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Cross-border trade in goods under the EU VAT System

An analysis on the place and time of taxable transactions

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1 INTRODUCTION

1.1 Problem and purpose of the thesis

The problem of the thesis is to determine where and when cross-border transactions of goods are deemed to take place for VAT purposes. In which Member State – and at what point in time – does a supply or an acquisition create a VAT liability for the trader?

Although the fiscal borders between Member States of the European Union were abolished almost 20 years ago, cross-border movements of goods can still create numerous VAT related difficulties. The EU legislator has not been able to establish a VAT system functioning within the Single Marked as it would within a single country, i.e. by VAT being charged in the Member State of origin and deducted in the Member State of destination. Consequently, where commodity flows not only involve one but several Member States, it is not always certain which Member State is the place of the taxable transaction; being the Member State in which VAT is to be charged and deducted. What is certain, however, is that VAT must be charged and deducted somewhere.

VAT constitutes a substantial income for every Member State. Consequently, when a transaction involves several tax jurisdictions, every associated Member State could argue that the transaction takes place for VAT purposes within its territory. Consequently, it is essential that certain rules exist to determine the allocation of tax between the competing tax authorities. Otherwise, one could end up with the result that VAT is charged on the same transaction in different Member States – or in no Member State at all. As stated by Advocate General[1] Kokott in *EMAG Handel Eder OHG*, "tax-raising powers must be coordinated in such a way that … where the authority of one Member State ends the authority of the other begins."[2]

[1] See section 1.5.1.3

[2] AG opinion, C-245/04 EMAG, paragraph 24

The moment in time when a transaction takes place for VAT purposes is more commonly referred to as the "tax point". It marks the occurrence by which the conditions for the tax authority to claim VAT are fulfilled. Needless to say, the time of a particular taxable transaction is relevant regardless of whether it involves goods being moved from one Member State to another. Cash flow and administrative considerations lead to the conclusion that the later the tax point occurs, the better for the trader. The tax point is also a central element in reporting procedures.[3] However, for the purposes of this thesis, it is relevant chiefly in relation to the determination of the place of taxable transactions. As we will see, the two concepts intertwine and mutually influence each other.

In the following, the aim is to give a thorough account of how the place and time of various taxable transactions should be determined, by gathering and interpreting different sources of EU law. In addition I hope to shed some light on the notions themselves, as well as the principles upon which they are based. The thesis will be limited to the treatment of trade in goods and B2B transactions between taxable persons[4].

1.2 Conceptual clarifications

Concepts which will be used throughout the thesis, as understood in accordance with the VAT Directive:

1.2.1 Goods

According to Article 14, "goods" are to be understood as "tangible property", i.e. physical objects. The definition of goods should be viewed in light of the definition of services, which is derived on a residual basis. In other words, any transaction that does not constitute a supply of goods is considered to be a supply of services (including transactions constituting supplies of intangible assets such as rights, patents, copyrights, and franchises.[5]

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[3] HM Revenue & Customs, *When transactions take place for VAT purposes*

[4] See definition in section 1.2.7

[5] Case C-97/98 *Peter Jägerskild v. Torolf Gustafsson*

1.2.2 Transaction of goods

The term "transaction of goods" is not defined in the VAT Directive – but a natural understanding thereof is either a transfer of goods between a supplier and an acquirer (a supply, an acquisition or both) or an exchange of goods and funds between the two.[6] In other words, it may be understood as either a one way transfer or as a two way exchange. Under the VAT Directive[7], seemingly the first understanding is to be applied. In light of this, the same viewpoint will be taken for the purposes of this thesis.

1.2.3 Cross-border transaction of goods

Neither "cross-border transaction of goods" is defined in the VAT Directive. A natural understanding of the term is a transaction where the end destination of the goods in a different Member State to where the transportation begins.

1.2.4 Taxable transaction of goods

It follows from Article 2 that a "taxable transaction of goods" is to be understood as either a supply or an acquisition of goods which is subject to VAT.

1.2.5 Domestic transaction of goods

The VAT Directive does not operate with the term "domestic transaction". However, it is useful as an opposite to the terms "cross-border transaction of goods" and "intra-Community transaction of goods". It can be understood either as transaction where the end destination is the same Member State as where the transport begins, or as a cross-border transaction which cannot be regarded as an intra-Community transaction.

1.2.6 Intra-Community transaction of goods

"Intra-Community transaction of goods" is to be understood either as a supply fulfilling the conditions to be exempt from VAT under Article 138, or as an acquisition in accordance with the definition laid down in Article 20.

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[6] Merriam Webster Dictionary

[7] Article 2 RVD, "transactions subject to VAT"

1.2.7 Taxable person

The term "taxable person" is to be understood in accordance with Article 9; namely as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity".

1.3 The link between the time and the place of supply

As mentioned, the concepts of time and place of taxable transactions in cross-border trade are strongly connected. It will be seen that the time of a taxable transaction is determined in accordance with the governing law of the Member State in which the taxable transaction takes place for VAT purposes.[8] In other words, the tax point depends on the place of the taxable transaction – the latter must be established in order to determine the former.

Correspondingly, the tax point may be relevant when establishing the place of a taxable transaction. The place at which VAT shall be charged is determined differently for domestic and intra-Community taxable transactions; it is therefore imperative to establish the character of each transaction in a supply chain in order to apply the right set of rules. This can be quite complex, and case law has shown that the classifications of the taxable transactions depend on each another and on the connection between each transaction and the movement of goods.[9] When the assessment of the link between the transaction and the movement is made, the time of the transaction – hence the tax point – is necessarily an important element. Consequently, the time of a taxable transaction may indirectly be decisive of the place thereof.

Normally, the determination of the time of a taxable transaction is not problematic, as the tax point usually occurs when the goods are physically delivered to the purchaser. In some cases, however, the tax point may possibly be created by an event other than the physical

[8] Article 58 RVD

[9] See C-245/04 *EMAG Handel Eder OHG* and C430/09 *Euro Tyre Holding BV*

delivery, for example by a transfer of legal title.[10] If the transfer of legal title occurs in the Member State of departure, while the delivery of the goods takes place in the Member State of destination, the question arises as to which event creates the tax point.

It should be noted that the specific criteria for determining the place and the time of a taxable transaction differ substantially. Whereas the place of a transaction depends on the sheer flow of goods[11], the tax point depends on who has the rights associated with them[12].

1.4 The EU VAT system

The Common System of VAT was introduced in 1977 with the purpose of harmonizing European VAT law. The objective was to realize open borders and create similar conditions of competition. It was wanted to establish a system which allowed for a free flow of goods across borders without the need for formalities. The First VAT Directive described the common system of VAT as follows:[13]

> "The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.
>
> On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.
>
> The common system of value added tax shall be applied up to and including the retail trade stage."

The final goal was to introduce the origin principle as the overall norm. This principle entails that every supply is taxable in the country of origin. In other words, everything that is

[10] See Norwegian Total Contract 2007, Article 22

[11] Articles 31-33 and 40-42 RVD

[12] Article 63 and 68 RVD

[13] Sixth Council Directive 77/388/EEC of 17 May 1977, Article 2

domestically produced is taxed, no matter who the purchaser is nor where he is established.[14] The purchaser deducts the VAT as input tax in his domestic VAT return by a "clearing" process. Application of the origin principle would result in a neutral VAT handling, and reduce tax evasion and fraud.[15] Border controls would not be needed. On the other side, it would bring about a possibility for Member States to discriminate between domestically produced goods and imports and entail significant changes in the distribution of VAT revenues across Member States.[16]

The origin principle did not receive sufficient support from Member States and was therefore never introduced into the common system of VAT. The destination principle has therefore been applied. It implies that everything that is domestically "consumed" is taxed. On one hand, this leads to production neutrality since VAT does not discriminate between foreign and domestic producers. On the other hand, seeing that goods and services travel free of tax, it is necessary to closely monitor cross-border trade and administrative cooperation is required.[17]

Upon completion of the Single Market in 1993, the fiscal borders between Member States were abolished and the so-called "transitional regime" was introduced. The transitional regime was initially supposed to be replaced by a final regime in 1996. Nevertheless, it has now obtained a more or less permanent status. The transitional regime replaced the concepts of "importation" and "exportation" with "intra-Community acquisition of goods" and "intra-Community supply of goods". The major difference was that cross-border acquisitions were now to be reported on the domestic VAT return rather than to customs officials at the borders. The regime was – and is – based on a modified version of the destination principle. It seeks to fulfill the requirements of an internal market whilst allowing room for

[14] Jesus E.S. Oliveira, *Economic Effects of Origin and Destination Principle for Value-Added Taxes*

[15] Ole Gjems-Onstad og Tor S Kildal, *Lærebok i Merverdiavgift*

[16] The application of the origin principle without a "clearing" mechanism results in disadvantages for purchasers effecting cross-border acquisitions, as they have pay VAT in the Member State of the supplier. The VAT can only be refunded through a special refund procedure

[17] Economy Watch

flexibility at the national level (VAT rates, collection and auditing). The origin principle is still the overall goal, but has been postponed for an indefinite period of time.[18]

1.5 Legal sources

1.5.1 EU law

The EU law is an international legal system, in the sense that it regulates the relationship between different countries. Although it may be more supranational than traditional international law[19], the starting point is that the EU law does not have direct effect for Member States. In general, the EU law must be implemented or incorporated into national law in order to apply.

The tax subjects must act in accordance with national law. If a Member State introduces rules that conflict with the EU law, they may be found invalid by the European Court of Justice (the ECJ). This can cause substantial repayment obligations for the relevant Member State. In practice, however, the ECJ has been more concerned with the interpretation of the rules than whether or not they are complied with by the Member States.[20] The reason for this may be that generally incompatibilities with the EU rules occur because the Member States have applied or adopted the relevant rules incorrectly. When the ECJ provides a clarification, off course the Member States must abide by this and if the national law conflicts with the clarification it must be changed. Nonetheless, initially the national rules were hardly incompatible with the EU law since the EU law had not been clarified.

In the following there will be given an overview of the most important sources of law for EU indirect tax law. The account is not meant to constitute an exhaustive list of legal sources in the EU law.

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[18] Economy Watch

[19] Finn Arnesen, Introduksjon til rettskildelæren i EF, p. 7

[20] Ole Gjems-Onstad og Tor S Kildal, *Lærebok i Merverdiavgift*, Ole Gjems-Onstad og Tor S Kildal

1.5.1.1 The VAT Directive

The essential piece of EU VAT legislation is the VAT Directive[21], which is effectively a recast of the sixth VAT Directive of 1977[22]. The VAT Directive constitutes a piece of secondary EU legislation, meaning that is based on a primary source, being the Treaty of Rome[23]. Like any EU law, the VAT Directive is not independent. It must be incorporated into the national law of the Member States in order to give rights and obligations to VAT subjects, but the choice of form and methods is up to the national authorities of each Member State.

The VAT Directive is regarded to be more user friendly than the sixth Directive.[24] However, it is still considered relatively difficult and causes many problems due to the ambiguity of its wording. The ECJ has been highly active in trying to shed light over the problematic issues. Nonetheless, it has been argued that while its decisions do make sense from a theoretical point of view, from a practical view they do not.[25] As stated by Redmar Wolf; "although the ECJ may have made things clear; it did not make things easier."[26]

Not only the ECJ, but also the EU legislator has been highly active in the field of VAT in the course of the last couple of decades. Many amendment directives have been adopted, including the so-called VAT package which came into force in 2010. The Directive on invoicing rules[27] should also be mentioned in this connection. It comes into force January 2013.

