if transport is arranged by an intermediary Party B. In such a case, if all links in the chain are unknown for Party A, Party B's intention and (non)provision of information to Party A can determine the transport to

⁸⁶ Joint cases C-536/08 and C-539/08 *X and Facet BV/Facet Trading BV* para. 40.

⁸⁷ *Idem* paras. 41-42.

⁸⁸ *Idem* para. 43.

⁸⁹ *Idem*. para. 44.

⁹⁰ *Idem* para. 45.

⁹¹ Dr Redmar Wolf, "VAT Pitfalls in Intra-EU Commodity trade", EC Tax Review 2012/1 p. 37.

either the first or the second supply.⁹² The position of Party B in principle is decisive. If Party B confirms that the goods will be transported to another Member States and provides a VAT identification number issued by the destination Member State then the supply A to B is an exempted IC supply and the supply B to C is a domestic supply in the Member State of destination. Nonetheless, if Party B does not provide the above information but informs Party A that the goods have been sold before they left the country of dispatch the supply A to B is a domestic supply in the Member State of dispatch and the supply B to C is an IC supply which triggers an IC acquisition in the Member State of arrival. In this case, B has to register in the Member State of departure.⁹³

In fact the CoJEU confirm the position that account must be taken, as far as possible, of the purchaser's intentions at the time of the acquisition, provided that they are supported by objective evidence.⁹⁴ The comparable position was also expressed by the Supreme Tax Court in Germany. The Supreme Tax Court in Germany gave a judgement⁹⁵ where a motor car dealer in Germany sold a car to a Spanish dealer. The customer picked up the car to transport it to Spain but the car was delivered to the final customer in France. The Spanish dealer did not provide any information about the supply to France nor did the customer in France have any knowledge of the German supplier. According to the German tax authority the first supply was a domestic supply and the second supply was an IC supply. The Supreme Tax Court denied this position and stated that this was not for the German car dealer himself to find out that his Spanish customer had already resold the car to another customer in France. The Court concluded that the Spanish intermediary party had a choice in taxation. If the intermediary party provided the information about the resale contract in Germany the first transaction must be a domestic supply in Germany followed by an IC supply. However, if the intermediary party decided to remain silent on the resale contract and provided the information to the supplier that the delivery would be to his own address for resale later the first transaction have to be ascribed as an IC supply and the second transaction as a domestic supply in the arrival Member State.⁹⁶

The interpretation of the CoJEU in joint cases *X and Facet BV/Facet Trading BV* (hereinafter – joint cases *X and Facet*) means that an intermediary party involved in the simplified triangular transaction can no longer automatically deduct VAT on an IC acquisition and application for successful refund depends if a customer had accounted for VAT on the receipt of the goods in the Member State of arrival.⁹⁷ The result of this situation is incurred cash flow or even losses for an intermediary party.⁹⁸ If the final customer in the Member State of arrival does not fulfil all obligations for declarations the simplified triangulation arrangements becomes impossible. Taking into

⁹² Dr Redmar Wolf, "VAT Pitfalls in Intra-EU Commodity trade", EC Tax Review 2012/1 p. 37.

⁹³ *Idem* p. 37.

⁹⁴ Ben Terra/Julie Kajus, IBFD Tax Research Platform, ECJ Case Law, Case C-430/09 *Euro Tyre Holding BV*, Case Summary, www.ibfd.org. See also Case C-84/09 *X v Skatteverket* para. 47 OJ C 13 15.01.2011.

⁹⁵ German Supreme Tax Court judgement V R 3/10 of August 11, 2011 published on October 19.

⁹⁶ PwC Reports Issues 1 January 5, 2012 available at http://tax-news.pwc.de/files/tax-legal-news-issue_1_2012.pdf (accessed at 02.05.2012).

⁹⁷ Ben Terra/Julie Kajus, Place of taxable transactions, e-book published by Cajus media, Series on International Tax Law, School of Economic and Business Management, Lund University 2011, p. 41.

⁹⁸ Michael van de Leur, "Triangulation or Strangulation?" International VAT Monitor November/December 2010, p. 398.

consideration that a taxable person is allowed to make amendments to the categorization of an IC supply which is made after the transaction has taken place to be reflected in the accounts of those taxable⁹⁹ an intermediary party has some options in the case when the simplified triangulations goes wrong. It can choose to incur the costs of VAT under Article 41 of the VAT Directive in the Member State which VAT identification number it used for the supply or register for VAT in the Member State of arrival. Registration in the country of arrival remains obligation to report an IC acquisition but it would allow to reduce VAT incurred under Article 41. However, the local VAT in the Member State of arrival has to be accounted and paid which can never be recovered from the final customer.

3.2. The case law of the CoJEU regarding the conditions for exemption of intra-Community supplies of goods

The CoJEU on 27 September 2007 decided three cases *Teleos plc and Others*¹⁰⁰, *Albert Collée*¹⁰¹, *Twoh International BV*¹⁰² and shed some light for correct identification of intra-Community supplies.

In *Teleos plc and Others* case¹⁰³ the CoJEU stated that in order to support exemption for IC supply the seller has to transfer the right to dispose of the goods as owner to the buyer and the goods must physically leave the territory of the Member State of departure.¹⁰⁴ The Member State cannot deny exemption for IC supply if provided documentation by the seller to support exemption subsequently turned out to be false but the seller acted in good faith and has no involvement in tax evasion and takes every reasonable measure in their power to ensure that the transaction did not lead to their participation in tax evasion.¹⁰⁵ The fact that the buyer reported an IC acquisition to the tax authorities in the Member State of arrival can constitute only an additional proof but not a conclusive proof to support exemption for IC supply.¹⁰⁶

The CoJEU in *Albert Collée* judgement¹⁰⁷ pointed out that transactions should be taxed taking into account their objective characteristics, therefore the principle of fiscal neutrality requires that if an IC supply was made in fact, the supplier should generally be entitled to exempt the transaction if the substantive requirements are satisfied even if

⁹⁹ Case C-146/05 *Albert Collée* para. 33.

¹⁰⁰ Case C-409/04 *Teleos plc and Others*.

¹⁰¹ Case C-146/05 *Albert Collée*.

¹⁰² Case C-184/05 *Twoh International BV*.

¹⁰³ *Teleos plc* (UK) sold mobile telephones to company TT in Spain. The goods were placed in the warehouse in UK and the buyer was responsible for transportation of the goods from the UK. *Teleos* issued invoices without VAT. TT made declarations to the tax authorities of the IC acquisition of the goods. *Teleos* also received from TT stamped and signed CMR that the goods reached the destination address. Later it turned out that CMR was falsified. *Teleos* had no idea about it.

¹⁰⁴ Case C-409/04 *Teleos plc and Others* para. 42.

¹⁰⁵ *Idem* para. 68.

¹⁰⁶ *Idem* para. 72.

