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Annika Streicher

Cross-Border Juridical VAT Double Taxation in the Framework of European Law

27

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Tax Law and Policy Series

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Cross-Border Juridical VAT Double Taxation in the Framework of European Law

Why this book?
Double taxation is a well-renowned problem in the area of direct taxation, and multiple mechanisms for its resolution based in EU and international law have been implemented over the past decades. In contrast, there is little awareness of the issue of double taxation in the VAT area and currently, there are no cross-border mechanisms for the resolution of VAT double taxation. Considering the ever-increasing globalization and the fact that the majority of states worldwide levy a kind of VAT/goods and services tax, this constitutes a significant problem for businesses. VAT double taxation can arise both in constellations involving exclusively EU Member States and in constellations involving both EU Member States and non-EU Member States and has several implications under primary EU law.

This book analyses the status quo of literature and jurisprudence on VAT double taxation. It describes the phenomenon, the various causes triggering it and constellations in which it might arise in practice, all of which are illustrated by a multitude of examples. It fathoms the consequences resulting from the various subtypes of VAT double taxation under the EU fundamental freedoms and the EU fundamental rights. In its last part, potential mechanisms to resolve VAT double taxation are analysed, reaching from the introduction of a mutual agreement procedure provision in the VAT Directive to the conclusion of bilateral VAT double taxation treaties. The book sheds light on the distribution of the necessary competences to implement the potential VAT dispute resolution mechanisms between the European Union and its Member States and the distribution of competences between the Court of Justice of the European Union and alternative dispute resolution bodies. After having read the book, the reader will have gained a comprehensive overview of the relevant primary EU law aspects of VAT double taxation.

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Preface

Mein Lehrer war ein Vogel, brachte mir das Fliegen bei.[1]

This book is the result of more than 5 years spent at the Institute for Austrian and International Tax Law at the Vienna University of Economics and Business. It was quite early in the course of these years that I discovered my passion for VAT, and this was no coincidence. I thank my academic role models, Karoline Spies and Caroline Heber, who fundamentally shaped my understanding of VAT and patiently supported my academic work in this area. Any tax researcher would go mad if they only occupied themselves with VAT. Therefore, I thank Georg Kofler, Michael Lang, Alexander Rust, Josef Schuch and Claus Staringer for the thorough education that I received in all other areas of tax law and for their kindness. Also, I wish to thank all my dear friends at the Institute – our joint publications, joint teaching, joint travels and joint evenings made this journey worthwhile!

The biggest debt of gratitude is owed to my parents, Renate and Manfred Streicher, who provided for my education and always put their children before themselves. Finally, thank you to my dear husband, Markus Schneiderbauer. I do not know any person in this world who has a heart as big as yours (maybe you should see a cardiologist).

1. Georg Danzer, Weiße Pferde.

List of Abbreviations

AETR	*Accord Européen sur les Transports Routiers* (European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport)
ATAD	Anti-Tax Avoidance Directive
BIT	Bilateral investment treaty
CAAD	*Centro de Arbitragem Administrativa* (Centre for Administrative Arbitration)
CETA	Comprehensive Economic and Trade Agreement
CFR	Charter of Fundamental Rights of the European Union
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
EComHR	European Commission of Human Rights
ECOSOC	Economic and Social Committee
ECtHR	European Court of Human Rights
EEC	European Economic Community
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GCC	Cooperation Council for the Arab States of the Gulf
GST	Goods and services tax
ICS	Investment Court System

ILO	International Labour Organisation
ISDS	Investor-state dispute settlement
ITA	Income Tax Act
MAP	Mutual agreement procedure
TFEU	Treaty on the Functioning of the European Union
TOMS	Tour Operators Margin Scheme
TRIPS	Trade-related aspects of intellectual property rights
TTIP	Transatlantic Trade and Investment Partnership
UNCLOS	UN Convention on the Law of the Sea
WTO	World Trade Organization

Chapter 1

Introduction

One could say that "VAT" not only stands for Value Added Tax, but also for Very Attractive Tax.[2]

1.1. Setting the scene

In an ideal world, there would be no VAT double taxation. In an ideal world, the European Union and third states would have identical VAT[3] regimes. In an ideal world, it would be clear how each of the VAT Directive's[4] provisions is to be interpreted, and all EU Member States would implement the provisions accordingly. In an ideal world, law would be interpreted identically in every jurisdiction. Businesses could casually engage in cross-border trade in goods and services. Unfortunately, this is not an ideal world. Instead, businesses face the inherent risk of VAT disputes whenever they engage in cross-border economic activities.

