The Impossible Proof of Intra-Community Supplies of Goods

According to the VAT Directive, taxable persons performing intra-Community supplies of goods can apply the zero VAT rate to such supplies provided that they can give evidence of the transport or dispatch of the goods. In this article, the author examines what documentation is requested by tax authorities in order to grant the zero VAT rate, through the analysis of national legislation and case law from national courts and the ECJ. Furthermore, the author illustrates the fact that the collection of such evidence by taxable persons can be a highly burdensome task that might not necessarily be in line with businesses’ real processes.

1. Introduction

A supplier who can provide evidence of transport or dispatch of goods to another taxable person located in a Member State other than the one in which the transport or dispatch started is entitled to exempt this supply from VAT, irrespective of whether the transport is performed by the supplier, the acquirer or a third party. Such exemption (zero rate) is only applicable to one supply, whatever the number of transporting. In practice, the tax authorities are allowed to challenge such evidence.

In this article, the author observes that these means of evidence are not only vague, but also that their communication by the supplier, or by the accountant of the supplier, does not follow the usual business process. For some categories of business, mainly SMEs, and for certain transactions, it even proves to be impossible to provide such evidence. The requirement for evidence of transport to another EU Member State seems to be based on the assumption that the physical tracking of goods is the most appropriate method to monitor the collection of the tax, while it has never been proved that this method is efficient or even feasible. As to the case law, it seems to give supremacy to the actual activity of the purchaser, rather than to the proof of the transport.

2. The VAT Directive

According to article 138 of the VAT Directive,1 “Member States shall exempt the supply of goods dispatched or transported to a destination out of their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, (…) in a Member State other than that in which dispatch or transport of the goods began.”

For the exemption with a right of deduction of input VAT (zero rate)2 to apply, the supplier should provide evidence: (i) of a transport or a dispatch, irrespective of whether it is performed by the supplier or the acquirer, or by a third party on behalf of the supplier or of the acquirer; and (ii) of a supply “for” another taxable person (in practice, a taxable person having provided a VAT number)3 in a Member State other than that in which dispatch or transport of the goods began4 or an operation equivalent to a supply; and, when there is more than one supply with a single transport, the supply benefiting from the VAT exemption.5

In Mecsek-Gabona,6 the Court of Justice of the European Union (ECJ) decided that the tax authorities may refuse the VAT exemption (zero rate) for an intra-Community supply when the vendor has failed to fulfil its obligations as regards evidence, or when he knew or should have known that the transaction which he carried out was part of a fraud committed by the purchaser, and that he had not taken every reasonable step within his power to prevent his own participation in that fraud.

3. Purpose of the EU Legislator

The current VAT exemptions (zero rates) for intra-Community supplies are an improvement of administrative simplifications called “Benelux 40”, which had been implemented by the Benelux countries on 1 July 1984.7 This procedure was intended to limit traffic jams caused by trucks at the borders and speed up the customs controls by redu-


3. When the author refers to an exemption in relation to the intra-Community supplies, he refers to an exemption with the right to deduct VAT (effectively, zero-rated).


5. The case law about the necessity of a VAT identification number is outside the scope of the present contribution: BG: ECJ, 9 Oct. 2014, Case C-492/13, Triunn EOOD v. Direktor na Direktia za Obezdržavanje danačno-soguritelna praktika Varna pri Tsentralno upravlenie na Nacional nata agentzia za prihodite, ECJ Case Law IBFD.

6. AT: ECJ, 6 Apr. 2006, Case C-245/04, EMAG Handel Eder OHG v. Finanzlandesdirektion für Kärnten (Berufungsantrag II), ECJ Case Law IBFD.