¹⁰⁷ *Collée* was a parent of a German car dealership (“GmbH”) which sold cars as the authorized dealer of Company A. GmbH entered into a contract with a Belgian dealer B for the sale of cars. GmbH was only entitled to claim a commission from company A in respect of the sales to local customers. For this reason GmbH first sold the cars to another German company S as a sham sales and later company S sold the cars to a Belgian dealer B. German tax authorities refused to deduct input VAT for company S because of the sham sale. After that *Collée* cancelled relevant accounting and rebooked the transaction as IC supply. However, the exemption for IC supply was denied because the prescribed records had not been updated regularly and immediately after the relevant transaction had been completed.

the supplier has failed to comply with some of the formal requirements.¹⁰⁸ ‘Member State cannot refuse to allow an intra-Community supply — which actually took place — to be exempt from value added tax solely on the ground that the evidence of such a supply was not produced in good time.’¹⁰⁹ However, if there is a risk of a loss of tax revenues and that risk has not been wholly eliminated and the supplier knowingly contributed then the exemption for an IC supply can be contestable.¹¹⁰

In *Twoh International BV* judgement¹¹¹ the CoJEU explained that it is for the supplier of the goods to furnish the proof that the conditions for exemption of an IC supply are fulfilled.¹¹² It follows that the mutual assistance directive¹¹³ and the administrative cooperation regulation¹¹⁴ were not adopted for the purpose of establishing a system for exchanging information between the tax authorities of the Member States allowing them to establish the intra-Community nature of supplies made by a taxable person who is not himself able to provide the necessary evidence for that purpose.¹¹⁵ The tax authorities of the dispatch Member State do not have the burden to obtain the information from the competent tax authorities in the Member State of destination.¹¹⁶

3.3. Pending cases in the CoJEU

3.3.1. Case C- 587/10 *VSTR (Vogtländische Straßen- Tief und Rohrleitungsbau GmbH)*

The case concerns the chain transaction where Party A registered for VAT in Germany sold the goods to Party B which only has its seat in a third country and is not registered for VAT purposes in any EU Member State. Later Party B resold the same goods to Party C registered for VAT in Finland. Before the goods left Germany Party B informed Party A that the goods were sold to Party C. As Party B could not provide its VAT identification number it provided Party C’s Finland VAT identification number. The goods were physically delivered from Germany to Finland.¹¹⁷ The question referred to the CoJEU is whether an IC supply in a chain transaction can be allow where one of the parties in the chain is from a third country and is not registered for VAT purposes in any

¹⁰⁸ Case C-146/05 *Albert Collée* paras. 30 and 31.

¹⁰⁹ *Idem* para. 41.

¹¹⁰ *Idem* para. 42.

¹¹¹ *Twoh* a Netherlands company supplied computer parts to company in Italy. The goods were placed in a Dutch warehouse and the buyer was responsible for transportation of the goods from the Netherlands. *Twoh* issued invoices without VAT. No declaration was filed by Italian buyer and no confirmation was received that goods had been transported. Dutch tax authorities refused to allow exemption for the supply. *Twoh* appealed that Dutch tax authorities may collect information about the delivery from Italian tax authorities.

¹¹² Case C-184/05 *Twoh International BV* para. 26.

¹¹³ Council Directive 77/799/EEC of 19 December 1997 concerning mutual assistance by the competent authorities of the Member State in the field of direct and indirect taxation OJ L 336, 27.12.1977 repealed by the Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation OJ L 64, 11.3.2011.

¹¹⁴ Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation repealed by the Council Regulation (EC) No 1798/2003 of 7 October 2003, subsequently replaced by Council Regulation No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) see note 25.

¹¹⁵ Case C-184/05 *Twoh International BV* para 34.

¹¹⁶ *Idem* para. 38.

¹¹⁷ Hearing of the Case C-587/10 *VSTR* 07.03.212 paras. 15-18, IBCFD Tax research platform, <http://www.ibfd.org/>, (translated by the author from the original text in German language).

EU Member State also taking into consideration that such transaction had been reported to the tax authorities as an IC acquisition?¹¹⁸

It was not the case to use the simplified IC triangulation measures as Party B was not registered in any of the EU Member States. Following judgements in *EMAG* and *Euro Tyre* cases the transactions must be regarded as following each other. As Party B informed Party A that the goods had been resold before they left Germany therefore the supply A to B has to be a domestic supply and the supply B to C has to be an IC supply. In this scenario B has to register in Germany. Even if the facts have been different and the supply A to B has been ascribed as an IC supply followed by a domestic supply B to C in Finland B should register in Finland. According to the VAT rules, registration for Party B in the country of departure or arrival seems to be unavoidable consequence. However, the question remains if a VAT identification number is an absolute requirement for an IC supply when all the other criteria are met under Article 138(1) of the VAT Directive. In this case the German tax authorities refused to exempt the transaction as an IC supply because under German rules Party A must provide Party B's VAT identification number. In the hearing of the case claimant (VSTR – Party A) expressed the opinion that a VAT identification number is not a material condition to apply the exemption for IC supply.¹¹⁹ The Commission stated that a taxable person cannot depend on the submission of VAT identification number of the purchaser.¹²⁰ Therefore, the fact that the purchaser has reported an IC acquisition in such a case is irrelevant.¹²¹

If for example exemption for IC supply in such a case has been allowed based on *Albert Collée* judgment because the transaction in fact took place and that a risk of a loss of tax revenue is wholly eliminated as the report of IC acquisition was submitted.¹²² Then the question remains whether the report of IC acquisition can wholly eliminate the risk of tax revenue loss. If the exemption for IC supply would be applicable in Germany without requiring the VAT identification number of Party B the question remains who will report an IC acquisition in Finland. In this case, the obligation to report rest on Party B and in order to do it Party B has to register for VAT in Finland. In the author's opinion without the information from German tax authorities it would be very difficult to follow such transactions and the liability for an intermediary party to register in Finland and report an IC acquisition. Nevertheless, if the report for IC acquisition would be provided by Party C, then the condition that the transactions must be regarded as following each other would not be satisfied anymore and the supply A to B no longer could be ascribed as an IC supply.

3.3.2. Case C-273/11 (*Mecsek-Gabona Kft.*)

The question referred to the CoJEU concerns the conditions for exemption of intra-Community supplies of goods. The Hungarian Baranya Megyei Bíróság asked whether the exemption for IC supplies applies when the goods are sold to a buyer from another

¹¹⁸ Case C-587/10 (*VSTR*) Reference for a preliminary ruling from Bundesfinanzhof (Germany) lodged on 15 December 2010, <http://curia.europa.eu>.

¹¹⁹ Hearing of the Case C-587/10 *VSTR* 07.03.2012 para. 27, IBFD Tax research platform, <http://www.ibfd.org/>, (translated by the author from the original text in German language).

¹²⁰ *Idem* para. 30.

¹²¹ *Idem* para. 38.

¹²² References for preliminary rulings and hearing reports Brussels Briefing - June 2011 available at <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/pages/brussels-briefing-june-2011.aspx>. (accessed at 03.05.2012).

Member State and under the sale contract the right of disposal and right of ownership are transferred to the buyer when the goods are loaded onto the transportation in the Member State of departure and the buyer assumes the obligation of transportation to the other Member State? Furthermore, is it enough for the seller to have a CMR returned by the buyer to support exemption or whether the seller must ensure that the goods has crossed the national border and has been transported within EU territory? The final question which concerns the impact is the fact that the Member State retrospectively revokes the buyer's Community tax number with effect from a date prior to the sale of the goods?¹²³

In the author opinion the situation in this case is comparable with *Teleos plc and Others* case. If the seller acted in good faith and has no involvement in tax evasion and took all reasonable measure in his power to prevent the evasion of VAT, the Member State should not seek to charge the VAT from the supplier.