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[21] Council Directive 2006/112/EC on the Common system of value added tax

[22] Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes

[23] The Treaty on the Functioning of the EU, Article 288

[24] Michael van de Leur, *Triangulation or Strangulation?*

[25] Redmar Wolf, *VAT Pitfalls in intra-EU Commodity Trade*

[26] Redmar Wolf, *VAT Pitfalls in intra-EU Commodity Trade*

[27] Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing

1.5.1.2 Judicial Practice

The competence of the ECJ follows from the Treaty of Rome[28]. It is commonly accepted that the ECJ, in accordance with European legal traditions, have the competence to exercise independence and creativity when laying down the content of the EU law.[29]

In the indirect tax arena, the most common types of cases brought before the ECJ are direct appeals in cases of violation of EU law by Member States[30], direct appeals by individuals and preliminary rulings, meaning that national courts ask the ECJ to interpret a point of EU law. The judges of the ECJ are assisted by eight Advocates-General (AGs) who are responsible for presenting a legal opinion on the cases assigned to them. The AGs' opinions are only advisory and do not bind the Court, but they are nonetheless very influential and are followed in the majority of cases.

Decisions by the ECJ in the sense of final rulings are binding for all courts of all Member States, but where a case is referred to it for a preliminary ruling, the judgment is merely precatory. For the Court itself, its judgments are never of binding character. Still, a previous decision will ordinarily constitute an important argument in a new case.

1.5.1.3 Legal Principles

In its interpretation of EU provisions, the ECJ has applied certain general legal principles.[31] Some are unwritten (such as the principles of equivalence, effectiveness and legal certainty, whereas others are mentioned in the Treaties as fundamental principles which must be observed (the principles of conferral, subsidiarity and of proportionality, sincere cooperation, and non-discrimination on grounds of nationality). These will not be treated in detail.

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[28] Article 164 RVD

[29] Finn Arnesen, Introduksjon til rettskildelæren i EF, p. 7

[30] TFEU Article 258

[31] See Article 19 TFEU

Of principles specifically related to VAT, that of fiscal neutrality is the most fundamental. It is laid down in Article 1(2) of the Vat Directive. The essence of the principle of fiscal neutrality is that the application of different VAT treatments on equal/similar competing products is to be prohibited since it leads to distortion of competition. In *NCC Construction Denmark*[32] the ECJ compared the principle of fiscal neutrality to the general principle of equal treatment. The Court stated that unlike the principle of equal treatment, the principle of fiscal neutrality does not have constitutional status; it can therefore not be regarded as an *independent* general principle of EU law.[33]

From the principle of fiscal neutrality, several specific principles can be derived. In *Commission v. France*[34] it was held that it also includes the two principles of VAT uniformity and elimination of distortion of competition. Furthermore, it encompasses the principle that double and zero taxation should be avoided[35], as well as the principle that the burden of VAT should ultimately fall on the final purchaser.

Another important principle, closely related to that of fiscal neutrality, is the right to deduct VAT. In *X and Facet BV/Facet Trading BV* it was stated that "the right to deduct VAT, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT and in principle may not be limited".[36]

The principles of the EU VAT system constitute its backbone. The VAT Directive and the rules on the place and time of taxable transactions are therefore shaped in order to ensure that these are complied with. The problem of determining the place and time of taxable transactions is particularly related to the principle that double and non-taxation should be

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[32] Case C-174/08 *NCC Construction Denmark*

[33] See Audytor, *The principle of neutrality in VAT*, available at http://www.audytor.biz.pl/en/cooperation/problems-for-discussion/12-zasada-neutralnoci-w-podatku-vat.html

[34] Case C-481/98 *Commission v. France*

[35] In line with this view it was expressed in the case Commission v. Italy Case C-45/95 *Commission v. Italy* that "double taxation [is] contrary to the principle of fiscal neutrality"

[36] Case C-536/08 *X and Facet BV/Facet Trading BV*, paragraph 28 and 29

avoided. In order for this to be complied with, only one Member State may tax a transaction – and a transaction may only occur once. Correspondingly, in order to avoid zero taxation, the place and a time of taxable transactions must unavoidably be determined.

1.5.1.4 Statements from the Commission

In particular cases, the Commission makes public statements concerning the interpretation and application of the relevant provisions. Particularly where there is lack of other sources, these statements may provide guidance due to their argumentative value.

1.5.2 National Law

In many situations, the EU law neither can nor should be adequate to answer all relevant questions. As mentioned above, the EU law sets the frame, but the Member States are allowed to determine the details. Consequently, the Member States' national law, judicial decisions and other sources of law may be relevant in relation to EU transactions. I will not go further into this; it suffices to say that the national laws of the Member States vary a lot, which may create a problem for the harmonization process. There is a continuous struggle to find the balance between the EU goal to achieve complete harmonization on one hand and the sovereign Member States on the other.

1.6 Scope and structure

There are two points in time which are relevant in respect of the time of a taxable transaction; the basic and the actual tax point. The former occurs when a taxable transaction is deemed to take place (and thus establishes a basis for VAT), while the latter occurs place when VAT can in fact be charged by the tax authorities.[37] The term time of a taxable transaction is logically linked to the basic tax point, s it sets the foundation for the actual tax point to be calculated[38] – it is the "root" to the chargeability of VAT. Hence it is the most interesting point in time for the purposes of the thesis. For the sake of completeness I will

[37] Ben Terra and Julie Kajus, A Guide to the European VAT Directives, p. 677

[38] RVD Articles 66, 67 and 69

also handle the actual tax point, but the emphasis will be put on establishing the basic tax point.

Furthermore, the thesis will only deal with cross-border, particularly intra-Community, transactions. The reason for this is that domestic transactions only involve one jurisdiction, thus the question as to where a transaction is deemed to take place is not relevant. Cross-border transactions, on the other hand, often involve numerous acquirers and suppliers in different Member States – consequently one must decide where the various transactions are to be taxed. It should be noted, however, that the treatment of cross-border transactions requires knowledge about both domestic and intra-Community transactions. After all, if a cross-border transaction does not fulfill the conditions necessary to be exempt as intra-Community[39], it must be handled as a domestic transaction[40] (See section 2). The tax point problem, as an independent issue, is relevant both with regards to domestic and cross-border transactions. Perhaps it is even more relevant for domestic transactions, since the general rule then that VAT is in fact to be paid. VAT on intra-Community acquisitions is merely accounted for and deducted in the same VAT return. Nevertheless, for the purposes of this thesis the emphasis is put on the connection between the place and the time of a taxable transaction. This connection does only exist for cross-border transactions. Exports and imports will not be treated.

The structure of the thesis will be from the general to the specific. Introductorily, in section 2, I will account for the notion "taxable transaction" and the scope thereof. Furthermore, I will go through the different types of taxable transactions and how they are to be defined. Section 2 will constitute a substantial part of the thesis, seeing that it lays the foundation for the main analysis. In sections 3 and 4 respectively, I turn to discuss the more specific questions of the place and the time of a taxable transaction. This includes a systematic analysis of the concepts themselves as well as the applicable rules and the results they give. Finally,

[39] Articles 42 and 138 RVD

[40] Article 32 RVD

in section 5, I will give an account of typical trade structures and how to determine the place and the time of each taxable transaction therein. The structures will vary from relatively simple chains of supply with only a supplier and an acquirer (in different Member States), to more complicated chains of supply where three parties are involved. The common element is that every structure includes at least one intra-Community transaction. I will handle the place of a taxable transaction before the time thereof. Certainly, the concepts are closely linked and will necessarily, to some extent, intertwine. But, as mentioned earlier, the criteria on which the place and the time are decided differ substantially. The reason why I have chosen to deal with the place of a transaction first is because in most cases it is theoretically more logical to determine this before the tax point.

2 TAXABLE TRANSACTIONS

2.1 Introduction

As mentioned introductorily[41], the structure of the thesis is from the general to the specific. In view of that, it is in order to make an account of the notion "taxable transactions". This gives, first of all, rise to two questions; which transactions are taxable[42], and which conditions must be fulfilled by such transactions[43]? Furthermore, it must be examined whether any exemptions apply.[44]

First of all it is necessary to distinguish between transactions which involve a movement of goods between countries (cross-border) and transactions which do not. Only the latter category is relevant for this thesis. Since a transaction only involves two parties, those which are cross-border can be divided into four different kinds; supply in the country of the seller, supply in the country of the purchaser, acquisition in the country of the seller, and acquisition in the country of the purchaser. In the strict sense of the word, only supplies and acquisitions being effected in the country of the purchaser are cross-border transactions. Only then does the transaction occur in a country other than that of origin.

The VAT Directive follows a slightly different logic than above. It operates with two categories: intra-Community transactions and all other transactions. For logical purposes, let us call these domestic. Article 20 gives the definition of an intra-Community acquisition (via the definition of supply under Article 14), whereas Article 138 stipulates that an intra-Community supply is to be exempt from VAT where it fulfills certain conditions. Hence the former provision gives a wide definition whereas the latter gives a narrow definition.

[41] Section 1.6

[42] Article 2 RVD

[43] Article 2 cf. Articles 14 and 20 RVD

[44] Article 138 RVD

2.2 Which transactions are taxable?

It follows from Article 2 which transactions are subject to VAT.

Article 2

1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

(ii) in the case of new means of transport, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1), or any other non-taxable person;

(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive 92/12/EEC, within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1);

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

(d) the importation of goods.

The provision recognizes four different taxable transactions: the supply of goods, the intra-Community acquisition of goods, the supply of services and the importation of goods. For the purposes of this thesis, only the two first transactions are relevant. They are only taxable when performed for consideration by a taxable person acting as such[45]. From the list in Article 2 it can be deducted that all transactions are taxable save for domestic acquisitions. This is logical seeing that domestic purchasers never account for VAT (unless the Member State in which the procurement takes place has introduced domestic reverse charge[46]). The liability vis-à-vis the tax authority lies solely with the supplier. For intra-Community transactions, the case is different. The starting point is that both the supplier and the acquirer have to account for VAT in their respective Member States. This would mean that the acquirer first would have to pay VAT in the Member State of origin (as part of the amount invoiced by the supplier) and then account for acquisition VAT in the Member State of

[45] Certain specific rules exist for intra-Community acquisitions, cf. Article 2(1)(b) RVD

[46]

destination. Although the input VAT can be refunded according to the 8th Directive[47], this would entail administrative costs and cash flow disadvantages. It also conflicts with the principle that double taxation should be avoided, since the same transaction is taxed twice (in two different Member States). In order to avoid this, intra-Communities supplies are exempt from VAT pursuant to Article 138.

2.2.1 Supply of goods

The definition of a supply of goods is highly relevant for the determination of the time of a taxable transaction, and in certain cases also for the determination of the place thereof. However, the analysis of the term in general logically belongs in this section, and will therefore be done here.

Article 14 stipulates that a supply of goods is to be understood as "the transfer of the right to dispose of tangible property as an owner". The full right of ownership to a good encompasses several limited rights. A distinction can be made between legal, economic and physical ownership.[48] Legal ownership may be defined as having the formal rights to a good, whereas economic ownership takes account of where the risks and rewards of ownership lie. Physical ownership is understood as having a good in one's possession. The question is whether all of these rights must be transferred to the purchaser in order for him to have acquired the right to dispose of the good as an owner.[49] Since the economic and the physical ownership typically follow each other, I will, for the purposes of this analysis, only operate with two forms of ownership: legal and economic.