* Xirius, Brussels; Co-chairman of the Indirect Tax Subgroup of the Conféderation Fiscale Européenne (CFE).

cencing physical controls on movements of goods between Belgium, the Netherlands and Luxembourg. This system, which functioned until 1992, had immediately proved to be fraud sensitive, and the EU Council of Ministers ("Council") was well aware of this weakness. In a document of 11 April 1988, the majority of the members of the Council ad hoc group on the abolition of fiscal frontiers actually concluded that a system based on the "Benelux model" could not be recommended because of the administrative burdens which it would place on both revenue authorities and traders, the difficulty of carrying out checks, and the vulnerability of the system to fraud. But the Council was confronted with a dilemma: on the one hand, the European Commission's proposal to collect VAT in the country of the supplier would have led to a financial disaster because of its conceptual weakness. But on the other hand, the EU ministers of finance were bound by a general political objective to create an internal market (in which VAT and excises were a negligible part), within which customs officers at the internal borders would have been inherently contradictory, and would not have been understood by their electors. Unsurprisingly, therefore, the Council's priority was to abolish the presence of customs officers at the internal borders by the end of 1992.

According to a note from the presidency of the ECOFIN Council of 7 November 1989, the control arrangements in this system were primarily based on the use by the national authorities of business returns, on regular exchanges of information and on the provision of supporting documents. The Council of Ministers did not expect such standing cooperation at administrative level to entail a burden on traders, and short-term adverse consequences were offset by the expected benefits of the creation of an internal market. In addition, after some improvements, the proposal of the European Commission for collection of the VAT in the country of origin was planned for adoption by 1996. From the context of the adoption of this system, it appears that the practical and internal business management aspects have never been taken into consideration, with the exception of simplifications in favour of triangular transactions.

Michel Aujean, who represented the European Commission during the negotiations of this new regime, wrote at that time: "What is noteworthy is the extent to which the practical functioning of these VAT arrangements is based upon normal commercial practice, as it is largely the case today." One of his colleagues argued that it would considerably reduce the costs of business. Twenty-five years later, it appears that VAT compliance costs are 11% higher in cross-border trade than in domestic trade. And this does not include the permanent danger of bona fide businesses becoming involved in missing trader fraud and being forced to deal with the contradictory proof of the so-called "Kittel Test", i.e. the right of tax authorities to claim the VAT and massive penalties; when they consider that a business "knew or should have known that it was involved in a fraud", which is an insurmountable obstacle for all businesses, in particular for SMEs.

4. Evidence of Dispatch or Transport

4.1. Terminology

The paired terms "dispatch or transport" seems to be derived from the German VAT Act. Transport means any movement of a good. A dispatch requires that the transport is carried out (carrier) or arranged (forwarding agent) by an independent party.

4.2. Diversity of documentation

According to the VAT Directive, there is no single document that would be sufficient to prove the dispatch or transport, but rather a number of documents of different types and formats, which may or may not be listed in national legislation, or alternatively used in practice. For instance: contracts, invoices, documents signed by the purchaser, a payment, a proof that the transaction has been correctly reported in the VAT returns and the intra-EU sales listing of the supplier, and bank documents. According to the Supreme Court of the Netherlands, it should consist of a combination of such documents, even if these documents contain errors. No document as such is sufficient. As to the German Supreme Tax Court, it considers that the documents must show the exact destination of the shipment and include appropriate receipts from the carrier.

11. Since 1992, most of the shortcomings of the Commission's proposals denounced at that time have been corrected (except the collection of the VAT in the country of establishment of the supplier), C. Amand and K. Boucquey, A New Defence for Victims of EU Missing-Trader Fraud?, 22 Intl. VAT Monitor 4 (2011), p. 236, Journals IBFD
20. BE: Court of Appeal of Mons, 26 June 2015, R no. 2014/19/367.
From a political point of view, the assumption is that such an obligation would be business friendly because it does not force businesses to create new documents, new internal procedures or to adapt costly software. Therefore, it would not create an administrative additional cost for businesses. From the point of view of judges, who are appreciating a posteriori single situations in their specific context with the assistance of lawyers and experts, this also seems to be a logical approach. But in practice, such an approach does not take into account the way businesses function, at least for some simple and repetitive transactions like the supply of goods.