3.4. New documentation requirements for intra-Community supply of goods in Germany

On 25 November 2011, the Bundesrat (Federal Council) approved the amendment of the Umsatzsteuer-Durchführungsverordnung (UStDV) (German VAT Implementation Regulation) which reorganizes the VAT evidence for IC supplies and exports. The new requirements for IC supplies will enter into force on 1 July 2012.¹²⁴ The purpose – according to official statements – is to create a simpler and clearer set of evidence – specific regulation.¹²⁵

The draft version of the new regulation provides that from this date only the so-called ‘Gelangensbestätigung’ (confirmation of goods having been received in the Member State of destination) will be accepted as evidence of the IC supply.¹²⁶ However, it will be possible to support exemption for IC supply with several other documents e.g., the CMR can still be part of the documentary evidence, if fully filled in by all parties.¹²⁷ Despite of exceptional cases the main proof to zero-rate an IC supply will be the Gelangensbestätigung and without it the suppliers have to charge German VAT. The new requirement applies to all IC supplies of goods irrespective of the means of transport and whether the goods are transported by the supplier, recipient or a third party. In the confirmation of arrival the customer must confirm that the goods have actually arrived in the Member States of destination. Pursuant to the wording and the

¹²³ Case C-273/11 *Mecsek-Gabona Kft.* Reference for a preliminary ruling from Baranya Megyei Bíróság (Hungary) lodged on 3 June 2011, <http://curia.europa.eu>.

¹²⁴ Changes in the VAT evidence for exports and intra-community supplies may create some hurdles for the export industry, Baker & McKenzie Client Alert December 2011 *available at* http://www.bakermckenzie.com/files/Uploads/Documents/Germany/Newsroom/AL_ChangesinRequirementsforexportsandintracommunitysupplies_December2011.pdf (accessed at 02.05.2012).

¹²⁵ RölfPartner/Baker Tilly VAT Newsletter Edition 4/2011 Editorial deadline: December 6, 2011, *available at* http://www.roelfspartner.de/PortalData/1/Resources/pdf/vat-newsletter/RoelfsPartner_VAT_Newsletter_4_2011_e.pdf (accessed at 02.05.2012).

¹²⁶ Changes to the German VAT implementation regulation, VAT breakingTAXnews: Germany - New requirements for proving exports and intra-community supplies, 22 December 2011 *available at* https://newsletter.pwc.ch/inxmail9/html_mail.jsp?params=62396+archive_de%40pwc.ch+4+i0r0000i0000bm3q (accessed at 02.05.2012).

¹²⁷ VAT breakingTAXnews: Germany: New draft regulations regarding documentary evidence for intra-community supplies, 30 March 2012 *available at* http://pwc.inx.ch/inxmail9/jsp/view_mailing.jsp?mid=9524&lang=en (accessed at 02.05.2012).

purpose of the new legislation, the *Gelangensbestätigung* can only be signed once the goods have arrived in the Member State of destination. In fact, when the goods are loaded onto the transportation of the buyer in the Member State of departure and the buyer assumes the obligation of transportation of the goods to the Member State of destination the *Gelangensbestätigung* cannot be signed thus no exemption for IC supply at this moment. What is more, the question remains how this new rule will work in simplified triangulations – which of the parties in the chain will have to sign the *Gelangensbestätigung* the intermediary party or the final party.¹²⁸ However, the fundamental question remains also whether the *Gelangensbestätigung* is in accordance with the EU law.

Under Article 273 of the VAT Directive Member States may impose obligations which they seem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers. However, according to the CoJEU the Member States must not go further than what is necessary to attain such objectives.¹²⁹ The CoJEU in *Eismann Alto Adige* case also pointed out that Article 273 of the VAT Directive applies only to transactions between Member States in requiring that they be treated in the same way as internal transactions.¹³⁰ Pursuant to the wording of the *Gelangensbestätigung* it is already discriminatory because the confirmation is necessary only when the goods cross the border and no similar documentation is required than the goods are transported to the buyer in Germany.¹³¹ In this case the *Gelangensbestätigung* potentially violates the EU law because the rules for cross-border supplies are stricter than the rules for domestic supplies. There is the suggestion that the *Gelangensbestätigung* should be optional otherwise it will endanger the application of the exemption for IC supplies under Article 138(1) of the VAT Directive and hinder trade within the EU.¹³²

Nonetheless, the draft of new German rule is contrary to *Albert Collée* judgement as exemption for IC supply will depend on subjective characteristics of the transaction – the specific document, even though in fact an IC supply have taken place. It can also trigger a double taxation problem. For example if the supplier in Germany will have to charge the local VAT because he will not be able to provide the *Gelangensbestätigung* but in fact the goods will be transported to the destination Member State and the buyer will report and account VAT for IC acquisition.

In the author's point of view the CoJEU judgement in the *Kraft Foods Polska* case¹³³ confirms that the taxable persons in Germany cannot be limited solely to have signed

¹²⁸ Changes to the German VAT implementation regulation, VAT breakingTAXnews: Germany - New requirements for proving exports and intra-community supplies, 22 December 2011, see note 126.

¹²⁹ Case C-25/03 *Hans V. Hundt-Eßwein*, ECR [2005] P. I-03123, para. 80.

¹³⁰ Case C-217/94 *Eismann Alto Adige*, ECR [1996] P. I-05287, para. 20.

¹³¹ Prof. Ben Terra, Special Seminar Pending and decided cases on VAT 2011, held 10.01.2012 at School of Economics and Management, Department of Business law Lund University Sweden.

¹³² Tax Executive Institute, Inc. New documentation requirements for intra-community supplies from Germany to other EU Member States – “*Gelangensbestätigung*” 2012 03 07 available at <http://www.tei.org/news/Pages/Europe%20%E2%80%93%20TEI-Comments-on-German-VAT-Documentation-Rules.aspx> (accessed at 04.05.2012).

¹³³ Case C-588/10 *Kraft Foods Polska*, OJ C 89, 19.3.2011.

Gelangensbestätigung in order to support exemption for IC supply. The alternative proof must be allowed. The case deals with the situation where a taxable person has to obtain a credit note receipt confirmation from the customer in order to make the output VAT corrections after a supply took place.¹³⁴ The CoJEU ruled that if it is impossible or excessively difficult for a taxable person to obtain the acknowledgment from the customer, despite his best efforts, the principles of VAT neutrality and proportionality require that a Member State cannot permit a taxable person the opportunity of establishing the alternative proof.¹³⁵ The other means of proof can be copies of the correcting invoice and the reminder addressed to the purchaser of the goods to send acknowledgment.¹³⁶

4. Other complications connected with chain transactions

4.1. The complications connected with simplified triangulation rules

4.1.1. Scenario 1 – Party B is registered in final Member State

As it was mentioned before the simplified intra-Community triangulation rules are not applied in a consistent way among the 27 Member States. In some Member States the simplified triangulation rules cannot be applied where the intermediate party (Party B) has a VAT registration in the country of Party C in the chain.¹³⁷ The scenario is as follows: Party A established in Member State 1 supplies goods to Party B established in Member State 2, afterwards Party B supplies goods to Party C established in Member State 3. Party B is also registered (but not established) in Member State 3. The goods are transported directly from Party A in Member State 1 to Party C in Member State 3. See Figure 5 below.