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[47] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State

[48] See Seventeenth Meeting of the IMF Committee on Balance of Payments Statistics Pretoria, October 26–29, 2004, *Adoption of Concept of Change of Economic Ownership*

[49] See section1.3

The *SAFE* case[50] concerned a situation in which the purchaser had acquired the economic but not the legal ownership to the goods.[51] The ECJ first noted:

"It is clear from the wording of the provision that "supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property.

This view is in accordance with the purpose of the directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardized if the preconditions for a supply of goods – which is one of the taxable transactions – varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law."

As a consequence of this, the Court held that a supply may take place even though there is no transfer of legal ownership to the goods. Moreover, the Advocate General noted that if under the specific circumstances, the transfer of economic ownership is considered a transfer of "the right to dispose of tangible property as owner" this constitutes a supply. Hence, a transfer of legal title is not necessary in order for a supply to have been made in accordance with Article 14.

The *SAFE* case was confirmed in *Auto Lease Holland BV*[52], wherein The Advocate General noted that "supply of goods has a meaning which is more economic than legal. It relates more to the opportunity for the person in receipt of the supply to make use of the goods than to the transfer of actual ownership within the meaning of the civil law of the Member

[50] Case C-320/88 *(Shipping and Forwarding Enterprise (SAFE)*)

[51] Ben Terra and Julie Kajus, *A Guide to the European VAT Directives*, p. 447 et seq.

[52] Case C-185/01*Auto Lease Holland BV*

States … only an economic definition of the term is compatible with the objectives of the … Vat Directive".[53]

Neither the *SAFE* case nor *Auto Lease Holland BV* examined what would be the result if, by contrast, the legal but not the economic ownership were to be transferred to the purchaser.[54] The question is then not only whether the transfer of legal title is *necessary*, but whether it is *sufficient*. It has been argued that, in light of what was expressed in the *SAFE* Case, this must be answered negatively[55]. Undeniably, the Court did, in that case, put decisive weight on the transfer of economic ownership to the purchaser – since this constituted the transfer of the actual right to dispose of the goods as if he were the owner. The Court did not, however, explicitly mention whether it would be possible, under certain circumstances, for a transfer of legal title to bring about the same result.

Yet, the Advocate General seems to assume that the transfer of legal title is not decisive. When discussing whether the purchaser, on the basis of the facts of a particular case, has acquired the "right to dispose as owner", he stated that in any way this must be the case where "the right of ownership retained by the original seller is so diminished that it is reduced to mere legal title".[56] If the "mere legal title" is considered such an incomplete right of ownership, the transfer of this can hardly constitute a supply in the sense that it enables the purchaser to "actually dispose of the property as if he were the owner". The Advocate General in Auto Lease Holland BV did also seemingly interpret the SAFE case in such a way as to confer on it the meaning that the transfer of economic ownership is necessary in order for a supply to be made.[57]

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[53] Case C-320/88, paragraph 7 and 8. The Court based this on the decision made in the *SAFE* case

[54] See section 1.3

[55] VAT implications of contract clause regarding transfer of title, Øystein Arff Gulseth and Narve Løvø, Earnst & Young Tax

[56] Paragraph 16

[57] Ref. excerpt from paragraph

In the light of this, it can be concluded that the transfer of legal title may not be a supply under Article 14. It should be noted that this is also accordance with the opinion of Advocate General Kokott in *EMAG*[58]*:* "A typical expression of ownership is the right to dispose of property as one sees fit, especially to exercise physical control over it and to sell it." Even though a legal owner would have the formal "right to dispose of the goods as if he were the owner", he would hardly have the actual right thereto. Nor would he have the physical control of the goods.

2.2.2 Intra-Community acquisition of goods

Article 20 defines an intra-Community acquisition of goods as "the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began."

Ergo the definitions of supply and acquisition coincide. This is logical, since a transaction necessarily has two sides and can only be effected once. Whether it constitutes a supply or an acquisition merely depends on whose point of view one assumes. Consequently, Articles 20 and 14 must be interpreted in such a way as to confer on them identical meaning and scope. This supposition was confirmed in *Teleos and Others*.[59]

The intra-Community element involves that goods must be dispatched or transported from one Member State to another and that the acquisition must be made in the Member State of destination. This can be regarded as narrow definition of an intra-Community acquisition.

Dispatch takes place when the seller or the acquirer uses an independent third party for transportation, which, during the transportation, does not follow instructions from either the seller or the acquirer. The seller loses control of the goods when he hands them over to the third party, but he still has the risk until delivery takes place in the Member State of desti-

[58] *EMAG Handel Eder OHG*, paragraph 58

[59] C-409/04 *Teleos and Others*, paragraph 34

nation. By contrast, transportation within the meaning of the directive takes place where the seller or the acquirer carries out the transport of the goods himself, or through agents who follow his instructions.[60] If the seller is responsible for transport, intra-Community acquisition takes place when the seller or his agent delivers the goods to the acquirer in the State of destination. If the acquirer assumes responsibility for transport, he obtains, directly or through his agent, the power to dispose of the goods as owner in the country of origin. But even in this case intra-Community acquisition does not take place until the transportation to another Member State has been completed.

This conflicts somewhat with the wording in Article 20, which clearly states that an acquisition is intra-Community where effected in a Member other than that in which the movement of the goods began. However, the provision also expressly allows for the purchaser to arrange for the transport. The movement of goods between the Member States must therefore be decisive. Indeed, the starting point is that the purchaser acquires the goods in the Member State of destination, but if he should acquires them in the Member State of departure the acquisition still falls under Article 20 provided that the intra-Community movement happens in connection with the acquisition.

It should be noted that certain intra-Community acquisitions are exempt from VAT under Article 2(1) b – they are excluded from the scope of VAT. Where this is the case, the transaction is not at all deemed to take place for VAT purposes. Other intra-Community acquisitions are exempt under Articles 3 and 4. These are handled differently from those under Article 2, although the wording, "subject to VAT", is similar in both provision. Whereas a transaction exempt under Article 2 is deemed not to take place (for VAT purposes), a transaction exempt under Articles 3 or 4 is merely not to be charged with VAT. In this case the acquisition does take place but it is zero-rated.[61]

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[60] C-409/04 *Teleos and Others*

[61] Ben Terra, Julie Kajus, *Commentary – A Guide to the Recast Vat Directive*, chapter 1 section 1.3

2.3 Obligation to register for VAT

In order to effect a taxable transaction in the EU, one has to be a taxable person[62] registered for VAT in the Member State where the transaction is taxable. The VAT system is a self-declaration system. The taxable persons collect the tax on behalf of the authorities; and it is the transactions which are subject to VAT, not the persons themselves. But it would hardly be possible for the tax authorities to administer a control system if the subjects were not identified for VAT. Congruently, it is not necessary to be registered to effect a transaction which is not taxable, for instance a domestic acquisition of goods. The transaction is not subject to VAT (for the purchaser), so it is not necessary for the tax authorities to be able to identify the purchaser. Consequently, if one is to make a taxable transaction one must be registered for VAT in the Member State in which the transaction takes place. The fact that intra-Community supplies are exempt from VAT does not eliminate the obligation to register. In order to evaluate whether or not a supply qualifies as intra-Community, the authorities need to be able to identify the supplier.

Norway is not a member of the EU and, as such, is considered a third country. Transactions to and from Norway must therefore be treated as imports and exports. However, where the flow of goods takes place between Member States, as a Norwegian company it is possible to register for VAT in a Member State and thus effect transactions within the EU under the same rules as companies established here.

2.4 Exemption for intra-Community supplies

Article 138(1) states that;

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

[62] See definition in section 1.2.7

If the transfer of goods from one Member State to another is regarded as an exempt intra-Community supply pursuant to Article 138, no accounting of VAT takes place in the Member State of dispatch. The supply is zero rated, and the supplier is entitled to deduct his input VAT[63] The acquirer accounts for VAT in his respective Member State in accordance with the rules on reverse charge.[64]

Article 138 stipulates three conditions which must be fulfilled for a supply to be zero rated. Firstly it must involve goods being dispatched or transported from one Member State to another[65]. Secondly, it must be effected for a person registered for VAT in a Member State other than that of origin[66]. Finally, the dispatch or transport must be arranged by either the seller or the purchaser[67]. This entails that where a third person is in charge of the transport, either the seller or the purchaser must carry the risk connected to it. If this was not the case, the link would effectively be erased between the intra-Community supply and the movement of goods, as the goods would actually belong to someone else at the time of the movement. [68]

How Article 138 functions is that the supplier needs to have the purchaser's VAT identification number from another Member State as well as sufficient proof that the goods have actually been moved. It follows from Article 131 that it is up to each Member State to lay down the specific requirements for the supply to be exempt. This may result in different practices throughout the Community.[69] Still, it should be noted that the general principles of EU law must always be complied with.[70]

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[63] Article 169(1)(b) RVD

[64] Article 97 RVD

[65] «the supply of goods dispatched or transported to a destination outside their respective territory but within the Community"

[66] "for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began"

[67] "by or on behalf of the vendor or the person acquiring the goods"

[68] Joep Swinkels, *Zero Rating Intra-Community Transactions*

[69] Germany, for instance, has introduced the rule that the supply can only be zero-rated if the supplier is able to document that the acquisition has been accounted for in the Member State of destination – needless to say, this constitutes a huge disadvantage for the suppliers

[70] Case C-184/05 *Twoh International BV*, paragraph 25

Where a cross-border supply[71] does not fulfill the conditions stipulated in Article 138, it is taxed as a domestic supply in the Member State of origin. Consequently the transaction is considered domestic for VAT purposes even though it is effected between two Member States, and the purchaser must pay VAT in Member State other than that in which he is established. Needless to say, this is an unwanted situation for the trader.

[71] See definition in section 1.2.3

3 THE PLACE OF TAXABLE TRANSACTIONS

3.1 Introduction

As stated introductorily, the place of a taxable transaction only plays a role when it involves goods being moved across two tax jurisdictions, as is the case in all cross-border transactions.

Every exchange of goods requires a place of supply and a place of acquisition. Interestingly, the place of a taxable transaction is often referred to simply as the place of supply; which can be either the Member State of origin or the Member State of destination. From a theoretical point of view, this is not logical. Where goods are transported between two Member States, the one of destination can never constitute the place of supply, even if the supply is actually effected here.[72] The rules determining the place of taxable transactions do not relate to the *time* of the transaction. They refer to the movement of goods; either when it begins or when it ends.

Following this, even exchanges of goods within a Member State do, in theory, have a place of supply and a place of acquisition – but they will necessarily coincide.

The principal consequence of the place of a taxable transaction is that VAT is accounted for here, but it also determines which VAT rate is to be charged, when it is to be charged and how it is to be charged, considering that each Member State is allowed to lay down the specific conditions under which VAT is accounted for.

3.2 Determining the place of taxable transactions

Whereas Articles 31-36 lay down the rules on how to determine the place of taxable supplies, Articles 40-42 stipulates the corresponding rules for intra-Community acquisitions. Before taking a closer look at these provisions, it should be noted that the Directive differ-

[72] This seems to be assumed in Case C-245/04 *EMAG*, paragraph 48

entiates between supplies of goods with and without transport. Since only the first mentioned give rise to questions about allocation, the emphasis will be put here. Moreover the Directive distinguishes between supplies of goods in general and intra-Community acquisitions in particular. Seeing that acquisitions which are not intra-Community are treated as taking place domestically, they are not taxable. In other words, domestic acquisitions are not subject to tax, only domestic supplies (except in Member States which practice the domestic reverse charge).

3.2.1 The place of supply of goods

Article 31 lays down the rule for determining the place of supply.