In large organizations, flexibility means uncertainty and what is uncertain is difficult and requires a lot of energy. Businesses are composed of people who frequently have only a vague idea of the ultimate purpose of what they are doing. In fact, they are doing what is requested by the hierarchy and they need to know precisely what they have to do, what document is necessary and how to complete it, and where appropriate to reply with “yes” or “no”, i.e. the only language that can be understood by computers and by colleagues who know nothing about VAT. Any grey zone is a waste of time and a reduction in productivity of the whole business. In addition, a grey zone creates a danger of conflict of competence between colleagues and renders costly external advice necessary. In practice, the document flows vary from one business to another and when documents exist, they are disseminated within the organization, or have to be communicated by the purchaser or by third parties. Most of the documents are not subject to single reporting and are not completed with the objective of fulfilling tax obligations. The only exception is the invoice, which has multiple accounting, operational and reporting functions. In addition, an invoice is immediately available to the accounting department in charge of the relations with the tax authorities.

From the tax inspector’s perspective, such flexibility requires knowledge of how each business is organized, in his own particular language. This is also impossible. Therefore, tax inspectors tend to focus on certain formalities or to require a specific piece of documentary evidence, and to deny the VAT exemption (zero rate) when a business is unable to provide it.

4.2.1. Specific document concerning transport vs complementary documents

4.2.1.1. Specific transport documents

The case law sometimes makes a distinction between specific and complementary documents. Specific documents include a CMR (transport by road), CIM (transport by train), Airway Bill (transport by air), and Bill of Lading (transport by sea). These are based on international conventions such as the Convention on the Contract for the International Carriage of Goods by Road (CMR). They contain information concerning the shipper, receiver, enclosed documents, type and quantity of the goods transported, vehicle licence plates, haulage contractor, etc., and are mainly intended to provide uniform rules regarding liability for transport damage.

The Bundesfinanzhof (German Federal Tax Court) considers that the CMR waybill can be acceptable documentation of a delivery of goods to another EU Member State if it notes the route details required for the VAT exemption (zero rate). However, the tax literature denounces the fact that tax inspectors systematically reject the deduction of input VAT on intra-Community supplies for example simply because CMRs are not signed, while a signature is not a necessary feature for the business to use this document.

4.2.1.2. Complementary documents

Many documents that have no link with the transport itself are generally accepted as evidence of intra-Community transport, and sometimes are qualified as “complementary”. When the taxable person tries to bring evidence of an intra-Community transport, he is frequently surprised by the rejection of such documents by the tax authorities or by a tribunal, or the fact that they are not accepted on their own:

- receipt of the goods: the Belgian tax authorities consider that such a document is only evidence of the fact that the goods have been received by a person authorized to sign on behalf of the purchaser and not that they have been transported to another EU Member State. But the United Kingdom authorities consider as acceptable a written order from the customer that shows their name, address and EU VAT identification number, and the address where the goods are to be delivered; and
- validation of the VAT identification number. Of course, such a document does not, on its own, prove anything about the transport.

National courts have been reluctant to consider the following documents as proof of transport:

- bank documents and invoices that do not prove the effective transport to another EU Member State;
- global certificates of the acquirer not referring to precise dates nor places, and issued years after the facts;

22. Contrary to the invoice, which is an accounting document that is used for various purposes.
23. VAT Expert Group, VEG no. 46 Taxud C1(2015) 3986604 EN, Brussels 31 Aug. 2015, p. 5. Indeed, when the CMR is not signed, the transporter is not responsible for damages that occurred during transport. Nevertheless, it remains a useful document.
27. VAT Expert Group, VEG no. 46 Taxud C1(2015) 3986604 EN, Brussels 31 Aug. 2015 p. 5. Indeed, when the CMR is not signed, the transporter is not responsible for damages that occurred during transport. Nevertheless, it remains a useful document.
29. Manuel de la TVA (Belgium), no. 310/12.
31. FR: CAA Douai, 27 June 2006, no. 05DA00311, Metro Cash & Carry France.
the registration of a sailing boat in Germany, because such a registration is not linked with an actual presence in a particular country; 32
– proper declaration of the supply in the recapitulative statement, 33 and
– the fact that an intra-Community acquisition was reported in the Member State of arrival does not constitute decisive proof that the goods have left the territory of the Member State of dispatch. 34

In Twoh, 35 the ECI decided that it is for the supplier of the goods to prove that the conditions for the VAT exemption (zero rate) are fulfilled. The authorities in the Member State of dispatch are not obliged to request information in the Member States of destination and even if the authorities in the Member State of arrival declare that an intra-Community acquisition was reported, this does not constitute decisive proof that the goods have left the territory of the Member States of dispatch.