The term "VAT disputes" covers various problems. The taxable person might be denied recovery of input VAT. This phenomenon is called "economic double taxation". The same transaction might be taxed multiple times in multiple states. This constellation is referred to as "juridical double taxation". In a reverse situation, a transaction might not be taxed in any of the involved states, resulting in double non-taxation. The taxpayer might be denied exemptions or reduced tax rates.[5] There is little to no relief for such problems once the domestic system of legal remedies is exhausted.[6]

While the problem of double taxation in direct tax has been recognized already since the 19th century – with the first income tax treaty being

2. H. Kogels, *Past and Future of the 40-Year-Old EU VAT*, in *A Vision of Taxes within and Outside European Borders: Festschrift in Honor of Prof. Dr. Frans Vanistendael* p. 587 (L. Hinnekens ed., Kluwer Law International 2008).
3. For simplicity's sake, this book only refers to value added tax (VAT) when referring to general indirect taxes on consumption (expenditure). The term is also intended to cover similar taxes such as the goods and services tax.
4. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1 (2006), Primary Sources IBFD.
5. *See*, in detail, sec. 2.2.
6. *See*, in detail, ch. 3.

concluded in 1869 between Prussia and Saxony[7] and the first OECD Model being published in 1963[8] – there is still no feasible solution for VAT double taxation. However, rather promptly after the VAT was first introduced in 1954,[9] the problem of VAT double taxation got attention at the 1956 IFA Congress.[10] After that, the topic was addressed once again at the 1983 IFA Congress.[11] There, the conclusion was that "double taxation problems in the field of turnover tax are not considered particularly serious"[12] and that there were "no major general problems".[13,14] Thus, no sustainable impact resulted from the discussions at both IFA Congresses.[15]

Englisch considers the traditional dominance of direct taxes; the wide implementation of the destination principle with resulting avoidance of double taxation; and the mechanism of input VAT deductions to be the main reasons for the lack of interest in the topic.[16] According to Terra, this lack of interest stems from three main reasons, namely (i) the definition of double taxation itself; (ii) the fact that companies treat VAT largely as a pass-through cost factor; and (iii) the fact that the risk of double taxation is reduced by the possibility to input tax deduction.[17] While the topic was, thus, not substantially covered in literature for a long time and political stakeholders showed no intention of finding solutions, the interest in this topic began to increase in the 2000s.[18] However, the literature published is

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7. J. Kippenberg, *Ältestes DBA: Das DBA Preußen-Sachsen von 1869*, 15 IstR 24 p. 868 (2006).
8. A. Streicher, *Doppelbesteuerung in der Umsatzsteuer: Materiellrechtliches Problem mit verfahrensrechtlicher Lösung?*, AVR 6, p. 210 (2020).
9. The first state to introduce the modern VAT designed by Maurice Lauré was France in 1954. *See* T. Ecker, *A VAT/GST Model Convention: Tax Treaties as Solution for Value Added Tax and Goods and Services Tax Double Taxation* p. 28 (IBFD 2013), Books IBFD.
10. J. Englisch, *Wettbewerbsgleichheit im grenzüberschreitenden Handel mit Schlussfolgerungen für indirekte Steuern* p. 766 (Mohr Siebeck 2008); and H.G. Ruppe, *General Report*, in *International Problems in the Field of General Taxes on Sales of Goods and Services* p. 110 (IFA Cahiers vol. 68b, 1983).
11. Englisch, id., at p. 766; and Ruppe, id.
12. Ruppe, id., at p. 146.
13. Id., at p. 143.
14. *See also* R.S. Avi-Yonah, *From Income to Consumption Tax: Some International Implications*, San Diego Law Review, p. 1353 (1996), who states that "in case of VAT, because all countries follow the destination principle, the allocation of the tax base among countries is much less complicated than in an income tax" and that "there is no need for an elaborate network of tax treaties to resolve disputes in that regard".
15. Englisch, *supra* n. 9, at p. 766.
16. Id., at p. 767.
17. B. Terra, *The Place of Supply in European VAT* p. 2 (Kluwer Law International 1998).
18. Englisch, *supra* n. 9, at p. 768.