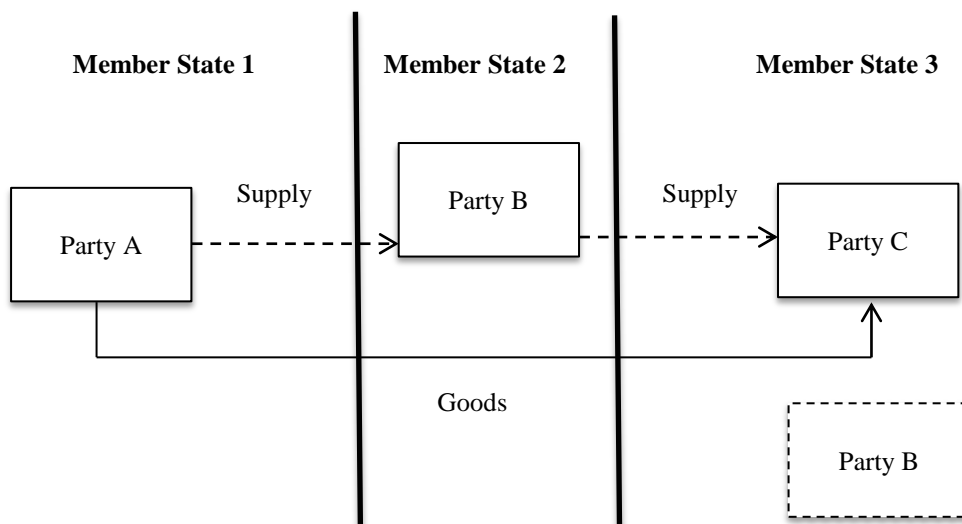


Figure 5: Party B is registered in final Member State¹³⁸

¹³⁴ Case C-588/10 *Kraft Foods Polska* paras. 10, 11 and 19. See also PwC Reviews Global VAT Developments February 2012, 2 March 2012, Tax Analyst Document Number: Doc 2012-4314, www.TaxAnalysts.com.

¹³⁵ Case C-588/10 *Kraft Foods Polska* para. 42.

¹³⁶ *Idem* para 41.

¹³⁷ Comments of Tax Executives Institute on Green Paper submitted to the Commission 31 May 2011, see note 6.

¹³⁸ Ben Terra and Julie Kajus, Commentary – A Guide to the Sixth VAT Directive (Historical Archive) - Chapter 16a, IBFD Tax research platform www.ibfd.org.

If C is established or registered in Austria, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Luxembourg, Malta, Portugal, the Slovak Republic, Spain or the UK, B's supply to C is not subject to the reverse charge mechanism i.e., the simplified triangulation rules cannot be applied, if B is registered in C's Member State. Where C is established in any other Member State, B's supply to C is still subject to the reverse charge mechanism i.e., the simplified triangulation rules can be applied, if B is registered (not established) in that Member State.¹³⁹ For example, in Greece there is one more additional condition that B's registration in Greece would be for other activity than the supply of goods.

In the case if the simplified triangulation rules cannot be applied then the supply A to B is an IC supply followed by an IC acquisition in Member State 3 and the supply B to C is a domestic supply in Member State 3. If Party C must account for the VAT under the local reverse charge will depend on the local rules of Member State 3.¹⁴⁰

4.1.2. Scenario 2 – Party B is registered in first Member State

In some Member States the simplified triangulation rules cannot be applied where the intermediate party (Party B) has a VAT registration in the country of Party A in the chain. The scenario is as follows: Party A established in Member State 1, supplies goods to Party B established in Member State 2. Party B is also registered but not established in Member State 1. Afterwards, Party B supplies goods to Party C established in Member State 3. The goods are transported directly from Party A in Member State 1 to Party C in Member State 3. See Figure 6 below.

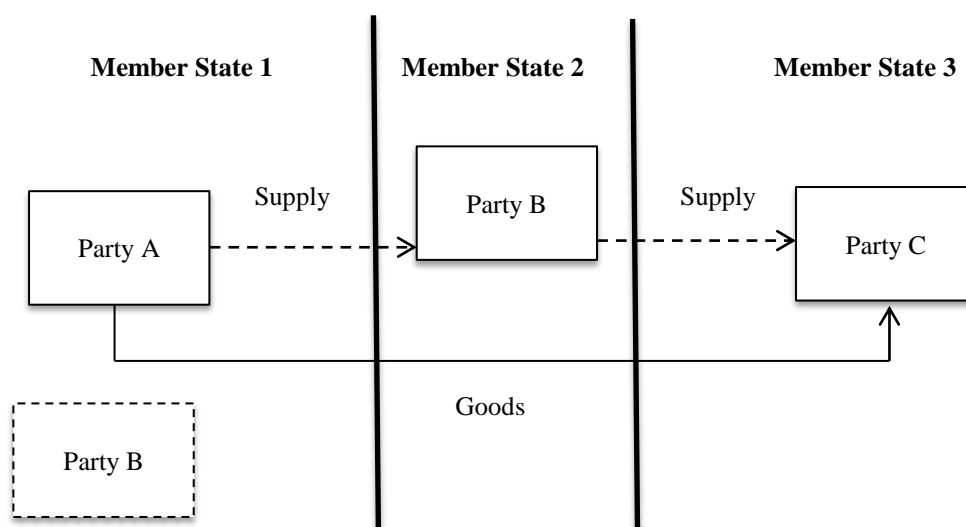


Figure 6: Party B is registered in first Member State¹⁴¹

For example, if A is registered (established) in Estonia, Italy or Latvia and B at the same time is registered in A's Member State, the simplified triangulation rules can be applied. In such a case B cannot use its VAT identification number issued by A's

¹³⁹ Walter van der Corput and Fabiola Annacondia (eds), EU VAT Compass 2011/2012, IBFD 2011 p. 601.

¹⁴⁰ Ben Terra and Julie Kajus, Commentary – A Guide to the Sixth VAT Directive (Historical Archive) - Chapter 16a, IBFD Tax research platform www.ibfd.org.

¹⁴¹ Idem Chapter 16a.

Member State. However, if A is registered (established) in Bulgaria, Hungary or Lithuania it is impossible to apply the simplified triangulation measures because B is also registered in A's Member State.

In the case if the simplified triangulation rules cannot be applied the supply A to B is a domestic supply in Member State 1 and the supply B to C is an IC supply which triggers an IC acquisition in Member State 3.

4.1.3. Scenario 3 – two parties in final Member State

Chain transaction can also involve more than three parties, but the goods eventually are delivered from the first party in one Member State to the final party in another Member State i.e., three supplies of goods but only one intra-Community movement of goods. In some Member States the simplified triangulation rules can be applied when more than three parties are involved, but this is not the result in other Member States.¹⁴²

The scenario is as follows: Party A in Member State 1 supplies goods to Party B in Member State 2, afterwards, Party B supplies goods to Party C in Member State 3 and finally Party C supplies goods to Party D also in Member State 3. The goods are transported directly from Party A in Member State 1 to Party D in Member State 3. See Figure 7 below.