4.2.2. Regular supplies vs occasional supplies

The French tax authorities make a distinction between regular supplies and occasional supplies. 36 In the case of regular supplies, the supplier is advised – for each supply – to keep, amongst other documents, the confirmation of receipt of the goods in another Member State, a copy of the transport document and insurance.

In the case of occasional supplies, the supplier should keep a copy of the identity card of the acquirer, a copy of the deed of incorporation, and a copy of the registration of the vehicle transporting the goods. 37 In the absence of such documents, the supplier is advised to require a guarantee for the amount of VAT. Those who have ever tried to purchase goods in France by strictly applying this procedure will confirm that it does not work 38 and that the easiest and safest way is either to purchase in the country of establishment of the purchaser or to be a large company.

4.3. Absence of usual commercial documents

4.3.1. Obstacle to free movement of goods

On certain commercial transactions, it frequently happens that there are no documents available related to the movement of goods. National courts sometimes consider that the requirement to keep documents that a person is not otherwise supposed to have or to keep would violate the freedom of circulation of the goods. 39 Although such analysis makes sense, it is not widely shared.

4.3.2. Charge local VAT

If the supplier cannot provide evidence, the French, 40 Irish 41 and Belgian 42 tax authorities recommend that the supplier charge local VAT on a transaction. In Italy, the professional organizations recommend the same. 43 In practice, however, charging VAT on intra-Community supplies in the absence of sufficient evidence is only a possibility available to large suppliers. The situation of smaller suppliers is slightly different: the reality is that the customer will invariably refuse to pay the VAT element shown on an invoice, with the result that the supplier is left with the VAT liability. At best, this dilemma leaves the supplier with a cash-flow cost, and, at worst, it means that he bears the full risk of the VAT. In such cases, businesses (especially SMEs) might feel that their only option is to decline the transaction. 44 This will depend upon the bargaining capacity of each party.

In a report published in 1994, the European Commission observed that “the only solution then available to the purchaser is to become identified for VAT purposes in the Member State in order to transfer the goods to the Member State of destination; this operation has to be shown on a periodic return on which the right to deduct the VAT invoiced by the supplier can be exercised. Such practice seriously prejudices the decision taken by the Council when it adopted Directive 91/680/EEC.” 45 According to the European Commission, “it is unacceptable that the VAT treatment of an intra-Community supply of goods (exempt or subject to VAT) should depend on the person assuming responsibility for the transport of the goods supplied: this runs counter to the equal treatment of sales transactions made under identical conditions and limits considerably the trader’s choice of their place of supply”. 46 Although the point of view of the European Commission on this issue was clear, infringement procedures against Member States violating the treaties in this way have never been reported.

4.3.3. Witness

The Bundesfinanzhof (German Federal Tax Court) decided that if a taxable person intends to provide the necessary proof for a zero-rated supply by means of evidence from a witness, he also has to prove that he is not able to, or that it would be unreasonable to, provide written proof. Otherwise, he runs the risk that his application will be rejected. 47

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**4.3.4. Specific new documents**

Some Member States unilaterally accept documents as a valid evidence of intra-Community supplies, e.g. the Netherlands (afhaalverklaring⁴⁸), Germany (Gelangensbestätigung⁴⁹), Austria (confirmation of the receipt of goods⁵⁰) and Belgium, but this is only applicable to freight forwarders.⁵¹ The legal basis seems to be article 161 and article 273 of the VAT Directive. According to these articles, VAT exemptions (zero rates) shall apply in accordance with the conditions that the Member States shall lay down for the purpose of ensuring the correct and straightforward application of those exemptions. Simultaneously, however, in accordance with article 401 of the VAT Directive, Member States are prevented from introducing formalities connected with the crossing of frontiers which gives rise to VAT charges.