very limited, which is in contrast to double income taxation – something that has been discussed in the greatest detail for decades. Concludingly, even though the topic has been on the minds of VAT experts for approximately 60 years, there is still no internationally unified approach towards the resolution of VAT double taxation.

1.2. The economic impact of VAT disputes

Globalization, deregulation and rapid technological developments have resulted in a drastic increase in global trade and international cross-border activities.[19] Together with the rise of VAT, which exists in over 170 jurisdictions[20] in some form and with various names, this results in a situation in which global actors have to deal with two or more VAT systems in the course of their activity.[21] As Eriksen and Hulsebos state, "the world is getting smaller, the VAT implications are getting bigger".[22] The potential for VAT double taxation has particularly increased because services get covered by the scope of VAT regimes more and more, while, in the early days of VAT, goods were mostly in the tax scope.[23] The potential for international double taxation in VAT has also increased due to the trend to outsource ancillary services and preliminary services and the fact that there are states that do not grant input tax refunds to non-resident businesses.[24] VAT is an area prone to double taxation due to the lack of binding internationally agreed principles in the field.[25]

Even though VAT is generally only a transitory item for businesses, competitive markets and the associated cost pressure (which is effected by a

19. Ecker, *supra* n. 8, at p. 29; N. Eriksen & K.-H. Haydl, *Avoidance of VAT/GST Double (Non-)Taxation: Recommendations and Other Types of Soft Law vs Legally Binding Instruments to Allocate Taxing Rights between States (e.g. Bilateral Tax Treaties)*, in *Value Added Tax and Direct Taxation: Similarities and Differences* p. 1148 (M. Lang et al. eds., IBFD 2009), Books IBFD.
20. OECD, *Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues* annex A (OECD 2020).
21. T. Ecker, *Digital Economy International Administrative Cooperation and Exchange of Information in the Area of VAT*, in *VAT/GST in a Global Digital Economy* p. 141 (M. Lang & I. Lejeune eds., Kluwer 2015); and Ecker, *supra* n. 8, at p. 30.
22. N. Eriksen & K. Hulsebos, *Electronic Commerce and VAT – An Odyssey towards 2001*, 11 Intl. VAT Monitor 4, p. 137 (2000), Journal Articles & Opinion Pieces IBFD; and Ecker, id., at p. 141.
23. Englisch, *supra* n. 9, at p. 767.
24. Id., at p. 768.
25. Ecker, *supra* n. 8, at p. 30.

negative cash flow) are considerable burdens on businesses.[26] VAT disputes are burdensome and trigger high costs; if the taxable person accepts the tax assessment, the tax burden may be higher. If the taxable person takes legal action, administrative cost and the cost for support by specialists will arise.[27] If the taxable person questions the interpretation of the applicable law, he has to challenge the tax assessments in all involved states even if only one of them is faulty; in some cases, he might not even be able to do this, e.g. when one of the involved states levies VAT on the transaction through the reverse charge mechanism.[28] The procedure is lengthy, costly and its outcome is uncertain.

Currently, there is no documentation on the number and monetary value of VAT disputes in the European Union while, for direct tax, the numbers are available: in 2019, there were approximately 900 taxation disputes on direct taxes in the European Union that were estimated to be worth over EUR 10.5 billion.[29] A 2004 OECD study came to the conclusion that the problem of VAT disputes is significant enough to require a solution, although it is hard to measure in precise terms.[30] A 2007 public consultation by the European Commission also reached the conclusion that double taxation in VAT is an "existing and real problem" that is considered as especially burdensome for small and medium-sized enteprises.[31] Hence, it is clear that a solution is necessary.