> *Article 31*
> "Where the goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place".

Consequently, for these transactions the place of supply is the Member State in which the "right to dispose" is transferred. This stands in contradiction to Norwegian law, by which a transaction is always taxable where it has been effected.

If the goods are either transported or dispatched, Article 32(1) applies.

> *Article 32(1)*
> "Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins."

Hereby the place of supply is not necessarily the Member State in which the goods are effectively supplied. The decisive criterion is where the movement starts, not where the "right to dispose" is transferred to the purchaser.[73]

[73] Redmar Wolf, *VAT Pitfalls in intra-EU Commodity Trade*

For cross-border supplies, Article 32 often merely serves as a starting point. Apart from where a supply does not fulfill the conditions to be zero rated as intra-Community (and is therefore treated as a domestic supply), the place of supply is primarily relevant with respect to reporting obligations. Yet, the starting point in Article 32 is an important one as such. The main rule for supplies with transport is that they are to be taxed in the Member State of dispatch – in accordance with the origin principle.

The reason why Intra-Community acquisitions are taxed rather than intra-Community supplies is that a purchaser should not have to pay VAT in a different Member State than the one in which he is registered. This is regarded as an inexpedient situation, as he will then have to get the VAT refunded[74]. The refund procedure can be lengthy and often demands significant administrative work. Consequently, the purchaser gets the cash flow inconvenience as well as new costs due to resources used to make the refund happen.

Article 33 establishes the place of supply for distance sales. A distance sale occurs when a supplier in one Member State sells goods to a person in another Member State who is not registered for VAT and the supplier is responsible for the delivery of the goods. If this is the case, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends. This is the only case in which the place of supply is considered a Member State other than that of origin. (For zero rated intra-Community transactions, the place of supply is still strictly speaking the Member State in which the movement of goods begins; only the supply is no longer taxable.) It should be noted that Article 33 constitutes an exception from the main rule in Article 32. The starting point is that private consumers are free to purchase goods in other Member States than where they reside at the VAT applicable in the Member State of purchase. The reason why an exception is established for distance sales is that unrestricted

1. [74] Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State

taxation in the Member State of purchase could lead to a diversion of trade. The consumers would unrestrictedly be free to buy goods from suppliers in Member States with lower VAT rates than their own. Seeing that consumers to not have a right to deduct input VAT, the VAT paid constitutes the final VAT revenue for the Member State.

3.2.2 The place of intra-Community acquisitions of goods

Article 40 lays down the main rule regarding the place of intra-Community acquisitions: "The place of acquisition shall be the Member State in which the dispatch or transport of the goods ends." Again it should be noted that this does not constitute an exception from the general rule of the place of supply for transported goods. The place of supply is still the Member State in which the movement starts, but seeing that intra-Community supplies are exempt from VAT pursuant to Article 138, they are not taxable and the place of supply becomes irrelevant. It is the place of acquisition which is significant, since this is where VAT should be accounted for and deducted.

Joep Swinkels writes[75] that intra-Community transactions are subject to five principles; intra-Community acquisitions of goods take place in the Member State in which transport of the goods physically ends; businesses must be registered in the Member State from which they make intra-Community supplies or in which they make intra-Community acquisitions[76]; if there is only one physical movement of goods from one Member State to another only one supply can be zero-rated as an intra-Community supply; the intra-Community transaction must be attributed to the transaction in the framework of which the goods are physically transported to the Member State of destination; and where the goods have been acquired as an intra-Community acquisition in a Member State any subsequent supplies are deemed to take place in that Member State.

[75] Joep Swinkels, *Intra-Community Triangulation*, International VAT Monitor

[76] Article 41 RVD

Article 41 provides a safety net to be applied in situations where the purchaser for some reason does not give the supplier its VAT identification number issued in the Member State in which the goods are delivered but, instead, its VAT identification number issued in, for example the Member State in which it is established. Under this provision, the acquisition of the goods is subject to VAT in the Member State that issued the VAT identification number under which the customer effected the acquisition. The second subparagraph stipulates that, if VAT is accounted for in the Member State of delivery, the taxable amount is to be reduced accordingly in the Member State that issued the VAT identification number under which the purchaser made the acquisition. The rationale behind this corrective mechanism is to prevent double taxation[77] while giving purchasers an incentive to declare their acquisitions in the Member State where the goods are acquired.[78]

Where the trade only involves two parties, it is rarely difficult to determine the place of acquisition. If the purchaser is registered for VAT in the Member State of destination, the acquisition becomes taxable here and, if he is registered for VAT in a Member State other than that of destination, VAT is to be accounted for in the Member State in which he is registered.

The main problem occurs where there are three parties in a chain of supply and the goods are delivered directly to the purchaser's customer, either in the Member State in which the purchaser is registered or in a different Member State. This is what happens in so-called chain transactions, or "ABC"- transactions[79] - the goods take a different route than the invoicing. The problem consists is ascertaining the character of the various transactions in order to subsequently determine the place of each of them.

In other situations it may be problematic to determine what constitutes an acquisition. This is the case where the full ownership of the goods is not transferred to the purchaser at a

[77] Joined cases C-536/08 and c-539/08 X and Facet BV/Facet Trading BV

[78] Joep Swinkels, *Intra-Community Triangulation*, International VAT Monitor

[79] Ben Terra and Julie Kajus, *A Guide to the European VAT Directives* p. 573

time. Here the goods do take the same route as the invoicing, but the delivery thereof is split into different parts.

The problems relating to the determination of the place of intra-Community transactions will be treated further in section 5.

4 THE TIME OF TAXABLE TRANSACTIONS (THE TAX POINT)

4.1 Introduction – chargeable event and chargeability

The rules on when domestic supplies and intra-Community acquisitions are to be regarded as effected for VAT purposes follows from Articles 63-67 and 68-69 respectively.

The provisions operate with the terms chargeable event and chargeability. According to Article 62(1), the chargeable event for a transaction is "the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled". With regards to chargeability Article 62(2) states that "VAT shall become "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred". Hence, the term chargeable event refers to the basic tax point, or when the transaction is effected, and the term chargeability refers to the actual tax point, i.e. when VAT is to be accounted for.

The distinction between the chargeable event and chargeability, or the basic and the actual tax point, constitutes a matter of logical definition. In order for VAT to become chargeable, the basic tax point has to take place. In other words, it is a prerequisite for the actual tax point to occur. The chargeable event refers to a factual happening (i.e. the transfer of the right to dispose of the goods as owner), whereas chargeability refers to the legal consequences of this (VAT becomes chargeable).

4.2 Parallelism

4.2.1 Supply v. acquisition

As previously mentioned, a supply and an acquisition are simply two sides of the same transaction; they must therefore necessarily occur at the same time. In other words, an exchange from one party to another can only be effected once. Hence, it is fundamental that the time of a supply is to be determined in the same way as the time of an acquisition. This is the logical reasoning. In addition, practical considerations lead to the same result, though only with regards to intra-Community transactions since domestic acquisitions are not tax-

able. Where an intra-Community supply is exempt from VAT it still has to be reported on the domestic return and recapitulative statement. Correspondingly, the acquisition has to be reported (and accounted for) in the Member State of destination. In order for the authorities to exercise effective control, parallelism of the effected transactions is completely necessary. Only if the transactions are considered effected at the same time, i.e. within the same interval or tax-period, can the information supplied to the respective tax authorities be compared.[80] Consequently, for effective control to be exercised the rules on supplies must correspond to those on acquisitions. This is however not always the case.

4.2.2 Chargeability v. the right to deduction

The parallel between the liability for VAT and the right to deduction constitutes a core principle in the VAT system. If the right to deduct were to arise earlier than the payment, the tax authority would in fact have to pre-finance VAT (likely to happen in an invoice based system), and vice versa.[81] According to the VAT Directive, the moment when VAT becomes chargeable[82] is decisive with respect to both the liability to pay and the right to deduct.[83] In order to maintain the parallel it is fundamental that the respective provisions are interpreted in such a way that they mirror each other.

4.3 Determining the time of taxable transactions

4.3.1 Supply of goods

Article 63 stipulates the starting point: "The chargeable event shall occur and VAT shall become chargeable when the goods and the services are *supplied*." Hence, according to the general rule the actual tax point is to occur at the same time as the basic tax point, namely when the goods are supplied to the purchaser.

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[80] Ben Terra and Julie Kajus, *Commentary – A Guide to the Recast Vat Directive*, chapter 6 section 6.7.1

[81] Ben Terra and Julie Kajus, *Commentary – A Guide to the Recast Vat Directive*, chapter 6 section 6.1

[82] Articles 63, 67 and 69 RVD

[83] Article 167 RVD

When establishing what constitutes a supply, one must look to Article 14 and its definition stating that a supply is made when the right to dispose of the goods is transferred to the purchaser. Article 14 was discussed in section 2.2.1; what is said here must also apply to the interpretation of Article 63. The question remains whether it is the transfer of legal ownership or the transfer of economic ownership which is decisive. Following the same reasoning as above, I will similarly conclude that the economic ownership is not only sufficient, but also necessary, in order for a supply to have been made under Article 63.

The general rule is that VAT becomes chargeable when a supply has been made. However, Article 65 states that "where payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received." Since the basic tax point has not occurred here, Article 65 opens the possibility for two interpretations. On the one hand, it may be interpreted in such a way as to confer on it the meaning that the actual tax point overrides the basic tax point[84] in the sense that it is not necessary for the basic tax point to occur. On the other hand, the provision may be understood as if the receipt of payment simply constitutes the basic tax point (and the actual tax point). This latter alternative seems to be the most natural. It would not be in accordance with the logical system of the VAT Directive if the basic tax point could simply be omitted. After all, it is what constitutes a taxable transaction. Under this interpretation the point of departure becomes the same as under Article 63; the basic and actual tax point occurs at the same time. The only change is that the receipt of payment is considered the defining event instead of the supply. The objective of Article 65 is to avoid tax fraud. It is a mechanism for the authorities to make sure that VAT paid to the supplier as a part of the invoice is immediately accounted for. This should also be seen in connection with the purchaser's right to deduct his input VAT.

Furthermore it should be noted that Member States are free within certain limits to introduce other rules for chargeability under Article 66.

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[84] Crowe Clark Whitehill, A quick guide to the VAT rate change

Article 67 regulates the actual tax point for intra-Community supplies.

> *"Article 67*
>
> 1. Where, in accordance with the conditions laid down in Article 138, goods dispatched or transported to a Member State other than that in which dispatch or transport of the goods begins are supplied VAT-exempt or where goods are transferred VAT exempt to another Member State by a taxable person for the purposes of his business, VAT shall become chargeable on the 15th day of the month following that in which the chargeable event occurs.
>
> 2. By way of derogation from paragraph 1, VAT shall become chargeable on issue of the invoice provided for in Article 220, if that invoice is issued before the 15th day of the month following that in which the chargeable event occurs."

Seeing that intra-Community supplies of goods are exempt from VAT[85], the actual tax point for these transactions is important primarily with respect to reporting obligations. Still, the provision gives rise to several theoretically important questions. Also, it has a corresponding provision in Article 69 for intra-Community acquisitions. For these transactions, the actual tax point is more important. Although VAT is merely to be accounted for under the reverse charge mechanism, it is important to establish the time at which this should be done. In the event that a trader does not fulfill his obligations in time, he may risk supplementary taxation and sanctions.