Businesses are strongly in favour of such documents, although they may present substantial legal downsides, such as the fact that the person who can sign the document is not competent to bind the purchaser, or that such documents may have unknown legal consequences. In fact, the sole existence of such documents demonstrates the failure of a system that was put into place in 1989 only for a very limited period of time.

Hungary has introduced a real-time tracker system (EKEAR) regarding road shipments of goods over a certain weight from and to EU countries and within Hungary.⁵²

**4.3.5. Intra-Community supplies of means of transport**

The difficulty with proving an intra-Community supply of means of transport is that it can move by itself, except when transported by large businesses for example. Small suppliers have to rely on evidence such as registration of cars abroad, but this can entail substantial costs.

**5. Transport by the Supplier, the Purchaser or by a Third Party**

**5.1. Who makes the supply?**

When the transport is being performed by a third party, there should be no difficulty in obtaining evidence. However, the information may be more difficult to obtain when the transport is being performed by the purchaser, or when there are various transports for a single supply.

**5.2. Transport by the supplier**

Large businesses are likely to have internal procedures which can be relied upon to prove the transport, such as documents confirming where the driver has delivered the goods, including hours, tachographs, driver’s books, etc.⁵⁴ In contrast, this will probably not be the case for SMEs.

The European Commission suggested that when the transport is organized by or on behalf of the supplier, the latter should hold two non-contradictory normal commercial and payment documents certifying the transport or dispatch to another Member State. With these documents, it could be presumed that the goods have been dispatched or transported to the other Member State’s territory. Of course, a tax authority may rebut such presumptions on the basis of evidence indicating that the goods were not dispatched or transported to the territory of that particular Member State.⁵⁵

**5.3. Transport by the purchaser**

When the transport is performed by the purchaser (Exports or Free to Carrier (FCA) supplies), the supplier has no control over the documentation that is needed to obtain the VAT exemption (zero rate), because he must rely on the purchaser to return the relevant evidence.⁵⁶ In the absence of good relations with his customer or appropriate contractual provisions, the supplier does not have many options to confirm whether the customer really transported the goods abroad. Therefore, a confirmation stating that the customer received the goods in the country of dispatch and will transport them to another territory within the European Union may be helpful in convincing the tax authorities that the conditions of the intra-Community supply have been fulfilled.⁵⁷ This presumes that the customer is willing to cooperate with the supplier and does not try to make the provision of evidence of intra-Community supplies conditional on, for example, concessions on the price of future supplies. The supplier may easily lose the possibility of obtaining evidence.

Sometimes, it is argued that the supplier should know his customer.⁵⁸ In practice, however, how often, and to what extent, is such knowledge necessary in order to get paid?

According to HM Revenue & Customs,⁵⁹ when the customer collects the goods or arranges for their collection and removal from the United Kingdom, evidence...
must show that the goods supplied have left the United Kingdom. Copies of transport documents alone will not be sufficient. Information held must identify the date and route of the movement of goods and the mode of transport involved. It should include the following: written order from the customer which shows their name, address and EU VAT identification number and the address where the goods are to be delivered, a copy of the invoice showing the customer’s name, a description of the goods and an invoice number, the date of departure of the goods from the supplier’s premises and from the United Kingdom, the name and address of the haulier collecting the goods, the registration number of the vehicle collecting the goods and the name and signature of the driver and, where the goods are to be taken out of the United Kingdom by a different haulier or vehicle, the name and address of that haulier, that vehicle registration number and a signature for the goods, the route (for example, the Channel Tunnel), port of exit, a copy of travel tickets, the name of the ferry or shipping company and date of sailing or airway number and airport, the trailer number (if applicable), the full container number (if applicable), and the name and address for consolidation, groupage, or processing (if applicable).