1.3. EU Commission action on VAT double taxation

The European Union discovered the importance of the issue in the early 2000s and published the consultation paper "Introduction of a Mechanism for Eliminating Double Imposition of VAT in Individual Cases" in 2007. Here, the Commission proposed a two-step approach to resolve VAT dou-

26. Englisch, *supra* n. 9, at p. 768.
27. K. Spies, *Dispute Resolution in VAT: Status Quo under the EU VAT Directive and Room for Improvement*, in *CJEU: Recent Developments in Value Added Tax 2016* p. 93 (M. Lang et al. eds., Linde 2017).
28. Englisch, *supra* n. 9, at p. 774.
29. *See* https://ec.europa.eu/taxation_customs/business/company-tax/resolution-double-taxation-disputes_en_en (accessed 23 Sept. 2020).
30. Ecker, *supra* n. 8, at p. 34; Eriksen & Haydl, *supra* n. 18, at p. 1148; and OECD, *The Application of Consumption Taxes to the Trade in International Services and Intangibles* p. 5 (OECD 2004).
31. European Commission, *Report on the Outcome of the Consultation on "Introduction of a Mechanism for Eliminating Double Imposition of VAT in Individual Cases"* p. 2 (2007) [hereinafter European Commission Report].

ble taxation: (i) a suspension of the obligation to pay the amount of VAT demanded a second time after VAT had already been paid until the dispute has been resolved; and (ii) dispute resolution by a mutual agreement procedure or arbitration. The publication was followed by a public consultation.[32] At this point in time, the Commission did not pursue this plan further even though the public consultation showed that double taxation was indeed considered a problem.[33] In 2015, the Commission published an information note on a dialogue between tax administrations in cases of VAT double taxation. Based on an initiative of the EU VAT Forum, some Member States (Belgium, Denmark, Estonia, Finland, France, Ireland, Latvia, Lithuania, the Netherlands, Spain and Sweden) agreed to voluntarily enter into a dialogue with each other in cases of VAT disputes.[34]

In July 2020, the Commission's "Action plan for fair and simple taxation" was published.[35] Here, it is held that disputes are costly and time-consuming; whenever they cannot be avoided, their fast resolution should keep costs for taxpayers and tax administrations to a minimum.[36] Regarding VAT disputes, the Commission states that "mechanisms to prevent and to solve disputes concerning the implementation of the VAT Directive are needed at every stage of the VAT transaction life cycle to ensure the VAT principles of legal certainty, neutrality and fairness".[37] The action taken by the Commission was to examine all possible options by 2022/2023, possibly leading to a legislative initiative in the form of a proposal for a Council directive introducing a dispute resolution mechanism.[38] Concludingly, further developments can only be expected in the medium to long term,

32. European Commission, *Consultation Paper: Introduction of a Mechanism for Eliminating Double Imposition of VAT in Individual Cases* (2007).
33. The report on the outcome of the consultation showed that "the issue of double imposition of VAT causes problems" and "deserves our further deliberation". This was considered to be even more important because the taxpayer has to bear the double tax "which is clearly against the neutrality of the VAT and a proper functioning of the Internal Market". *See* European Commission Report, *supra* n. 30, at p. 5.
34. European Commission, *Information Note – VAT Double Taxation: Dialogue between Tax Administrations* (14 Feb. 2015), available at https://taxation-customs.ec.europa.eu/system/files/2020-02/dialogue_tax_administrations_ms_en.pdf (accessed 12 Mar. 2023).
35. European Commission, Communication from the Commission to the European Parliament and the Council: An Action Plan for Fair and Simple Taxation COM(2020) 312 Final (15 July 2020) [hereinafter European Commission Communication].
36. Id., at sec. 3.5.
37. Id.
38. European Commission, Annex to the Communication from the Commission to the European Parliament and the Council: An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy p. 4 (15 July 2020); and European Commission, Communication from the Commission to the European Parliament and the Council:

even though awareness of the topic seems to have been present within the Commission for at least 15 years. The action plan also contains another action relevant for VAT disputes arising when EU and non-EU Member States are involved. Since the Commission senses a need to cooperate with third countries, it intends to propose starting the process to negotiate administrative cooperation agreements in VAT with relevant third countries (similar to the agreement between the European Union and Norway[39]).[40]