In essence, Article 67 stipulates two alternatives for when VAT can become chargeable; either on the 15th day of the month following that in which the chargeable event occurs or on issue of invoice if that this happens first. Both alternatives seem to assume that the basic tax point has occurred. Where VAT becomes chargeable pursuant to paragraph 1, this is evident. The chargeable event constitutes the starting point from which the actual tax point is calculated. However, in the event that the actual tax point is created by the issue of an invoice, similarly to Article 65, the question arises whether a basic tax point needs to be

[85] See section 2.4 and Article 138

established. In line with the reasoning above, one must assume that the basic tax point needs to take place, and the question arises whether the issue of the invoice itself can be seen as the chargeable event, hereby creating a basic tax point which coincides with the actual tax point.

The application of paragraph 2 presupposes that an invoice is issued before the 15th day of the month following that in which the chargeable event occurs. If the issue of the invoice itself is regarded as the chargeable event, strictly speaking the issue occurs before the 15th of the following month – it occurs at the same day as the counting begins. Nevertheless, it seems rather unnatural to understand the wording of the provision this way. On the contrary, the wording suggests that the issue of the invoice and the chargeable event constitute two distinguishable occurrences. Additionally, an invoice issued before the supply is likely to contain both the date of the issue and the date on which the supply is supposed to take place – this points in the direction that also in practice the issue of the invoice and the chargeable event are regarded as two separate events.

Lastly, but quite importantly, if the issue of the invoice was to constitute the chargeable event, this would in fact mean that a VAT liability could arise merely as a result of the issue of an invoice. In contrast to what is the case when a payment on account is received in accordance with Article 65, the issue of the invoice does not constitute an exchange of means - no real transaction has taken place and the conditions for zero rating the supply as intra-Community are not yet fulfilled. This is a weighty argument pointing toward the conclusion that an issue of invoice cannot itself constitute the chargeable event.

The analysis of whether the issue of the invoice can be regarded as the chargeable event could be taken even further, as Article 68 states that the chargeable event takes place when the supply of goods is made. This must mean that a supply of goods, however this is defined by the governing law, needs to take place in order for a basic tax point to be created. Considering the issue of the invoice as the chargeable event could therefore only be in ac-

cordance with the wording of the Directive if one considers the issue of the invoice to constitute the supply. This seems to be stretching the wording a bit too far.

Finally it should be mentioned that Article 65 does no longer apply to intra-Community supplies.[86] If not even a pre-payment can create a basic tax point, it would be highly illogical if the issue of invoice could.

4.3.2 Intra-Community acquisition of goods

Article 68 stipulates the time at which the chargeable event occurs for intra-Community acquisitions.

> *Article 68*
> "The chargeable event shall occur when the intra-Community acquisition is made.
>
> The intra-Community acquisition of goods shall be regarded as being made when the supply of similar goods is regarded as being effected within the territory of the relevant Member State."

In contrast to what is the case under Article 14[87], the relevant criterion under Article 68 is not merely when a supply has been made but when a supply has been made according to national law. The governing law must undoubtedly be that of the Member State in which the acquisition takes place *for VAT purposes,* hence the place of acquisition. With regard to the application of Article 14, the ECJ has stated that it is not decisive what constitutes a transfer of ownership according to national law; "the terms used in the VAT Directives must be defined at Community level unless the directives themselves leave it to the Member States to determine the term".

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[86] Council Directive 2010/45/EU amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing , Article 4

[87] See section 2.2.1 and Case C-320/88 *(Shipping and Forwarding Enterprise (SAFE)*)

Article 68 can hardly be understood in any other way that that it explicitly leaves it to the Member States to define what constitutes a supply. An interpretation that should initially be made in accordance with the Community understanding of Article 14 must therefore instead be made in accordance with the governing law.

In light of this, the transfer of "right to dispose as owner" – and thus the imposition of VAT – will happen at different intervals depending on which Member State's law is decisive. For instance, whereas the law of France, Italy and Belgium consider property transferred by contract, that of the Netherlands consider it transferred by the formal act of delivery. The result is inevitably an uneven application of the term "supply" throughout the Community, which is exactly what the VAT Directive aims at avoiding. In addition, it entails a breach of the principle of parallelism in the sense that intra-Community supplies are defined by other criteria than intra-Community acquisitions. It might therefore be asked why the Directive stipulates such a result.

With respect to the actual tax point, Article 69 is the relevant provision. Seeing that it mirrors Article 67, the same analysis applies.

4.3.3 The Directive on invoicing rules

On 13 July 2010 the ECOFIN Council adopted Directive 2010/45/EU amending the VAT Directive as regards the rules of invoicing.[88] The Directive must be implemented by 1 January 2013. It is stated in the preamble that:

> "The rules concerning the chargeability of VAT on intra-Community supplies of goods and on intra-Community acquisitions of goods should be clarified in order to ensure the uniformity of the information submitted in recapitulative statements and the timeliness of the exchange of information by means of those statements…"

[88] Ben Terra and Julie Kajus, *A Guide to the European VAT Directives*, p. 681 et seq.

As rearticulated by the Directive on invoicing rules, Article 67 now stipulates that VAT on intra-Community supplies shall become chargeable *on issue of the invoice* or *on expiry of the time limit referred to in the first paragraph of Article 222* (as amended by the Directive) if no invoice has been invoiced by that time. Article 222 as rephrased states that for supplies of intra-Community goods an invoice shall be issued no later than on the fifteenth day of the month following that in which the chargeable event occurs. The Directive on invoicing rules also amends Article 69, which regulates chargeability of intra-Community acquisitions of goods. Hence, Articles 67 and 69 still mirror each other so that the parallelism between chargeability of supplies and acquisitions is maintained.

It appears that the rephrasing of Articles 67 and 69 does not bring about any material differences. It merely changes the order of the two alternatives for when VAT can become chargeable. Instead of the general rule being that VAT becomes chargeable on the 15th day of the month following that in which the chargeable event occurs, unless an invoice is issued before this date, it is now reversed: The time of the issuance of an invoice is, as the main rule, decisive for when VAT becomes chargeable, but if no invoice is issued by the 15th day of the month following that in which the chargeable event occurs, VAT becomes chargeable on this date. The system of chargeability is now (supposed to be) based primarily on invoicing.

It should be noticed that the main chargeability rule, as it follows from the rephrased Article 67, does not refer to the chargeable event at all. It simply states that VAT shall be chargeable on issue of the invoice. This cannot entail a different interpretation than above.

5 THREE-PARTY TRADE STRUCTURES – DETERMINING THE PLACE AND TIME OF TAXABLE TRANSACTIONS

5.1 Introduction

This section will contain an analysis of typical three-party trade structures that involve at least one intra-Community transaction. (It should be noted that the term transaction will here be used as a collective term for both the supply and the corresponding acquisition.) Structures with longer chains of supply will not be included, merely because it would be too comprehensive. In addition, it is not necessarily needed. Most chains of supply can be "dismantled" into structures containing two or three suppliers and/or acquirers. If one is familiar with the typical ways in which these smaller chains of supply are arranged – and can answer the questions relating to the time and place of taxable transactions, additional links can always be added. In essence, knowing how to handle smaller trade structures is the key to being able to handle structures with, in theory, infinite chains of supply. A different issue is that where there are more links to a transaction, this often comes with more obligations with regards to registration.[89]

A transaction viewed as a two way exchange is the supply/acquisition between two parties.[90] Accordingly, a three-party structure comprises two transactions (A-B and B-C). A two-party structure simply contains one. A transaction has to consist of goods being traded between two Member States to be termed intra-Community. Hence, there is only one possible way of constructing a two-party intra-Community trade structure; namely this kind of structure will involve a supplier (B) in Member State 1 (MS1) and an acquirer (C) in Member State 2 (MS2). A three-party structure, however, can include one intra-Community transaction and one other type of transaction, or two intra-Community transactions. Where

[89] A triangular structure will get an additional domestic transaction on either side – this may create an obligation to register. See Peter Hughes, *EU VAT Aspects of Longer Chains of Triangular Transactions*, International VAT Monitor

[90] See definition in section 1.2.2

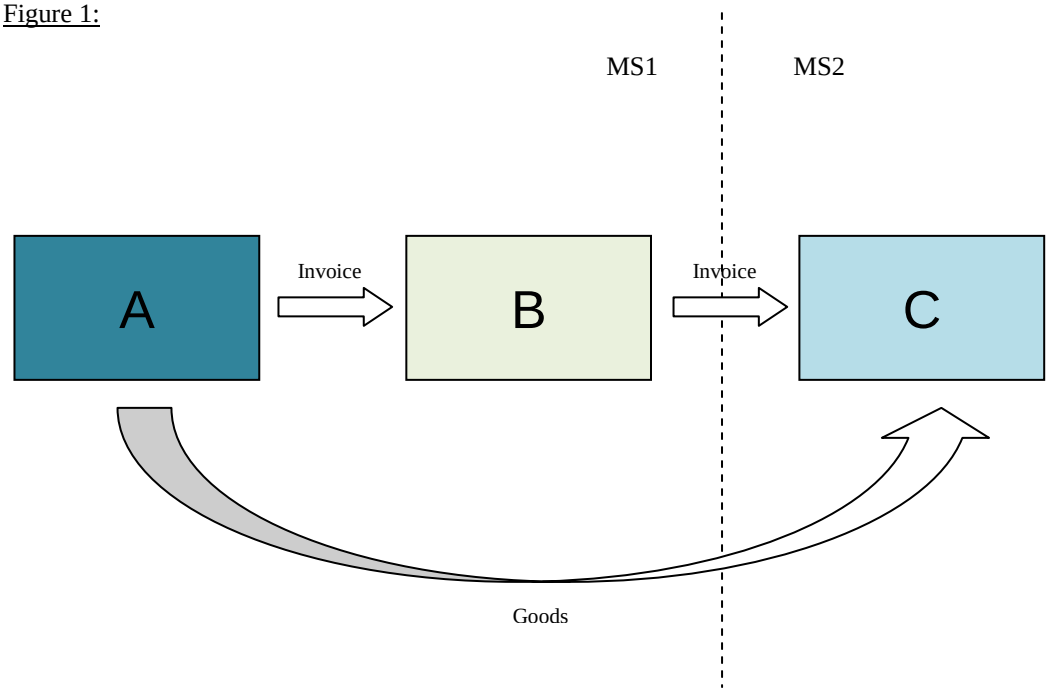
there are three parties (thus two transactions) but only one movement of goods, one has a triangulation. This leaves several possible structures:[91]

Intra-Community + Domestic
Domestic + intra-Community
Intra-Community + intra-Community

In section 5.2-5.4, the tax point occurs is assumed to occur at the time of the delivery of the goods. The focus will be on the place of the taxable transactions, considering that the tax point question is quite straight forward. Section 5.5 will deal with the situation in which the tax point is created by the transfer of legal title, hence before the delivery of the goods, and how this effects the determination of the place of the taxable transactions.

5.2 Domestic + Intra-Community/Intra-Community + Domestic

Figure 1:



[91] See section 2

5.2.1 The place of taxable transactions

Structures containing one domestic and one intra-Community transaction (regardless of the order) involve three parties and two Member States. A typical chain of supply is as follows: A makes a supply of goods to B – and B makes an acquisition thereof – in Member State 1. B then supplies the goods on to C from Member State 1 to Member State 2, meaning that the place of supply is the Member State of dispatch, whereas the place of acquisition is the Member State of destination (see Figure 1 above). It seems pretty clear that the supply from A and B must be regarded as a domestic transaction, since the goods are delivered and acquired in the same Member State. Correspondingly the supply from B to C must, assuming that the conditions are fulfilled[92], be exempt as intra-Community.