The Italian tax authorities clarified on 25 March 2013 the rules on how evidence of a zero-rated intra-Community supply can be provided, especially when the delivery conditions “Ex-Works” apply. An electronic transport document (CMR), in addition to the paper CMR, can be considered as evidence of an intra-Community supply with this delivery condition. In addition to the CMR, other documents with the same content and information as the CMR (details of the supplier, transporter and recipient) can also be used as valid evidence. However, the Italian tax authorities indicate that even if electronic CMRs (or the equivalent documents) qualify as evidence, they cannot be considered as valid electronic documents for tax purposes if they do not have a time reference and electronic signature. As a consequence, if the time reference and electronic signature are not available, the CMRs have to be printed on paper (and signed) anyway, in order to be considered valid evidence for tax purposes. Furthermore, the tax authorities have repeatedly stated that CMRs are valid evidence only if they are stored along with the invoices, proof of payment and the sales listings declarations.

6. One Supply and Two or More Transports

6.1. Multiple transports

Frequently, there is more than one transport for a single supply, and the questions that arise are, first, which is the relevant transport, and, second, how does one attribute a document to a specific supply?

6.2. Use of consolidated hubs

The development of the single market has resulted in an increase in the diversity of suppliers and the use of consolidated hubs in Member States before the onward dispatch of goods to purchasers. Such arrangements are particularly attractive for businesses, as it is more cost effective to group traffic (i.e. maximizing loads in fewer vehicles). The issues associated with hubs become more complex where these arrangements are used by members of the same corporate group (rather than just a single legal entity) and the hub is used as a consolidation and dispatch point to a number of different Member States and legal entities.

Such arrangements can be particularly challenging in trying to match transport documentation with individual supplies and their invoices.

6.3. Multiple freight or shipping parties

It is possible that more than one carrier will be responsible for the movements of the goods from the supplier’s premises to those of the purchaser in another Member State.

While the supplier will often have a direct contractual relationship with the first carrier, the latter may not be the carrier responsible for that portion of the movement when the goods leave the supplier’s Member State. The supplier will need documents from a transporter with whom he has never had direct contact nor contract. Of course, this can be solved by inserting appropriate contractual provisions with the first transporter. But the economic benefits obtained by better organization are reduced by the additional administrative compliance.

6.4. Processing of goods prior to the supply to the final customer

The processing may take place in the country where the customer is established, as in the case Fonderie 2A, in which there was one transfer assimilated to an intra-Community supply, which was followed by a local supply. The processing may take place in a third Member State, as in the Case Dresser, where there was one transfer followed by an intra-Community supply. Finally, the processing may also take place in another Member State and the goods are transported to a customer established in the country where the supplier is established.

7. Two or More Supplies and One Transport

Zero-rated VAT treatment can only be granted to one supply.

7.1. One transport and two supplies between parties identified for VAT in three countries: the classical triangular transaction

After the decision of the Council to adopt an improved Benelux model for the zero-rating for VAT purposes of intra-Community supplies of goods, it appeared that a
strict application of article 138(1) of the VAT Directive would have obliged all traders to register for VAT in many Member States. In addition, this affected a substantial part of essential intra-Community trade. Therefore, it was necessary to introduce – hurriedly – simplification measures. However, these measures have been limited to transactions between three taxable persons (A-B-C) established in three EU Member States: the intermediary B was deemed to perform an intra-Community acquisition in the Member State of the final purchaser C who accounted for the VAT on that intra-Community acquisition.

Literature has shown that numerous practical difficulties arise, that are caused by a lack of harmonization of national interpretations.

7.1.1. Intermediaries’ need to protect their commercial secrets

It is generally admitted that a fundamental condition for the application of the simplification measure in triangular transactions (A-B-C) is that the transport is made in respect of the A-B transaction, i.e. the transport is made by A, or for his account, or by B, or for his account. However, if A organizes the transport to C, C will know who is the first supplier and B will be superfluous. Hence, if B organizes the transport to C, B will be likely to refuse to communicate any evidence of transport to A (otherwise A will know the identity of the final purchaser and B will lose his trading position). Of course, such difficulties do not exist when A-B or B-C are related companies. But when B is independent from A or from C, it is crucial that C does not know the identity of establishment of A (otherwise B loses his trading position). The situation is so serious that it has been observed that companies in the situation of B often agree with A to show the documents proving the transport to the tax authorities of A, but not to disclose them directly to A. However, case law rejects the zero rate of VAT where the documentation and recording obligations have been breached and where the supplier has attempted to conceal the identity of the customer, thus allowing this person to conceal the acquisition in his own country. In such cases, it will no longer be possible for the supplier to demonstrate the actual intra-Community delivery by other means.