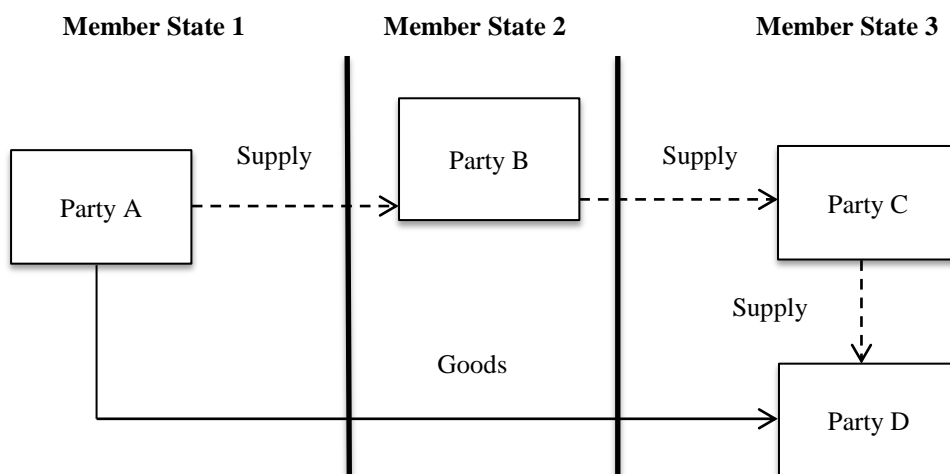


Figure 7: two parties in final Member State¹⁴³

In this scenario if C is registered (established) in Denmark, Sweden or Belgium the simplified triangulation measures are allowed. Normally, the simplified triangulation applies between A, B and C, but the supply C to D is treated as a domestic supply. By contrast, if C is registered (established) in Austria, France or Greece it is impossible to apply the simplified triangulation measures in such a case. Therefore, B must register in Member State 3. As a result, the supply A to B is an IC supply which triggers an IC acquisition in Member State 3 and the supplies B to C and C to D deemed to be made in Member State 3 i.e., are a domestic supplies. Whether the VAT must be accounted under the local reserve charge for the supply between B to C will depend on the local rules of Member State 3.

¹⁴² Comments of Tax Executives Institute on Green Paper submitted to the Commission 31 May 2011.

¹⁴³ Ben Terra and Julie Kajus, Commentary – A Guide to the Sixth VAT Directive (Historical Archive) - Chapter 16a, IBFD Tax research platform www.ibfd.org.

4.1.4. Linking transport to a supply in a simplified intra-Community triangulation

In the case than the simplified triangulation rules are applied in described scenarios 1, 2 and 3 the transport must be arranged following judgments in *EMAG* and *Euro Tyre* cases. The simplified triangulation rules can be applied than the intra-Community transport is attributed to the supply between Party A to Party B. If the transport is arranged by Party A or if Party A supplies the goods under ‘ex works’¹⁴⁴ condition and Party B takes the responsibility to transport the goods to Party C (or Party D in the scenario 3) the simplified rules apply. However, in the case than Party B arranges the transport but informs Party A that the goods have been resold to Party C before the transport took place in the Member State of dispatch, the simplified triangulation rules cannot be applied. The simplified rules cannot be applicable if the transportation is arranged by Party C i.e., Party C picks up the goods in the Member State of dispatch on its behalf and account.

4.1.5. How law should be interpreted

In scenarios 1 and 2 some of the Member States do not allow to apply the simplified triangulation rules if the intermediary Party B is also registered (but not established) either in the Member State of arrival or dispatch. The argumentation provided by these Member States is that in such situations it is not necessary to use the simplification rules because these rules were introduced in order to avoid the necessity registration for Party B in the Member State of arrival or dispatch.¹⁴⁵ In the author’s point of view, even if this argument makes sense in some situations, it also creates some absurd situations from a business point of view. The following conclusion under this argument is that as long as Party B has a VAT identification number in the Member State of arrival or dispatch, the ability to use the simplification rules are limited depending on the Member States national law. Additionally, it means incurred cash flows concerning VAT for an intermediary party. It is true, that VAT identification number in the Member State of arrival or dispatch can serve for other activities than the supply of goods and companies do not want to mix these activities. Also, Party B can be identified for VAT in the Member State of arrival or dispatch because it receives the reverse charge supplies under Article 214(d) of the VAT Directive. What is more, the registration for a single transaction for an intermediary party either in the Member State of arrival or dispatch will have negative consequences for simplified triangular transactions. Hence, different interpretation of the same rules only leads to inconsistent results.

Literal interpretation of Article 141 of the VAT Directive does not specifically provide that the simplification rule is not allowed for scenario 1. However, for scenario 2 Article 141(c) of the VAT Directive states that the goods acquired by Party B must be dispatched directly from another Member State (in scenario 2 Member State 1) than that in which he is identified for VAT.¹⁴⁶ The author thinks that the meaning of the wording ‘in which he is identified’ is not clear enough for a uniform interpretation. It can be understood as ‘registration’ but it also can be understood as ‘establishment’. The practice shows also that the Member States interpret this provision in their own way

¹⁴⁴ Under Incoterms 2010 ‘ex works’ condition the seller makes the goods available at its premises. The buyer pays all transportation costs and also bears the risks for bringing the goods to their final destination. (See at <http://en.wikipedia.org/wiki/Incoterms0> accessed at 05.05.2012).

¹⁴⁵ Ben Terra and Julie Kajus, Commentary – A Guide to the Sixth VAT Directive (Historical Archive) - Chapter 16a, IBFD Tax research platform www.ibfd.org.

¹⁴⁶ Idem Chapter 16a.

because some Member States allow to apply simplification rule in scenario 2 while others disallow it. The author's position is that application of simplified rules in scenario 2 should not be influenced because of Party B's registration in Member State of dispatch. As an example, Party B can be registered in the Member State of dispatch because it receives only the reverse charge supplies. For the author it looks unreasonable in such a situation to force Party B to make an IC supply from Member State 1. The result will be the same; the goods will be transported from Member State 1 anyway. The author also does not see the interest of the tax authorities in Member State 1 to continue checking whether Party B is also registered in Member State 1.

Under literal interpretation of Article 141 of the VAT Directive the simplified triangulation rules with four parties (scenario 3) are contrary to referred provision. However, since C's supply to its customer D is a domestic supply, from a logical point of view, it seems strange why the simplified triangulation rules should not be applied. The simplified rules should be applied between A, B and C as the goods is transported directly from Member State 1 to Member State 3.¹⁴⁷ What is more, this conclusion can be supported by *EMAG* case where the intermediary Party K is making the IC acquisition even if the goods are also transported directly to the final party's EMAG customers in the Member State of arrival. If an IC acquisition of goods is allowed in such a case then it does not seem understandable why suddenly the simplified IC triangulation is treated differently if the goods are delivered to the final party's customer in the Member State of arrival.¹⁴⁸

4.1.6. Consequences of incorrect use of the simplified triangulation rules

It may be the case that the Parties involved in a triangular supply can end up with an incorrect application of the simplified IC triangulation rules. For example, in scenario 3 if Member State 3 has decided that the simplified rules have not taken place, Party B has to register in Member State 3. Presume that in Member State 3 the local reverse charge is applicable for the supply between B and C under Article 194 of the VAT Directive.¹⁴⁹ According to Article 140(c) of the VAT Directive Member State 3 has to exempt an IC acquisition of goods because Party B is not established in Member State 3 and makes the reverse charge supplies and is covered by refund rules. Member State 3 in principle cannot claim any tax due to the first transaction which is an exempt IC acquisition and for the second transaction the local reverse charge applies. At the end there is no risk of loss of tax revenue in Member State 3 and the purpose of registration for Party B would be only for exempt and reverse charge transactions.

In the case when the local reverse charge is not applicable in Member State 3 for the supply from B to C, B would be obliged to charge local VAT for the supply to C. B would have to collect VAT and pay to the tax authorities and C would deduct it. In the author's point of view, this situation creates a bigger risk for a loss of tax revenue for Member State 3 than allowing to apply the simplified rules.