For the first transaction, the place of supply – and thus the place of acquisition – must necessarily be Member State 1, pursuant to Article 32 which states that the place of supply is the place where the goods are located at the time when dispatch or transport of goods to the customer begins. The time the transaction is decided by the general rules on chargeable event and chargeability. According to Article 63, both the basic and the actual tax point occur when the goods are supplied, unless the relevant Member State has decided otherwise pursuant to Article 66[93] What constitutes a supply depends on an interpretation of Article 14[94], and will in this case be the time of delivery.

With regard to the second transaction, the intra-Community must, in order to be exempt in the Member State of departure, fulfill the conditions laid down in Article 138. The place of acquisition is determined according Article 40[95], from which it follows that the place of acquisition is where the movement of the goods ends.

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[92] Article 138 RVD

[93] This provision applies only to the actual tax point

[94] See section 2.2.1

[95] Alternatively according to Article 42, cf. section 3.2.2

The basic tax point for the acquisition is the time at which the supply is deemed to be made under the national law of Member State 2, cf. Article 68. Moreover, acquisition VAT becomes chargeable in accordance with Article 69.

In case the intra-Community acquisition takes place before the domestic acquisition, the place and time of each transaction is determined in the same way as above. The order is simply different.

If the transactions and their character are clearly established, it is rarely problematic to decide the place and time for each supply/acquisition. In situations where the goods are physically delivered to B before he supplies them on to C, two separate movements of goods occur, and since only two Member States are involved, only one of the movements can be border-crossing. It will be relatively easy to determine which of the two transactions that is, depending on where B gets the right to dispose of the goods as owner. It is not relevant where B is registered for VAT, although he must be registered in the EU to make intra-Community acquisitions/supplies.

The problem occurs when B merely acts as an intermediary, i.e. he never physically acquires the goods. They are transported directly from the supplier A to the customer C. But the invoicing goes via B, hence there are still two transactions succeeding each other in time. In these cases, it might be uncertain whether the movement of goods is linked to the first or the second transaction. Contrary to where B gets the physical right to dispose of the goods, it is here highly relevant where he is registered.

Regarding registration, there are four possible scenarios here:

- B is registered in MS 1
- B is registered in MS 2
- B is registered in a Member State other than 1 or 2
- B is not registered

If B is registered in a Member State other than 1 or 2, the chain transaction actually involves three Member States but only one movement of goods. In these cases the simplified procedure of triangulation can be applied.[96] In the case B is not registered at all, it is not possible to execute taxable transactions.[97] Intra-Community acquisitions and supplies, as well as domestic supplies, can only be made by registered subjects. B would therefore have to acquire one in the Member State which he finds the most expedient.[98] In conclusion, the only scenarios possible are B being registered either in the Member State of departure or the Member State of destination.

5.2.1.1 *EMAG Handel Eder OHG*[99]

EMAG Handel Eder OHG deals with the classification of taxable transactions in chains of supply with three parties but only one movement of goods. The Austrian company K GmbH (K) supplied goods to EMAG Handel Eder OHG, Klagenfurt (EMAG), also Austrian. K had suppliers in Italy and the Netherlands, and arranged for the goods be picked up here and transported directly to EMAG or EMAG's customers. The suppliers zero-rated their sales as intra-Community dispatches, while K had accounted for Austrian acquisition VAT and charged Austrian VAT on its sales to EMAG. EMAG had recovered the Austrian VAT charged as input tax. The problem arose when the tax authorities argued that EMAG was not in fact entitled to deduct the input tax. They claimed that K had been wrong to include VAT in the invoice, as the transaction should be regarded as a tax-exempt intra-Community supply. The ECJ disagreed with this, and concluded that EMAG had the right to recover the input VAT charged by K.

The main question in *EMAG* was whether the transaction from K to EMAG should be considered a domestic or an intra-Community supply. The Court stated that "the single intra-Community movement of goods can be ascribed to only one of the two successive sup-

[96] See section 5.3

[97] See section 2.3

[98] It should be mentioned that the requirements for registration vary from Member State to Member State

[99] C-245/04 *EMAG Handel Eder OHG (EMAG)*

plies". Hence there can only be one zero-rated supply in a chain transaction involving two Member States.[100] If both supplies were to constitute exempted intra-Community supplies, this would be both illogical and contrary to the scheme of the VAT Directive for the taxation of trade between Member States. Even if two successive supplies give rise to only a single movement of goods, they must be regarded as having followed each other in time. The intermediary can only transfer the right to dispose of the goods if this right has previously been transferred to him by the first vendor. Since only one of the transactions can be regarded as intra-Community, the other transaction must necessarily be regarded as domestic.

The AG held that in determining which transaction fulfills the conditions of an intra-Community supply/acquisition, the right to dispose of the goods as owner while the goods are moved across the border is an essential factor.[101] It is the person who arranges the transport, and who subsequently exercises the right to dispose of the goods while they are being moved, that should be regarded as effecting an intra-Community acquisition. This is the person who is "best informed" about the places of departure and destination of the goods. The AG stated that this conclusion holds true regardless of whether the supplier of the acquirer has the responsibility for the transport. In line with this, the AG pointed out that if the person arranging the transport is established or registered for VAT in the Member State of dispatch the first transaction must be considered effected within the territory of this Member State. From this it can be concluded that the first transaction can be regarded as intra-Community only if it is the acquirer who is responsible for the transport and if he is registered for VAT in the Member State of arrival.[102]

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[100] Michael van de Leur, *Triangulation or Strangulation?*

[101] AG Opinion in Case C-245/04 *EMAG Handel Eder OHG*

[102] Patrick Walker and Jo Bello, *The EMAG case – a matter of opinion*

5.2.1.2 *Euro Tyre Holding*[103]

The question how it should be determined to which of the two supplies the transport should be ascribed was further discussed in *Euro Tyre Holding.* The facts were quite similar to those in EMAG. A Dutch Company Euro Tyre Holding B.V. (A) supplied goods to a Belgian company (B) which supplied them on to another Belgian company (C). B collected the goods at the premises of A in the Netherlands and conducted transport thereof directly to C in Belgium. The question was which supply should be zero-rated as intra-Community.[104]

First of all, the ECJ stated that "[t]he answer to that question depends on an overall assessment of all the specific circumstances from which it is possible to determine which supply fulfills all the conditions relating to an intra-Community supply" Moreover, the Court held that even though B's collection of the goods from A's warehouse constituted the first supply, this was not sufficient to justify the conclusion that the first supply was an intra-Community supply. "It cannot be ruled out that the second transfer of the power to dispose of the goods as owner may also take place in the Member State of the first supply, before the intra-Community transport has occurred. In such a case, the intra-Community could no longer be ascribed to that supply … 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."

The question arises as to how A can be aware of B's intentions. The ECJ decided that the information received from B is decisive. If A has been informed by B that the goods will be transported to another Member State and has been given his VAT registration number attributed by that other Member State, A can assume that his supply is an intra-Community supply and therefore apply the exemption. Nevertheless, if he has been informed by B of

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[103] C430/09 *Euro Tyre Holding BV*

[104] Joep, Swinkels, *Zero Rating Intra-Community Transactions*; Stefan Mauntz and Hendrik Marchal, *Zero Rating Cross-Border Triangular Transactions under EU VAT*

the fact that he would sell the goods on to C before leaving the Member State of departure, he is not entitled to zero-rate the supply and may be held liable afterwards if this is done.

With regards to the condition relating to evidence, the Court noted that A essentially depends on information received by B, and that it is sufficient for him to "act in good faith and take every reasonable measure in his power to ensure that the transaction that he effects does not lead to participation in tax fraud".

Somewhat confusingly, in the end of the judgment the Court stipulates as an "extra" condition for the first supply to be regarded as an intra-Community supply that the "right to dispose" is transferred to C in the Member State of arrival. Whether this condition is fulfilled or not, is up to the national court. The logic behind this must be that where the first supply is considered intra-Community, the second necessarily takes place domestically in Member State 2. And a domestic supply can only take place where the "right to dispose" is transferred in the relevant Member State. This is not the case in the event that C acquires the goods in Member State 1, and the last supply must therefore be considered the intra-Community supply. Since the Court also stated that as long as A acts in good faith he may not be held liable for zero-rating the supply, it seems that in this case, B must be liable for VAT in the Member State of departure.

In light of this, *Euro Tyre Holding* apparently leads to the conclusion that it becomes up to B whether the first or the second supply is to be zero-rated as intra-Community. If he confirms the intra-Community transport and provides his VAT registration number, the first supply is zero-rated, whereas if he does not confirm the transport and informs A about the sale to C, the second supply is considered the intra-Community supply. It could be discussed whether this is an expedient result for A as, although he is "safe" if he acts in good faith, it is uncertain what is demanded of him. As Redmar Wolf appropriately states; "In practice, party A cannot possible know what happens with the goods after delivery to party

B. In fact, party A always takes a certain risk if he does not arrange the transportation, but does apply the exemption for intra-Community supplies."[105]

B, on the other hand, may also experience complications, seeing that he is required to register for VAT either in the Member State of departure or the Member State of arrival. Granted, it is possible for him to apply the simplified procedure of triangulation. However, this does not necessarily entail that he escapes all unwanted obligations.[106]

5.2.2 The time of taxable transactions

The basic and actual tax points for the supplies and the acquisitions must be decided according to the general rules on chargeable event and chargeability for intra-Community and domestic transactions. The time of the basic tax points depends on the classification of the transactions and the transportation arrangements.

For the intra-Community transaction, the tax point is decided according to Articles 63 and 68 for the supply and the acquisition respectively, and for the domestic transaction (the taxable supply) the tax point is decided according to Article 63. Since the ownership is transferred at the time of the delivery of the goods, it is not problematic to determine the chargeable event.

If A has the responsibility for the transport, the tax point occurs similarly for both transactions wen the goods are delivered to C. B gets a flash title to the goods at the moment of delivery.[107] In the event that C is in charge of the transport, the first tax point occurs when the goods are delivered from A to B, and the second tax point takes place when the goods are delivered from B to C. Both events happen in the Member State of departure. If B is in charge of the transport, the first tax point occurs when he acquires the goods in the Member State of departure, and the second tax point takes place when he delivers the goods to C in

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[105] Redmar Wolf, *VAT Pitfalls in intra-EU Commodity Trade*

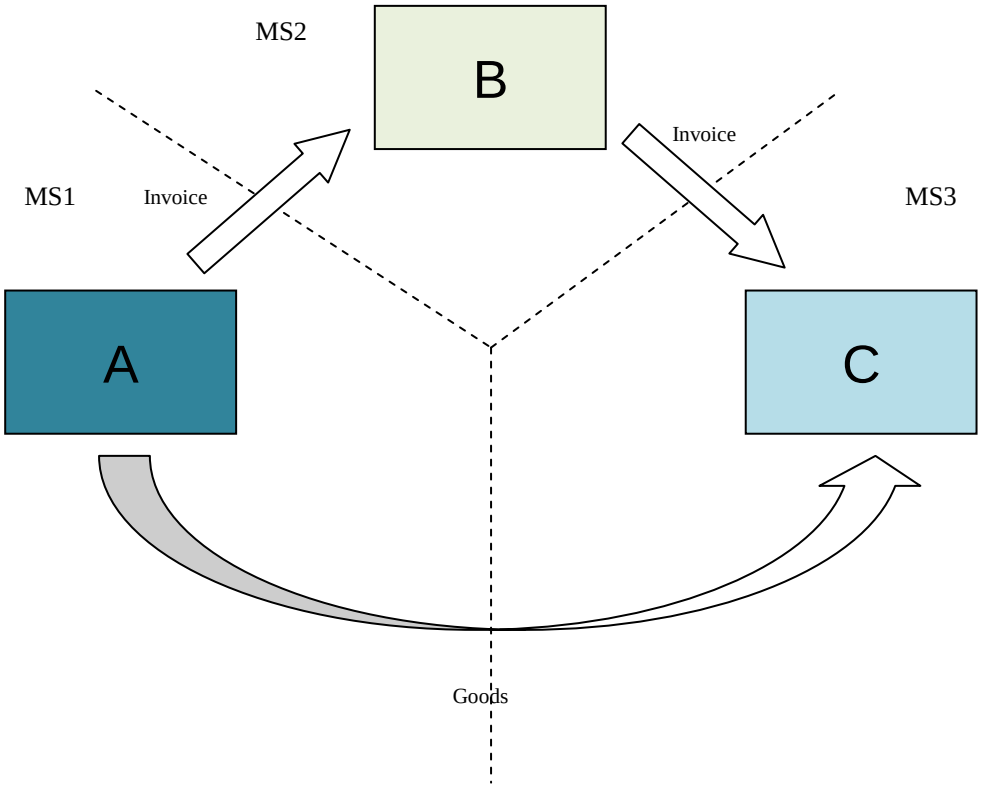
[106] See section 5.3

[107] Since the two transactions succeed each other in time, C can only get the ownership to the goods if B gets it first, cf. case C-320/88 *(Shipping and Forwarding Enterprise (SAFE)*)

the Member State of destinations. VAT becomes chargeable pursuant to Articles 63, 67 and 69.