1.4. VAT double taxation in ECJ jurisprudence

The issue of VAT double taxation is also present in Court of Justice of the European Union (ECJ) case law. In its case law, the differentiation of juridical VAT double taxation and economic VAT double taxation is discernible, albeit the Court does not use these exact terms. To begin with, the ECJ conceives juridical double taxation as a problem not inherent to the VAT Directive but rather resulting from the erroneous application of the place of supply rules by the Member States. Beginning in 1985 with the *Berkholz* (Case 168/84) case, the Court has adhered to its line of reasoning until today: "Article 9[41] is designed to secure the rational delimitation of the respective areas covered by national value-added tax rules by determining in a uniform manner the place where services are deemed to be provided for tax purposes. […] The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation."[42]

An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy p. 14 (2020).

39. Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud, and recovery of claims in the field of value added tax, OJ L 195/3 (2018), Primary Sources IBFD.

40. European Commission Communication, *supra* n. 34, at sec. 3.4.

41. Art. 9 of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes contained the place of supply rules for services.

42. DE: ECJ, 4 July 1985, Case 168/84, *Gunter Berkholz v. Finanzamt Hamburg-Mitte-Altstadt*, para. 14, Case Law IBFD. The court followed this line of reasoning in its subsequent case law. *See* PL: ECJ, 7 May 2020, Case C-547/18, *Dong Yang Electronics Sp. z o.o. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu*, Case Law IBFD; NL: ECJ, 8 May 2019, Case C-568/17, *Staatssecretaris van Financiën v. L.W. Geelen*, Case Law IBFD; SE: ECJ, 13 Mar. 2019, Case C-647/17, *Skatteverket v. Srf konsulterna AB*, Case Law IBFD; HU: ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, Case Law IBFD; HU: ECJ, 30 Apr. 2015, Case C-97/14, *SMK kft v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága and Nemzeti Adó- és Vámhivatal*, Case Law IBFD; PL: ECJ, 16 Oct. 2014, Case C-605/12, *Welmory sp. z o.o. v. Dyrektor Izby*

The ECJ held up this line of reasoning also in the rather recent *KrakVet Marek Batko* (Case C-276/18) case and particularly referred to recitals 17 and 62 of the VAT Directive, according to which the objective of the catalogue of place of supply rules is to avoid conflicts of jurisdiction that may result in double taxation and non-taxation.[43] However, in *KrakVet Marek Batko*, the Court went even further and, by referring to the *Toridas* (Case C-386/16)[44] case, stated that the correct application of the VAT Directive makes it possible to avoid double taxation and ensure fiscal neutrality.[45] Additionally, as also stated in the *Marcandi* (Case C-544/16)[46] case, "the existence in one or several other Member States of different approaches to