Interestingly, the European Commission is aware of this critical commercial issue and has recently suggested a practical solution in order to prevent the intermediary B from having to provide the supplier A with the detail of the Member State of arrival of the goods (where C is identified for VAT). To preserve the confidentiality of B’s business customers, it (B) would not have to disclose the exact destination of the goods (such as the postal address or name of the recipient). This information would be recorded by the supplier B. It would constitute proof of transport supporting the fact that VAT will be accounted for in the Member State of arrival. Of course, tax authorities may rebut such a presumption.

7.1.2. Weakening of the invoice as a method of control

Another consequence of the simplification in favour of triangular transactions is that they render the tracking of physical movements of goods within the European Union impossible:

- since there are two supplies, there are also two invoices, with different prices and which do not necessarily include the same goods. Therefore, it is impossible to compare the invoice issued by the supplier and the one received by the final customer;
- the supplier should be concerned that the goods are transported to a Member State other than the one where the invoice is addressed. This flows from the nature of the simplification measures. Logically, the German Supreme Tax Court has held that a supplier who honestly believed in the validity of the documents presented to him, showing a supply of goods to Spain, could not be held liable for the VAT when the carrier diverted them to a final customer in France;
- multiple transports combined with multiples supplies of goods that are potentially interchangeable during any intermediary storage:

As Richard T. Ainsworth pointed out, fraudsters have found that simplified triangulation disguises the flow of the goods involved in MTIC frauds. They have also found that when multiple and overlapping triangles are used, the movement of the goods becomes even more obscure.

7.2. One transport and two supplies between parties identified for VAT purposes in two different Member States

In EMAG, the ECJ decided that where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, give rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be


67. E. Sutkaitis, Intra EU Trade and Chain Transactions under EU VAT between Simplification Measures and Inconsistent Results (Lund University, May 2012).

68. P. Hughes, VAT Aspects of Longer Chains of Triangular Transactions, 23 Inl. VAT Monitor 4 (2012), p. 230, Journals IBFD.


71. Missing Trader Intra-Community (MTIC) fraud.

ascribed to only one of the two supplies, which alone will be exempted (zero-rated) from tax.\textsuperscript{73}

But which of the two supplies will be exempted (zero-rated)? In \textit{Euro Tyre}, the ECJ decided that "the first person acquiring the goods, having obtained the right to dispose of the goods as owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his value added tax identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport."\textsuperscript{74} In other words, it is the intermediary who effectively decides which supply will be zero-rated for VAT purposes. If the intermediary withholds information from the supplier that the goods were already onward supplied to the final customer at the moment of dispatch, the first supply can still be treated as an intra-Community supply.\textsuperscript{75} How could this work in practice?

7.3. One transport and two and more supplies between parties established in two or more Member States

In 1995, Michel Aujean wrote that these chain transactions raise great difficulties whenever the number of transactions involved does not permit application of the simplification solution adopted for triangular transactions.\textsuperscript{76} He added that: "Consequently one should conclude that this problem will only be generally resolved within the framework of a definitive tax regime."\textsuperscript{77}

8. Time of Availability of the Evidence

For some Member States, all evidence must be held at the time when the supply is carried out. Because of the nature of the evidence, the requirement for full information to be available at the time of the supply is simply impossible.\textsuperscript{78}