5.3 The simplified procedure of triangulation

Figure 2:



5.3.1 The place of taxable transactions

It is not uncommon to encounter trade structures consisting of three parties, A, B and C, where they are all situated (established/registered) in different Member States (see Figure 2 above). The goods are transported directly from Member State A to Member State C, whereas the invoicing goes via B. This results in two transactions but only one movement of goods. The difference from the structure analyzed above, where the intermediary holds a

VAT registration in either Member State A or C, is that he is here registered in Member State B. Instead of there being two countries involved there are now three.

The treatment of this structure according the general rules would be that B makes an intra-Community acquisition in Member State C and then supplies the goods domestically (or vice versa). In order for this to be possible, B would have to register in Member State C (or Member State A). The simplified triangulation rules were introduced in order to eliminate the need for B to register in either Member State A or C. It entails that A makes an exempt supply to B under Article 138 and B acquires the goods in Member State C without having to account for VAT. He then supplies them on to C domestically, but instead of the supply being taxable, C accounts for VAT under the reverse charge rules laid down in Article 197.[108]

The intra-Community acquisition and the place thereof are regulated by Article 42.

> *"Article 42*
> The first paragraph of Article 41 shall not apply and VAT shall be deemed to have been applied to the intra-Community acquisition of goods in accordance with Article 40 where the following conditions are met:
> (a) the person acquiring the goods establishes that he has made the intra-Community acquisition for the purposes of a subsequent supply, within the territory of the Member State identified in accordance with Article 40, for which the person to whom the supply is made has been designated in accordance with Article 197 as liable for payment of VAT;
> (b) the person acquiring the goods has satisfied the obligations laid down in Article 265 relating to submission of the recapitulative statement."

The provision states that the place of acquisition is to be determined pursuant to Article 40, i.e. the place of acquisition is Member State in which the transport of the goods ends. Nevertheless, VAT shall be deemed to have been applied to the acquisition (in other words VAT is not to be charged. if two conditions are fulfilled.

[108] Ben Terra and Julie Kajus, *A Guide to the European VAT Directives*, p. 585

Firstly the acquirer has to establish that he has made the intra-Community acquisition for the purposes of a subsequent supply in Member State C to a person liable to account for VAT under the reverse charge rules as stipulated by Article 197. A further elaboration is provided for in Article 141.

> *"Article 141*
>
> Each Member State shall take specific measures to ensure that VAT is not charged on the intra-Community acquisition of goods within its territory, made in accordance with Article 40, where the following conditions are met:
>
> (a) the acquisition of goods is made by a taxable person who is not established in the Member State concerned but is identified for VAT purposes in another Member State;
>
> (b) the acquisition of goods is made for the purposes of the subsequent supply of those goods, in the Member State concerned, by the taxable person referred to in point (a);
>
> (c) the goods thus acquired by the taxable person referred to in point (a) are directly dispatched or transported, from a Member State other than that in which he is identified for VAT purposes, to the person for whom he is to carry out the subsequent supply;
>
> (d) the person to whom the subsequent supply is to be made is another taxable person, or a non-taxable legal person, who is identified for VAT purposes in the Member State concerned;
>
> (e) the person referred to in point (d) has been designated in accordance with Article 197 as liable for payment of the VAT due on the supply carried out by the taxable person who is not established in the Member State in which the tax is due."

Article 141 makes it compulsory for each Member State to make sure that VAT is not charged in accordance with Article 42 where certain conditions are fulfilled. Essentially, B has to be registered in a Member State and he must sell the goods on to a person registered in Member State C who has to account for VAT pursuant to Article 197. Article 141 must be seen as merely affirming the maximum limit as to which conditions must be fulfilled for the Member State to exempt the acquisition from VAT. If the conditions are not fulfilled the relevant Member State can still allow Article 42 to apply (as long as the high level conditions of Article 42 are met). However, this is not very practical, seeing that the Member States generally wish not to exempt acquisitions from VAT.

The second condition of Article 42 is that the obligations for declaration set out in Article 265 have been satisfied by the acquirer. This will not be discussed further.

The consequence of the triangulation rules is first and foremost that B does not have to register in Member State A or C. Instead he maintains his VAT position in the Member State in which he is already registered and reports his acquisitions and supplies in his VAT return here. The simplified procedure of triangulation does not alter the core structure of the transactions. A triangular structure will always contain two transactions, of which the first is intra-Community between A and B and where the place of acquisition is Member State C and VAT is exempt.

The second transaction in a triangulation structure is a domestic supply from B to C in Member State C. Inevitably the place of acquisition for this will be Member State C. Consequently, the places of acquisition for the two transactions will always be congruent. Ordinarily, a domestic supply would have to be charged with VAT in Member State C. But in a triangulation structure this is not the case. The application of Articles 42 and 197 is based on the assumption that C is liable to account for VAT in his Member State under the reverse charge rules laid down in Article 197. Article 197, in turn, states that the reverse charge rules apply – and C becomes accountable for VAT – only when the acquisition by C is a result of a supply carried out in accordance with the conditions of Article 141.

One may therefore say that the two provisions mutually depend on each other. In order to apply Article 141 (and Article 42), the conditions of Article 197 must be fulfilled. Correspondingly, the application of Article 197 depends on whether the conditions of Art 141 are met. In any case, the coexistence of Articles 197 and 141 results in VAT being exempt on the domestic supply from B to C. The burden is shifted to C so that he, and not B, is responsible for reporting and paying VAT in Member State C. In conclusion, B does not have to account for VAT neither on his acquisition nor on his supply of the goods. The intra-Community transaction is completely VAT free, whereas the domestic transaction is subject to VAT but under the responsibility of C.

Consequently, for C, the application of the triangulation rules imply that where he would otherwise merely pay an invoice with VAT (and then deduct it), he now has to account for VAT on his own initiative according to the reverse charge rules. However, seeing that input

VAT can usually be deducted in the same VAT return, ordinarily no actual payment has to take place. Therefore, the triangulation procedure constitutes a more expedient arrangement also for C.

5.3.1.1 Transport arrangements

It follows from *EMAG*[109] and *Euro Tyre Holding BV*[110] that in order for the simplified triangulation rules to apply, certain conditions regarding transport must be fulfilled. First of all, the transport cannot be arranged by C. This is fairly logical, and it also follows from Article 138. If C arranged the transport and thus acquired the right to dispose as owner of the goods in Member State A, one could hardly regard the first transaction as intra-Community and the second as domestic. Instead, the first transaction would be domestic and the second intra-Community – if not both would have to be considered domestic transactions in Member State A.[111] Seeing that the triangulation rules require in order to apply that the first transaction is the intra-Community transaction, C arranging the transport is not compatible with the triangulation procedure.

Furthermore, the ECJ has stated that neither can the transport be arranged by B if he has informed A about the resale to C before the goods leave Member State A. Following the same reasoning as above, this does also make sense. If A knows that the goods are being transported by B to C in Member State C, his supply to B cannot be invoiced without VAT. In this case it is not the first transaction which must be considered border-crossing, but the second.

Moreover, in some Member States the triangulation rules cannot be applied if B arranges the transport. Where B acquires the right to dispose of the goods as owner in Member State A, the movement of the goods good can still be attributed to the transaction between A and B if it happens within a certain time limit after the supply. B can therefore arrange the

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[109] C-245/04 *EMAG Handel Eder OHG (EMAG)*

[110] C430/09 *Euro Tyre Holding BV*

[111] See section 5.5.2

transport without "ruining" the triangulation structure. However, this demands an assessment of every individual situation. The VAT handling is easier and more predictable if A arranges the transport; in these cases it is clear that the right to dispose of the goods as owner is acquired by B in Member State C.

5.3.1.2 Joined cases X and Facet BV/Facet Trading BV

The decision in X and Facet BV/Facet Trading BV concerned the right to for intermediate purchasers to deduct input VAT on assumed acquisitions under Article 41.[112]

X, a company established in the Netherlands purchased goods from suppliers in other Member States, and sold them on to customers in Spain. The goods were transported directly from the suppliers to the customers. The suppliers did not charge VAT in the invoices to X, and X did not charge VAT in the invoices to the customers. As X had not established in his VAT return that the goods were transported directly to Spain, the tax authorities considered the company to have made intra-Community acquisitions and therefore imposed an additional assessment to VAT. Furthermore, the tax authorities claimed that X had no right of deduction in respect of those intra-Community acquisitions.

Facet, a company established in the Netherlands purchased goods from suppliers in Germany and Italy and sold them on to customers who were established in Cyprus and had a tax representative in Greece. The goods were transported directly from the suppliers to Greece. The suppliers did not include VAT in the invoices to Facet, and Facet did not include VAT in the invoices to the customers, referring to the Greek VAT registration number received by the customers. However, no intra-Community acquisitions were accounted for in Greece or Cyprus. Also, the customers were not registered for VAT in Greece. The tax authorities took the view that Facet had made intra-Community acquisitions and were not entitled to deduct the VAT. In those circumstances, they imposed an additional assessment.

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[112] Then Article 28b(A)(2) of the Sixth Directive

The question before the ECJ was whether a person effecting an intra-Community acquisition must be allowed a right to immediate deduction where he has failed to establish that the intra-Community-acquisition in question has been subject to VAT in the Member State of destination and therefore is subject to tax in the Member State which issued the VAT identification number.[113] The Court first stated that "deduction of the input VAT charged on intermediary goods and services acquired by a taxable person, inter alia within the context of intra-Community acquisitions, 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. It then went on to say that since the goods in this particular case did not actually enter the Member State, the relevant transactions cannot be regarded as giving a "right to deduct" under the general regime of deduction. It was pointed out that the general regime for the deduction of tax is not intended to replace the corrective mechanism in Article 41. A right to deduct would also risk undermining the effectiveness of the incentive to account for VAT in the Member State of destination, which again could jeopardize the application of the basic rule that intra-Community acquisitions are to be taxed where the movement of goods ends.