Skarbowej w Gdańsku, Case Law IBFD; PL: ECJ, 27 June 2013, Case C-155/12, *Minister Finansów v. RR Donnelley Global Turnkey Solutions Poland sp. z o.o.*, Case Law IBFD; DE: ECJ, 26 Jan. 2012, Case C-218/10, *ADV Allround Vermittlungs AG, in liquidation v. Finanzamt Hamburg-Bergedorf*, Case Law IBFD; UK: ECJ, 16 Dec. 2010, Case C-270/09, *Macdonald Resorts Ltd v. The Commissioners for Her Majesty's Revenue & Customs*, Case Law IBFD; UK: ECJ, 3 Sept. 2009, Case C-37/08, *RCI Europe v. Commissioners for Her Majesty's Revenue and Customs*, Case Law IBFD; IT: ECJ, 2 July 2009, Case C-377/08, *EGN BV – Filiale Italiana v. Agenzia delle Entrate – Ufficio di Roma 2*, Case Law IBFD; IT: ECJ, 19 Feb. 2009, Case C-1/08, *Athesia Druck Srl v. Ministero dell'economia e delle finanze and Agenzia delle entrate*, Case Law IBFD; SE: ECJ, 6 Nov. 2008, Case C-291/07, *Kollektivavtalsstiftelsen TRR Trygghetsrådet v. Skatteverket*, Case Law IBFD; SE: ECJ, 29 Mar. 2007, Case C-111/05, *Aktiebolaget NN v. Skatteverket*, Case Law IBFD; IT: ECJ, 23 Mar. 2006, Case C-210/04, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. FCE Bank plc*, Case Law IBFD; FR: ECJ, 9 Mar. 2006, Case C-114/05, *Ministre de l'Économie, des Finances et de l'Industrie v. Gillan Beach Ltd*, Case Law IBFD; NL: ECJ, 27 Oct. 2005, Case C-41/04, *Levob Verzekeringen BV and OV Bank NV v. Staatssecretaris van Financiën*, Case Law IBFD; UK: ECJ, 12 May 2005, Case C-452/03, *RAL (Channel Islands) Ltd and Others v. Commissioners of Customs & Excise*, Case Law IBFD; FR: ECJ, 15 Mar. 2001, Case C-108/00, *Syndicat des producteurs indépendants (SPI) v. Ministère de l'Economie, des Finances et de l'Industrie*, Case Law IBFD; DE: ECJ, 6 Nov. 1997, Case C-116/96, *Reisebüro Binder GmbH v. Finanzamt Stuttgart-Körperschaften*, Case Law IBFD; DE: ECJ, 16 Sept. 1997, Case C-145/96, *Bernd von Hoffmann v. Finanzamt Trier*, Case Law IBFD; NL: ECJ, 17 July 1997, Case C-190/95, *ARO Lease BV v. Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam*, Case Law IBFD; NL: ECJ, 6 Mar. 1997, Case C-167/95, *Maatschap M.J.M. Linthorst, K.G.P. Pouwels en J. Scheren c.s. v. Inspecteur der Belastingdienst/Ondernemingen Roermond*, Case Law IBFD; UK: ECJ, 20 Feb. 1997, Case C-260/95, *Commissioners of Customs and Excise v. DFDS A/S*, Case Law IBFD; DE: ECJ, 26 Sept. 1996, Case C-327/94, *Jürgen Dudda v. Finanzgericht Bergisch Gladbach*, Case Law IBFD; and DE: ECJ, 2 May 1996, Case C-231/94, *Faaborg-Gelting Linien A/S v. Finanzamt Flensburg*, Case Law IBFD.

43. HU: ECJ, 18 June 2020, Case C-276/18, *KrakVet Marek Batko sp. K. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, para. 42, Case Law IBFD.

44. LT: ECJ, 26 July 2017, Case C-386/16, *'Toridas' UAB v. Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*, para. 43, Case Law IBFD.

45. *KrakVet Marek Batko* (C-276/18), para. 50.

46. UK: ECJ, 5 July 2018, Case C-544/16, *Marcandi Limited v. Commissioners for Her Majesty's Revenue & Customs*, para. 65, Case Law IBFD.

that prevailing in the Member State concerned must not, in any event, lead to a misapplication of the provisions of that directive".[47]

Resulting from that, a Member State *must* tax a transaction *even if* another Member State has also already levied VAT on the same transaction, *if* the former Member State is of the opinion that its application of the Directive is correct. The only obligation that Member States must meet is that their domestic courts must – under certain conditions – refer a request for preliminary ruling to the ECJ in order to ascertain the correct interpretation of the provisions in question.[48]

This view could prove to be highly problematic for taxpayers. First, they might be encumbered with the negative cash-flow effect when two states levy VAT on the same transaction – even though they ultimately have a right to a refund of charges levied in breach of EU law, according to the *Compass Contract Services* (Case C-38/16) case.[49] Second, speaking with all due respect, the Court's statement that double taxation cannot occur when all involved Member States apply the place of supply rules correctly is far from reality. The number of VAT cases that the ECJ has to decide[50] shows that the "correct" interpretation of the Directive's provisions is anything but clear. Additionally, finally, it may be true that Member States' courts refer to the ECJ for a preliminary ruling but, in practice, Member States might refuse to do so, and the taxpayer has no legal remedy against this.[51]