¹⁴⁷ Ben Terra and Julie Kajus, Commentary – A Guide to the Sixth VAT Directive (Historical Archive) - Chapter 16a, IBFD Tax research platform www.ibfd.org.

¹⁴⁸ Ben Terra/Julie Kajus IBFD Tax Research Platform, ECJ Case Law, Case C-245/04 *EMAG*, Case Summary, www.ibfd.org.

¹⁴⁹ For transaction involving a non-established supplier some member States have chosen to apply reverse charge i.e., the obligation to account the domestic VAT is transferred to the local established company. This rule for domestic goods and services is applicable in Belgium, Estonia, Finland, France, Italy, Malta, Netherlands, Poland, Portugal, Romania, Spain, and Sweden. (See Chris Platteeuw, Pedro Pestana De Silva, Quick Reference to European VAT Compliance – 2011, Kluwer International BV p. 3-7).

However, if Party B would not decide to register in Member State 3 and Member State 3 would decide to inform about it Member State 2 could that have the impact to Party's B right to deduct VAT on the acquisition in Member State 2. The situation in some sense would be similar to *X and Facet* case because the goods have been acquired on Party's B VAT identification number issued by Member State 2. However, the right to deduct VAT on IC acquisition in Member State 2 could not be denied as Party B could prove that the goods arrived in Member State 3. The situation would be different than in *X and Facet* case because in that case the intermediary party could not prove that the goods arrived in the Member State of destination.

At the end, it is likely that Party B would be fined for not registering in Member State 3. Also, Party B can have complications for not reporting an IC acquisition in Member State 3.¹⁵⁰

If in scenario 1 Member State 3 has decided that the simplification rules have not taken place it can consider that Party B has made an IC acquisition in Member State 3 followed by a domestic supply to Party C. However, Party B can be registered in the Member State of arrival for the reason that it makes domestic supplies or receives the reverse charge supplies there. In scenario 1 where Party B is registered in Member State 3 and does not make supplies there, the consequences would be the same as in the previous scenario depending if the supply B to C would be covered by the local reverse charge rule or not.

In scenario 1 where Party B is registered (but not established), because it makes supplies in Member State 3, in the author's opinion can be comparable to the situation that is covered by Article 192a of the VAT Directive. Article 192a removes the obligation to pay VAT from a fixed establishment located in the same country as the customer, as long as that fixed establishment does not intervene in the supply.¹⁵¹ Therefore, Party B's registration in Member State 3 should not be equated with a fixed establishment which intervenes in the supply and has to account and pay VAT. If Member State 3 disallows the simplification rules under scenario 1 it potentially treats Party's B registration in Member State 3 the same way as it was a fixed establishment which intervenes in the supply. In the author perspective it can be contrary to the VAT Directive and the case law of the CoJEU.

4.2. The complications conceded with the right to deduct/refund input VAT

Taxable persons under Articles 168 and 169 of the VAT Directive can deduct input VAT on goods and services used for taxed transactions and some deductible exempt transactions. The CoJEU settled in the case case-law that 'the right of deduction is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to

¹⁵⁰ The circumstances of the individual case and national law of the Member States are decisive and would have the impact for the final potential sanction.

¹⁵¹ Council Regulation on implementing the Directive including new place of supply rules – issues around Member State implementation KPMG's Indirect Tax Update No.09/10 week commencing 1 March 2010 available at <http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Tax/ITU%200910.pdf> (accessed at 06.05.2012).

inputs.¹⁵² For all taxable persons who are not established in the Member State in which they incur VAT on inputs to purchase goods and services or import goods subject to VAT Article 170 of the VAT Directive provides a right of refund. For taxable persons established in the EU, refunds are made under the terms and conditions of the Directive 2008/9/EC also known as ‘8th VAT Directive’.¹⁵³ For taxable persons established outside the EU, refunds are made under the terms and conditions of the Directive 86/560/EEC also known as ‘13th VAT Directive’.¹⁵⁴

Under Article 3 of the 8th Directive the following conditions must be met if a taxable person registered for VAT in one EU Member State wants to reclaim VAT incurred in another Member State:

- a taxable person must not be established in the Member State of refund;
- a taxable person has not had in the Member State of refund the seat of his economic activity or a fixed establishment from where business transactions are affected or domicile or normal place of residence;
- a taxable person has not supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of transport and transport-related services and supplies of goods and services where the customer has to account VAT under reverse charge rule (Article 194, 195, 196, 197 and 199 of the VAT Directive).

Under Article 171a of the VAT Directive Member States may instead of granting a refund of VAT allow deduction of VAT pursuant to the procedure laid down in Article 168. This provision can help to reduce the VAT cash flows for non-established businesses. For example, in scenario 3 where the simplified triangulation is allowed and Party C is non-established in Member State 3 and for the supply between Party C and Party D the reverse charge is applicable. In this case Party C, as non-established business in Member State 3, fulfills the condition for a refund procedure. When Party C receives the invoice from Party B it has to account for VAT under Article 197(1)(a) (reverse charge) and later Party C makes a reverse charge supply to Party D. In the end, Party C cannot deduct VAT on its purchase on the VAT return and must claim it back in accordance with the refund rules. It can take a minimum of four months to get the refund.¹⁵⁵ If Member State 3 allows a deduction instead of refund Party C can deduct VAT on its purchase submitting the VAT return.

In the joint cases *X and Facet* the CoJEU explained that an intermediary Party involved in simplified triangulation has no immediate right to deduct input VAT charged on an IC acquisition in the same VAT return.¹⁵⁶ It resulted that an intermediary Party has to report an IC acquisition in its VAT return but this input VAT can be deducted only by

¹⁵² Case C-465/03 *Kretztechnik*, ECR [2005] P. I-4357, para. 33, Case C-437/06 *Securita*, ECR [2008] P. I1597, para. 24, Case C-29/08 *SKF*, ECR [2009] P. I-10413 para. 56.

¹⁵³ Article 171(1) of the VAT Directive. See also The 2011 worldwide VAT, GST and sales tax guide published by Ernst&Young p. 192 available at [http://www.ey.com/Publication/vwLUAssets/VAT_GST_sales_tax_guide_2011/\\$FILE/VAT_GST_sales_tax_guide_2011.pdf](http://www.ey.com/Publication/vwLUAssets/VAT_GST_sales_tax_guide_2011/$FILE/VAT_GST_sales_tax_guide_2011.pdf) (accessed at 28.04.2012).

¹⁵⁴ Article 171(2) of the VAT Directive. See also The 2011 worldwide VAT, GST and sales tax guide published by Ernst&Young p. 192.

¹⁵⁵ Article 19(2) of Council Directive 2008/9/EC of 12 February 2008 provides that ‘The Member State of refund shall notify the application of its decision to approve or refuse the refund application within four months of its receipt by that Member State’.