It is argued that ECJ's decision in Facet produces highly undesirable results for traders effecting "assumed" intra-Community acquisitions under Article 41.[114] Before they can apply for a refund they need to obtain information from their customer abroad showing that the latter has accounted for VAT in the Member State of arrival of the goods. Due to this, the purchasers would incur severe cash flow losses or even run the risk of never obtaining the relevant information and thus not get the refund.

5.3.2 The time of taxable transactions

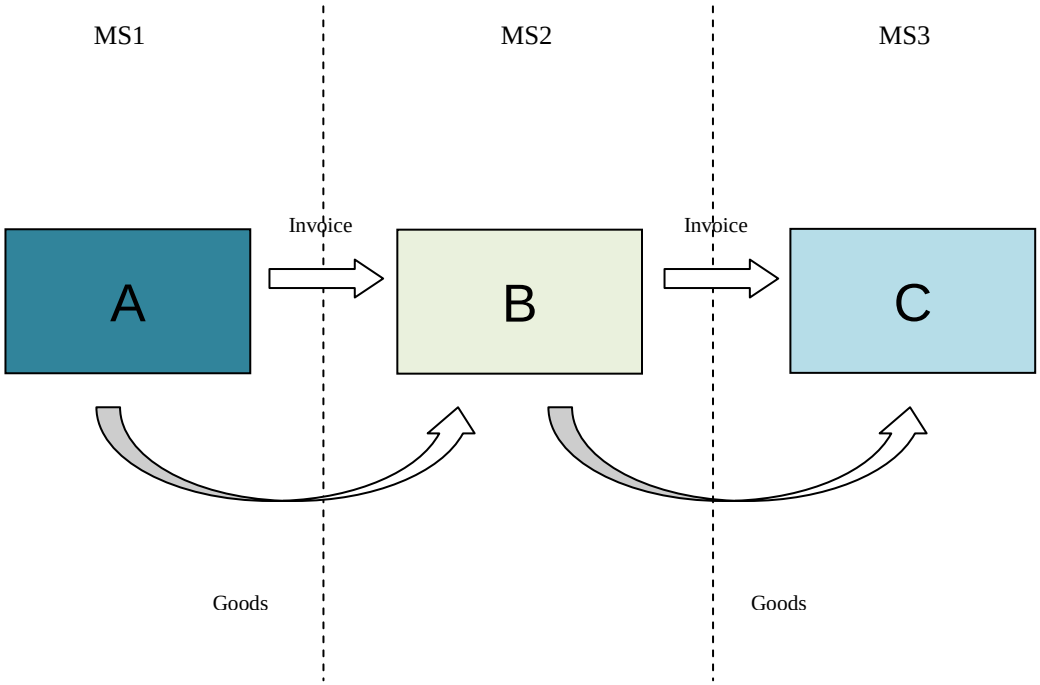
See section 5.2.2.

[113] Article 28b(A)(2) of the Sixth Directive, Article 41 RVD

[114] Michael van de Leur, Triangulation or Strangulation?

5.4 Intra-Community + Intra-Community

Figure 3:



5.4.1 The place of taxable transactions

This structure contains, similarly to the triangulation structure, three parties and three countries. The difference here is that the goods are not transported directly from Member State A to Member State C, but actually enter Member State B on their way (see Figure 3 above). This situation is fairly simple. Both supplies can be made VAT exempt, and B and C must account for VAT in their respective Member States in accordance with the reverse charge rules. Article?

5.4.2 The time of taxable transactions

The tax points are determined under Articles 63 and 68 (chargeable event) and Articles 67 and 69 (chargeability).

5.5 Transfer of legal title as the taxable event

In certain contract types it is not uncommon to encounter provisions about transfer of legal title. The motive is usually for the final purchaser (C) to be secured in case any of the suppliers should go bankrupt. An example is to be found in the Norwegian Total Contract of 2007[115].

> "Title to the Deliverables shall pass to Company progressively as the Work is being performed. Title to Materials passes to Company on arrival at Site, or when paid for by Company, if payment has been made earlier."

5.5.1 The time of taxable transactions

Whether the transfer of legal title may constitute the chargeable event, is to be determined according to Article 63 (via Article 14) for supplies of goods and according to Article 68 for intra-Community acquisitions of goods. As mentioned above, the two provisions are not to be understood in the same way. Whereas the transfer of legal title may not be decisive for supplies, it may be for intra-Community acquisitions if it follows from the Member State in which the transaction is deemed to take place for VAT purposes.[116] The following analysis assumes that the transfer of legal title is decisive according to the law of the Member State deemed to be the place of acquisition.

5.5.2 The place of taxable transactions

The result of the transfer of legal title creating a tax point is that the Company (C) effects the acquisition in the Member State of departure. The question arises as to whether this will result in a different classification of the taxable transactions in a chain of supply and thus a change of place thereof.

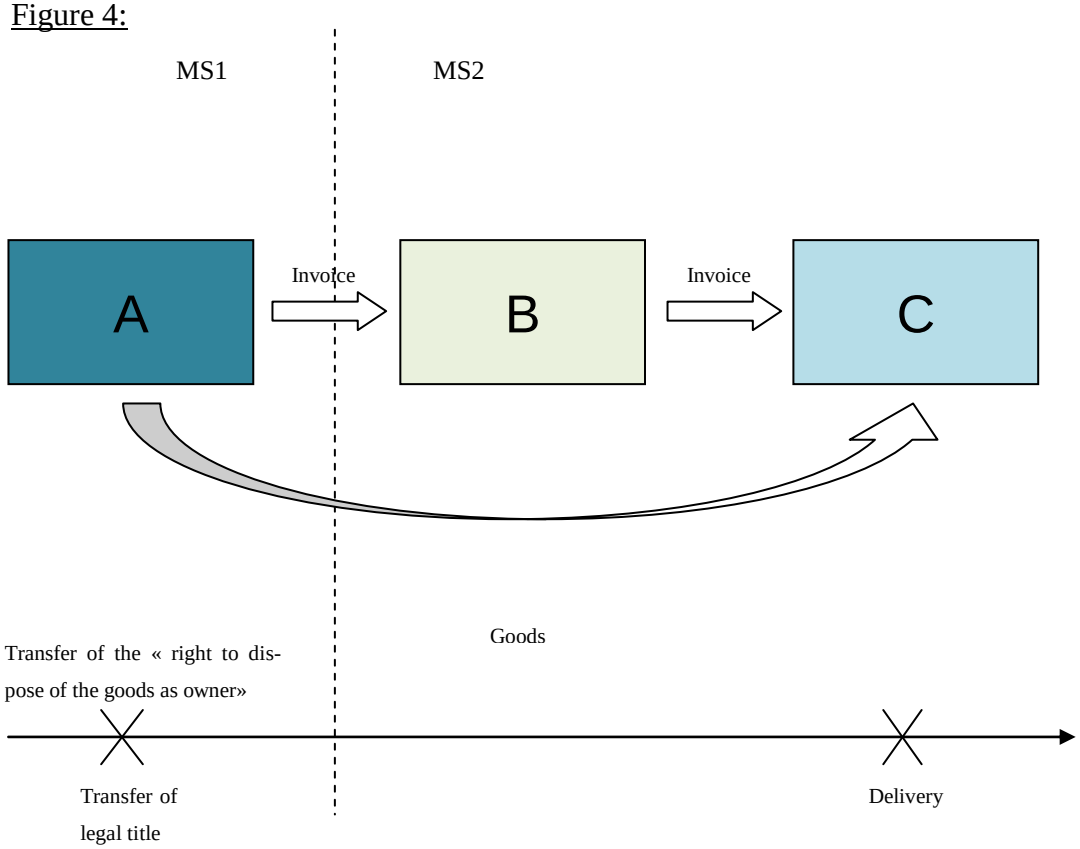
Firstly, it should be mentioned that the issue of the transfer of legal title can be relevant regardless of which structure a chain transaction has. However, for the purposes of this

[115] Article 22.1, 1st paragraph

[116] Articles 63 and 68 RVD

thesis, the problem will only be treated in relation to the Intra-Community + Domestic structure. Where the delivery of goods creates the tax point, the place of supply for the first (intra-Community) supply would be the Member State of departure, and the place of the first (intra-Community) acquisition would be the Member State of destination. The place of the second (domestic supply) would be the Member State of destination, so would the place of the second acquisition.

Figure 4:



Where the transfer of legal title is decisive for when the various transactions take place, C acquires the goods in the Member State of Departure (see Figure 4 above). For this to happen, however, B must necessarily have acquired it first. One can never transfer a right to someone else that one does not have oneself.[117] What will happen in this scenario is that B

[117] See Case C-430/09 EMAG, paragraph 31

obtains a so-called flash title to the goods. Although a flash title only exists momentarily, it is still considered to constitute a full change of ownership.

It follows from *Euro Tyre Holding* that in order for the first supply to be regarded as an intra-Community supply, C must acquire "the right to dispose as owner" in the Member State of destination. This is logical, seeing that if it was transferred to C in the Member State of departure, hence before the movement of the goods begins, it would not be possible for B to make a domestic supply to C in the Member State of Destination. In addition, it would actually erase the link between the supply from A to B and the transport. Consequently, if the tax point was created by the transfer of legal title, the supply from A to B would have to be considered a domestic supply, with the place of supply being the Member State of departure. The place of the intra-Community supply would also be the Member State of departure, and the place of the intra-Community acquisition would be the Member State of destination. So, where the tax point is altered to the time of the transfer of legal title the place of domestic supply shifts from the Member State of destination to the Member State of departure, whereas the places of intra-Community supply and acquisition respectively remain the unchanged. This does make logical sense, seeing that even though the order of the transactions is switched, the flow of goods does still go from the Member State of departure to the Member State of destination. From the analysis above it can be derived that the tax point is – to some extent – relevant for the determination of the place of a taxable transaction. While, it is not relevant with regards to the places of supply and acquisition for intra-Community transactions, it is relevant with regards to in which Member State a supply becomes taxable as a domestic supply.

On a different note, it could be argued that where C acquires the goods in the Member State of departure by a transfer of legal title similar to that in the Norwegian Total Contract, not even the supply from B to C can be considered an intra-Community supply, since C may effect the acquisition of the goods long before they are actually moved to the Member State of destination. (Also, it could be problematic that the acquisitions happen little by little over a long period of time.) The result would be that both the supply from A to B as well as

that from B to C would have to be considered domestic supplies, thus being taxed in the Member State of departure. The transport of the goods to the Member State of destination would have to be regarded as a deemed intra-Community supply.

6 CONCLUSION

The EU legislator, together with the ECJ, has drawn up a highly complicated system for determining where and when VAT should be accounted for. Although it may be theoretically logical, it does not necessarily create efficient results. Traders encounter numerous complications, particularly where forming part in chain transactions. Countless elements, such as transportation arrangements, registration, flow of goods and number of parties, are significant for the outcome. Hence, in order to achieve an expedient VAT treatment, traders need to carefully plan the structure of the chains of supply in which they participate. In addition, the connection between the tax point and the place of taxable transactions could easily be overlooked or misunderstood and result in unwanted consequences – a mere contract clause might overthrow an otherwise advantageous trade structure.

On 1 December 2010, the European Commission issued its Green Paper on the future of VAT[118], which aims at finding possible ways of moving toward a simpler, more robust and more efficient VAT-system. The suggestions include systematically introducing the destination principle, applying the reverse charge mechanism to domestic transactions and basing the system on cash accounting.[119] The issue of the Green Paper undoubtedly constitutes an important step in the right direction; nonetheless only time will tell what the future of VAT will bring.

[118] http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/com(2010)695_en.pdf

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