Sometimes, ECJ jurisprudence is even the trigger of VAT double taxation, as can be seen in the *SK Telecom* (Case C-593/19)[52] case. Here, the ECJ interpreted article 59a of the VAT Directive as meaning that a Member State can shift the place of supply of a service from a third state into the European Union if the service is used or enjoyed in the domestic territory and the transaction has not yet been taxed anywhere else in the European Union. The referring state, Austria, had applied a more lenient interpretation of article 59a of the VAT Directive in favour of the taxpayer, under which it only shifted the place of supply to Austria if the VAT rate in the

47. *KrakVet Marek Batko* (C-276/18), para. 50.
48. Id., at para. 51.
49. UK: ECJ, 14 June 2017, Case C-38/16, *Compass Contract Services Limited v. Commissioners for Her Majesty's Revenue & Customs*, para. 29 et seq., Case Law IBFD; and Streicher, *supra* n. 7, at p. 213 et seq.
50. At the moment (Mar. 2023), 59 VAT cases are pending at the ECJ.
51. *See*, in detail, sec. 3.4.1.
52. AT: ECJ, 15 Apr. 2021, Case C-593/19, *SK Telecom Co. Ltd. v. Finanzamt Graz-Stadt*, Case Law IBFD.

third state was below 15%. With this decision, the ECJ, in effect, might cause double taxation of many transactions involving EU Member States and third states.[53]

The ECJ also acknowledges the problem of economic double taxation in its case law. In the *Uudenkaupungin kaupunki* (Case C-184/04) case, the Court held that, when goods or services are used for the purpose of taxable output transactions, "deduction of the input tax on them is required in order to avoid double taxation".[54] The Court repeated this reasoning in its subsequent case law.[55] What is more, the Court acknowledges the problem of cumulative taxation/cascade effects, i.e. the levy of VAT on goods that are already burdened with residual VAT. Its jurisprudence on cumulative taxation has become notorious with its two *Schul*[56] decisions in the 1980s. There, the Court acknowledged that cumulative taxation is a form of double taxation that violates article 110 of the Treaty on the Functioning of the European Union (TFEU)[57] and, thus, must be eliminated.[58]

This brief overview shows that the ECJ is aware of the issue of VAT double taxation and that it distinguishes different kinds of double taxation, even though it does not always refer to them explicitly. The relevant cases will be further analysed within this book.

1.5. Aim of the book

The book will focus on VAT double taxation in the framework of EU law. It will discuss VAT double taxation, the reasons for its occurrence and the constellations in which it can arise. This will be the foundation for

53. E. Freitag & A. Streicher, *Verlagerung des Leistungsortes bei Telekommunikationsdienstleistungen mit Drittstaatsbezug: Die Rs SK Telecom*, taxlex 7-8, p. 268 et seq. (2021).
54. FI: ECJ, 30 Mar. 2006, Case C-184/04, *Uudenkaupungin kaupunki*, para. 24, Case Law IBFD.
55. PL: ECJ, 8 May 2019, Case C-566/17, *Związek Gmin Zagłębia Miedziowego w Polkowicach v. Szef Krajowej Administracji Skarbowej*, Case Law IBFD; PL: ECJ, 16 June 2016, Case C-229/15, *Minister Finansów v. Jan Mateusiak*, Case Law IBFD; and PL: ECJ, 5 June 2014, Case C-500/13, *Gmina Międzyzdroje v. Minister Finansów*, Case Law IBFD.
56. NL: ECJ, 21 May 1985, Case 47/84, *Staatssecretaris van Financiën v. Gaston Schul Douane-Expediteur BV*, Case Law IBFD; and NL: ECJ, 5 May 1982, Case 15/81, *Gaston Schul Douane Expediteur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, Case Law IBFD.
57. *Treaty on the Functioning of the European Union* art. 110 (13 Dec. 2007).
58. *See* in detail sec. 4.3.3.