¹⁵⁶ Joint cases C-536/08 and C-539/08 *X and Facet BV/Facet Trading BV* para. 45. See also Dr Redmar Wolf, “VAT Pitfalls in Intra-EU Commodity trade”, EC Tax Review 2012/1 p. 38.

filling a separate refund request after the tax due was accounted in the Member State of arrival. Before the judgement for practical reason the input VAT due on an IC acquisition was deducted in the same VAT return in which an IC acquisition was reported.¹⁵⁷ There was a lot of criticism after the judgement in joint cases *X and Facet*. Firstly, the judgement terminated the simplification, at least as it currently applied in practice.¹⁵⁸ Secondly, it created uncertainty and the danger of double taxation under the current VAT system. Thirdly, it may have become too complicated to use the simplification regime.¹⁵⁹ Finally, there was an opinion that a separate request to reclaim the input VAT in such a situation was not in line with the VAT Directive.¹⁶⁰

The solution to this criticism was suggested by the Dutch government. Dutch proposed changes to the simplified triangulation rules from 1 January 2012. Under the new rules, the Dutch intermediary Party (in cases where it provides its Dutch VAT registration number to a supplier from another Member State) has no longer the obligation to report the intra-Community acquisition in its Dutch VAT return. Therefore no input VAT needs to be reclaimed separately. The Dutch intermediate Party B would still be required to include the subsequent supply to the final party in its EU Sales Listing.¹⁶¹

4.3. The complications connected with reporting obligations

Businesses involved in intra-EU trade normally report about cross-border supplies in three different ways. Firstly, the transactions are reported in periodic VAT returns. Under Articles 250 and 251(a),(e) of the VAT Directive a taxable person has to submit VAT returns and file the total value, exclusive of VAT, of goods supplied to VAT registered customers or purchased from VAT registered customers in other EU Member States.¹⁶²

Secondly, suppliers have to file recapitulative statements known as ‘EU Sales lists’ (ESL).¹⁶³ The recapitulative statement is a list of the VAT identification numbers of the recipients of IC acquisitions of goods and the total value of IC supplies of goods supplied to them in the reporting period. From 1 January 2010, recapitulative statements in principle must be filed on a monthly basis.¹⁶⁴ According to Article 262(a) of the VAT Directive every taxable person identified for VAT purposes must submit an EU Sales list if he made IC supplies of goods to VAT registered customers in another EU Member State. The simplified intra-Community triangular transactions (see Figure 1) for EU Sales listing must be reported in this way: Party A must report an IC supply on

¹⁵⁷ VAT breakingTAXnews: the Netherlands – Proposed changes regarding simplified triangulation, 27 October 2011, available at

http://pwc.inx.ch/inxmail9/jsp/view_mailing.jsp?mid=8286&lang=de (accessed at 07.05.2012).

¹⁵⁸ Michael van de Leur, “Triangulation or Strangulation?” International VAT Monitor November/December 2010 p. 398.

¹⁵⁹ EU Tax Advisers Discuss VAT Improvements, by David S. Stewart., 25 July 2011 www.TaxAnalysts.com Tax Analyst Document Number: Doc 2011-15559.

¹⁶⁰ VAT breakingTAXnews: the Netherlands – Proposed changes regarding simplified triangulation, 27 October 2011.

¹⁶¹ PwC Reviews Global VAT Developments, 2 October 2011, Tax Analyst Document Number: Doc 2011-23067, www.TaxAnalysts.com.

¹⁶² Chris Platteeuw, Quick Reference to European VAT Compliance, 2010 Kluwer Law International BV, The Netherlands p. 3-11.

¹⁶³ Idem.

¹⁶⁴ Walter van der Corput and Fabiola Annacondia (eds), EU VAT Compass 2011/2012, IBFD 2011 pp. 629-630.

its ESL, Party B must report an IC supply to Party C on its ESL quoting Party C's VAT identification number and the code (T) to denote a triangulation supply.¹⁶⁵

Thirdly, suppliers are responsible for submitting Intrastat declarations that are used by the Member States for statistical purposes.¹⁶⁶ Statistics relating to the trading of goods between Member States shall cover dispatches and arrivals of goods.¹⁶⁷ Intrastat information shall be set at a level that ensures that the value of at least 97% of the total dispatches and at least 95% of the total arrivals of the relevant Member State's taxable persons are covered.¹⁶⁸

Based on Article 7 of Regulation 638/2004¹⁶⁹ the parties responsible to provide information for the Intrastat system of dispatch is the taxable person as define in VAT Directive under Title III in the Member State of dispatch who:

- has concluded the contract, with the exception of transport contracts, giving rise to the dispatch of goods or, failing that;
- dispatches or provides for the dispatch of the goods or, failing that;
- is in possession of the goods which are the subject of the dispatch.¹⁷⁰

In the Member State of arrival the information must provide the taxable person as define in VAT Directive under Title III in the Member State of arrival who:

- has concluded the contract, with the exception of transport contracts, giving rise to the delivery of goods or, failing that;
- takes delivery or provides for delivery of the goods or, failing that;
- is in possession of the goods which are the subject of the delivery.¹⁷¹

In simplified intra-Community triangulations (see Figure 1) Party A is responsible for Intrastat reports in the dispatch Member State and Party C in the arrival Member State.¹⁷² However, the situation can appear confusing of who should file the Intrastat reports in scenario 1 (see Figure 5: Party B is registered in final Member State) and scenario 2 (see Figure 6: Party B is registered in first Member State).

When Party B has a VAT registration in the Member State of dispatch or arrival according to Article 7 of the Regulation, it seems that Party B can fulfil mentioned criteria and reasonably think that it should file the report instead of Party A or Party C. What is more, there is also a risk that double reports will be provided. The Regulation do not provide any guidance in the solving these inconsistencies. The National Intrastat guidelines are also not interpreted in the same fashion by the Member States.¹⁷³

¹⁶⁵ Chris Platteeuw, Quick Reference to European VAT Compliance, 2010 Kluwer Law International BV, The Netherlands p. 5-7.

¹⁶⁶ Idem p. 3-11.

¹⁶⁷ Article 3(1) of Regulation 638/2004.

¹⁶⁸ Article 10(3) of Regulation 638/2004 amended by Article 1(6) of Regulation 222/2009.

¹⁶⁹ Amended by article 1(3) of Regulation 222/2009.

¹⁷⁰ Article 7(1)(a) of Regulation 638/2004 as amended by article 1(3) of Regulation 222/2009.

¹⁷¹ Article 7(1)(b) of Regulation 638/2004 as amended by article 1(3) of Regulation 222/2009.

¹⁷² Chris Platteeuw, Quick Reference to European VAT Compliance, 2010 Kluwer Law International BV, The Netherlands p. 5-8.

¹⁷³ Patrick Vettenburg and Lodewijk Reijjs, "Intrastat and the link with in VAT", Tax Analysts August 2011 pp. 365-366.