9. Efficiency and Challenge of the Evidence by the Tax Authorities

From experience, it appears that very few fraud cases are discovered on the basis of missing documents. In addition, both businesses and Member States admit that fraudsters are generally more compliant with the details of formalities than other businesses.\textsuperscript{79} The case law confirms such observations: the evidence of intra-Community supplies is most often negligible in comparison with the information showing the reality of the activity of the purchaser. When the tax authorities succeed in confirming that the activity of the purchaser abroad is limited, courts tend to reject any evidence of transport, even when it is convincing.\textsuperscript{80} Courts reject the zero rate VAT because the foreign acquirer had no accounting, or was not known to the foreign tax authorities.\textsuperscript{81} Relevant elements in this case are the nature of the legal ties binding the company and its suppliers or customers, lack of operating resources, the significance of the trade relationship between companies, bank statements related to the invoices, means of payment and payer’s identity, as well accounting records and documents, rather than the means of transportation of goods and relevant transportation documents. An order form and an invoice signed with an indication of the VAT identification number of the purchaser have been considered insufficient where the tax authorities have put to the Tribunal information indicating that the goods were purchased in the Member State of the supplier.\textsuperscript{82}

The weakness of evidence of transport as proof of intra-Community movements of goods is aggravated by the fact that VAT registrations are not linked with a fixed establishment having a human presence. Therefore, Member States where the goods are circulating will not have direct access to the documents related to the transport of the goods. The tax authorities have no means to directly force a business established abroad to communicate documents. They have to seek the assistance of foreign tax authorities and this is difficult. In addition, in the absence of a fixed establishment, the information obtained from the VAT registration and from the VAT return is fragmented and therefore impossible to be used for the monitoring of the collection of VAT.

10. Possible Solutions?

A possible solution to the structural weakness of the means employed for controlling the intra-Community movement of goods described in this article would be to consider the flow of invoices as the starting point of tracking the goods. The person who issues an invoice certainly knows where these goods are supposed to be, or at least has the possible means to know where they are.

Unfortunately, even if the author consider this as a promising alternative, any discussion of this alternative seems impossible because, according to the European Commis-

\textsuperscript{73} AT: ECJ, 6 Apr. 2006, Case C-245/04, EMAG Handel Eder OHG v. Finanzlandesdirektion für Kärnten (Bemessungszeitraum II), ECJ Case Law IBFD.

\textsuperscript{74} NL: ECJ, 16 Dec. 2010, Case C-430/09, Euro Tyre Holding B.V. v. Staatssecretaris van Financiën, ECJ Case Law IBFD.


\textsuperscript{77} For a recent analysis coming to the same conclusion, see VEG no. 029, Option 1R, Sub-Groups report – Chain transactions, Brussels 13 Jan 2014.


\textsuperscript{79} Id.


\textsuperscript{81} BE: Court of appeal of Ghent, 15 Mar. 2011, no. 2009/AR/1174, Monkey. be. Similarly, the vast majority of UK case law about “zero-rating of specific exports” concerns sales to unregistered customers in other EU Member States (A. Dolton & D. Rudling, Tolley’s VAT Cases 2013 (LexisNexis 2013), no. 23.21).

\textsuperscript{82} BE: Tribunal of Bruges, 7 Jan. 2002. Of course, tax authorities have access to databases and have the legal powers to require information not available to businesses.
11. Conclusion

The VAT zero rate for intra-Community supplies of goods based on proof of transport is an improvement of the simplified customs procedures that was applicable in some Member States at the end of the 1980s. It was supposed to be supported by documents used in the course of normal business transactions. However, it appears that the collection of these documents is extremely costly, even when they exist. The supplier, obliged to communicate these documents to the tax authorities, may be dependent on his customers to obtain them and, sometimes, such documents are treated as commercial secrets. In some cases, such documents do not exist at all and therefore some Member States authorize specific documents. It may also happen that there are so many documents that, to connect them to a particular supply is a very difficult task. The simplification measure in favour of triangular transactions breaks the tracking of the flow of the goods. From case law and from experience, it appears that such evidences of transport are not really useful in order to collect the tax, but they do impose huge costs on businesses. For SMEs, this may be an insurmountable obstacle to cross-border transactions.

The proof of intra-Community supplies of goods has been qualified as "the Achilles’ Heel of the VAT System". It seems worth recalling that an "Achilles' heel" is a weakness in spite of overall strength, which can actually or potentially lead to downfall.

83. Definitive VAT regime for intra-EU trade, VEG no. 050 Brussels, 12 Nov. 2015, p. 4.