the subsequent elaborations on a possible violation of primary EU law by VAT double taxation. What is more, this book aims to comprehensively examine the underlying competences necessary for the implementation of dispute resolution mechanisms in VAT. Due to the relevance of EU law for this book, only VATs conceptually similar to EU VAT will be covered, i.e. non-cumulative, all-stage consumption-type VATs.[59]

The research carried out in the field until now has mainly focused on existing legislation and initiatives in the field of VAT dispute resolution. The overall aim of this book is to depict the various possibilities for VAT dispute resolution and to describe and discuss relevant provisions in EU law governing their applicability. The book aims to be a significant step in driving the research on VAT dispute resolution and further advancement of existing literature on the topic. The book shall contribute to further academic and legal policy discussions on the topic.

Due to necessary limitations of its scope, this book does not address all issues related to VAT disputes (e.g. the denial of the application of a reduced tax rate, the denial of the application of certain special schemes, such as the common flat-rate scheme for farmers, disputes on the moment of the chargeable event) but instead focuses on cross-border juridical double taxation in constellations that involve at least one EU Member State. This book does not comprehensively address economic double taxation. The mechanisms for the resolution of juridical and economic double taxation are not congruent, and covering both types of double taxation would expand this book's dimensions significantly. In addition, the book will not provide a detailed analysis of VAT double non-taxation. Finally, double taxation in purely domestic situations will not be dealt with in this book. Further research on these topics is nevertheless desirable.[60]

1.6. Structure of the book

The research is structured as follows. To systematically evaluate the current legal system relevant for the topic of VAT double taxation and to work on possible solutions, it is necessary to define the relevant concepts of VAT double taxation and to identify both the causes triggering VAT double taxation and the constellations in which VAT double taxation can arise.

59. *See also* Ecker, *supra* n. 8, at p. 93.
60. To the author's knowledge, there is currently no literature on the topic of domestic VAT double taxation.

This is discussed in chapter 2. The first part of this chapter addresses the term "VAT double taxation" and discusses whether the definitions of "juridical double taxation" and "economic double taxation" as used in direct tax law can be made feasible for VAT purposes as well. Afterwards, it illustrates a specific definition of juridical and economic double taxation for VAT purposes that is advocated in literature. This chapter also addresses the question if and, if yes, how the ECJ and the VAT Directive define the term "double taxation" for VAT purposes. The second part of this chapter illustrates the constellations in which cross-border VAT double taxation can occur. Here, double taxation in intra-EU constellations; constellations involving EU Member States as well as non-EU Member States ("mixed constellations"); and constellations only involving non-EU Member States can be distinguished. For the purpose of this book, only the first two constellations are relevant. The third part of this chapter discusses the causes of VAT double taxation. Again, a distinction of causes in intra-EU constellations and in mixed constellations is drawn. In both constellations, causes for VAT double taxation due to divergent rules and despite identical rules can be distinguished.

Chapter 3 gives an overview of existing mechanisms for resolving VAT disputes. Mechanisms in domestic, international and EU law will be discussed. Advantages and disadvantages of each mechanism will be described.

Chapters 4 and 5 set out the provisions in primary EU law relevant for the issue of VAT double taxation. Chapter 4 deals with the question of whether VAT double taxation is prohibited under article 110 of the TFEU, as well as the free movement of goods and the freedom to provide services. Chapter 5 answers the question of whether VAT double taxation is prohibited under the fundamental rights, i.e. the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

Chapter 6 presents and discusses possible new mechanisms for resolving VAT double taxation in intra-EU constellations and mixed constellations. Each of the presented mechanisms is discussed in respect of its compatibility with the EU law framework. Chapter 7 follows up on the findings of chapter 6 and addresses the question of whether VAT arbitration is in conformity with primary EU law.

Chapter 8 provides an overall conclusion of the points discussed, highlights potential for future research and presents a way forward.

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