The UK national Intrastat guidelines states that the Parties should follow the ordinary conditions for Intrastat reporting obligations. Party A reports the dispatches and Party C the arrivals. However, the Belgian national guidelines provides that the possession of a VAT number by Party B automatically attracts Intrastat reporting obligations in the Member State of dispatch or arrival depending on where company B is registered.¹⁷⁴

If in scenarios 1 and 2 the simplified triangulation rules have not been applicable because of the national rules of the Member States, then *EMAG* and *Euro Tyre* cases should be followed to determine the place of supply for each individual transaction along the chain. The VAT system should be kept in mind when explaining the Intrastat rules. It is important to determine between which Parties the transport is arranged.¹⁷⁵ In scenario 1 if the supply A to B is an IC supply then A is responsible for Intrastat reporting obligations in the Member State of dispatch and B in the Member State of arrival. The supply B to C is a domestic supply in the Member State of arrival and does not attract Intrastat reporting obligations. In scenario 2 if the supply B to C is an IC supply then B is responsible for Intrastat reporting obligations in the Member State of dispatch and C in the Member State of arrival. The supply A to B is a domestic supply in the Member State of dispatch and does not attract Intrastat reporting obligations.¹⁷⁶

It is true that ESL and Intrastat reporting obligations rules has variations among the Member States. The differences occur in reporting thresholds, periods and etc., for example in France, transactions are reported using only the Intrastat reports as there is no separate ESL.¹⁷⁷ Traders and especially multiple companies located and operating in multiple Member States involved in chain transactions in order to report correct information must be aware of the differences in interpretation of the rules among Member State. Late reports or errors may result in a penalty. Uncertain position of an intermediary party may result with mismatches between the VAT returns, ESL and Intrastat reports when the simplified triangulation rules are applied. Even if simplified IC triangulations are reported in a different section of the VAT return or ESL the Regulation 638/2004 should be clearer determining the Party responsible for Intrastat reports in triangular cases.¹⁷⁸

4.4. Possible solutions and improvements for the future

The recent Green Paper on the future of VAT (Green Paper) was published by the Commission on 1 December 2010. The Commission acknowledged that the current system of intra-EU trade creates obstacles for the business because of complex rules and obligations.¹⁷⁹ Also the current system appears to be sensitive to fraud and does not prevent tax losses through the EU.¹⁸⁰ This document started a wide discussion how to improve the VAT system. The Commission suggested several alternatives for the VAT treatment of cross-border supplies. One of the suggestions was to apply a system which is based on taxation in the country of origin. However, in order to work this system

¹⁷⁴ Patrick Vettenburg and Lodewijk Reijs, "Intrastat and the link with in VAT", *Tax Analysts* August 2011 p. 365 and footnote 9.

¹⁷⁵ *Idem* p. 365.

¹⁷⁶ *Idem* pp. 365-367.

¹⁷⁷ The 2011 worldwide VAT, GST and sales tax guide published by Ernst&Young p. 214.

¹⁷⁸ Patrick Vettenburg and Lodewijk Reijs, "Intrastat and the link with in VAT", *Tax Analysts* August 2011 pp. 366 and 368.

¹⁷⁹ Green Paper para. 1.2.3. see note 4.

¹⁸⁰ Beate Wohlfahrt, "The future of the European VAT system", *International VAT Monitor* November/December 2011 p. 387. See also Green Paper pp. 7-8.

properly in the internal market requires a high level of harmonization of VAT rules especially for VAT rates, deductions and returns.¹⁸¹ Another suggestion provided by the Commission was to introduce the place of taxation where the customer is established, both for goods and services. In this way it would harmonise the rules applicable to goods and to services.¹⁸² In order to improve the cross-border supplies in relation to VAT treatment the Commission also provided some suggestions related to administrative burdens which require attention. Firstly, information reporting obligations and documentation requirements should be standardised and made less dependent on national jurisdictions.¹⁸³ Secondly, the changes should be made in the refund system in order to reduce a considerable amount of time for a non-established business to recover input VAT.¹⁸⁴

On 6 December 2011, the Commission published the results of the public consultation on its Green Paper, launched in 2010. According to the Commission's report, a future-proofed EU VAT system will be based on the 'destination principle' because the system based on the 'origin principle' remains politically unachievable.¹⁸⁵ The Commission decided to take some priority action in relation to better information at EU level and will set up a web portal, which provides information in several languages on issues such as registration, invoicing, VAT returns, VAT rates, special obligations and limitations to the right of deduction.¹⁸⁶ Furthermore, the Commission will propose in 2013 that a standardised VAT declaration should be available in all languages and optional for businesses across the EU.¹⁸⁷ In the first half of 2014 the Commission will table a legislative proposal laying down the definitive regime of taxation of intra-EU trade.¹⁸⁸

5. Concluding remarks

Taxable businesses should not take too much time to handle with tax rules in order to identify the VAT treatment for their supplies. However, this is not the case when businesses are involved in cross-border chain transactions. As a result, instead of easy application of the rules, they face complex rules and lack of legal certainty which creates significant problems.

Despite that the CoJEU shed some light on how to determine the place of supply along the chain, it does not make it easier for businesses to deal with chain transactions in

¹⁸¹ Green Paper para 1.3.2.

¹⁸² Green Paper para. 1.3.1.1.

¹⁸³ Green Paper paras. 9.6. and 9.7. See also Comments of Tax Executives Institute on Green Paper submitted to The European Commission 31 May 2011.

¹⁸⁴ Green Paper para. 4.3.5.

¹⁸⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the future of VAT Towards a simpler, more robust and efficient VAT system tailored to the single market COM(2011) 851 final 6.12.2011(hereinafter – Summary of responses received to Green Paper) para. 4.1. *available at*

http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf (accessed at 07.05.2012). See also The EU Commission issues its comments on the future of VAT, Tax News Ernst&Young 7 December 2011 *available at* http://tmagazine.ey.com/wp-content/uploads/2011/12/Indirect-Tax-Alert_6-Dec-2011.pdf (accessed at 07.05.2012).

¹⁸⁶ Summary of responses received to Green Paper para. 5.12.

¹⁸⁷ Green Paper para. 5.1.4.

¹⁸⁸ *Idem.* para 5.4.

practice. It is not enough to know that the transactions must be regarded as following each other. The circumstances of each supply and information provided by the parties in the chain are in principle decisive. How to get all relevant information and stay discreet at the same time becomes complicated. A lack of information results in errors and potential losses.

To apply the simplified intra-Community triangulation rules in practice becomes very complicated because of non-uniform interpretation of the rules. The examples have shown how the parties involved in chain transactions can end with complicated scenarios instead of simplified one. As a result, further harmonization of the interpretation of the rules must be reached. It is extremely challenging for businesses to deal with 27 different rules and it is contrary to the principle of legal certainty. In the author's opinion the simplified rules should be applied in more flexible way. In the situation where an intermediary party is also registered (not established) in the Member State of arrival or dispatch (see Figures 5 and 6) it should be able to choose by the party itself the most suitable tax scenario.

The author strongly supports the idea that information reporting obligations and documentation requirements should be standardised. In the author's point of view businesses should have a more certain position dealing with cross-border supplies and *Gelangensbestätigung* or other contrary documentation should not intervene in intra-EU trade. Standardized reporting obligations arising for Intrastat would be clearer in chain transactions and would reduce mismatches which occur in double reporting of the same transaction or non-reporting.

As long as traders involved in chain transactions are taxable persons they should recover input VAT incurred for taxable business expenditures. To improve neutrality, Member States should put more attention to proposed Dutch changes to the simplified triangulation rules. In the author's perspective the same or similar changes would help to reduce undesirable results for an intermediary party. Also, neutrality would be improved for non-established businesses if Article 171a of the VAT Directive would be more relevant among the Member States.

After nearly 20 years of being in effect, the simplified arrangements for intra-EU trade made a significant improvement compared to the old exports and imports system. Despite this, the new arrangements have not eliminated obstacles completely for proper trade between Member States and proper functioning of the single market. Currently, there are clearly many questions in this area and it is reasonable that the Commission started the consultations on the future of the VAT. After some observations the Commission has already planned the first steps for improving the VAT treatment for intra-EU trade. However, the question remains if these changes will give a desirable effect or the VAT system must be changed substantially.

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