

PLACE WHERE THE SUPPLY / ACTIVITY
IS EFFECTIVELY CARRIED OUT AS AN
ALLOCATION RULE:
VAT vs. DIRECT TAXATION

Rita de la Feria



OXFORD UNIVERSITY CENTRE FOR
BUSINESS TAXATION

SAÏD BUSINESS SCHOOL, PARK END STREET
OXFORD OX1 1HP

WP 09/06

Place Where the Supply/Activity is Effectively Carried Out as an Allocation Rule: VAT vs. Direct Taxation

Rita de la Feria *

I. INTRODUCTION

In direct taxation allocation of taxing rights between countries is done through international tax rules. Even within the EU these rules are set out by national tax systems, albeit limited by double taxation treaties (DTTs), and despite the undeniable influence of the European Court of Justice (ECJ) particularly during the last decade. In practice, however, all international tax rules allocate taxing rights on the basis of only two fundamental principles: residence and source.¹ A pure residence based system will impose tax on income whenever earned by residents of the taxing country; whilst a pure source based system will impose tax on income earned in the taxing country. The principle of source is therefore defined as a principle for allocating taxing jurisdiction “according to which a country may tax income having its source in that country, regardless of the residence of the taxpayer”.² Source of the income being the place where a particular item of income is deemed to originate, taxation at source is in essence taxation at the “place where the activity is effectively carried out” (PWAECO). Most countries do not model their tax systems exclusively in either source or residence principles, however, but rather have in place hybrid systems which place an emphasis in one of the two. Although at present the division is less clear, traditionally developed – capital exporting – countries tended to place heavier emphasis on the residence principle, whilst capital-importing countries in general relied more strongly on the source principle.

In VAT allocation of taxation right is usually done through the establishment of what are known as “place of supply rules”.³ Within the EU, these rules have been established at European level since the introduction of a VAT system in 1967: they were first set out in the

* Senior Research Fellow, Centre for Business Taxation, Oxford University. I am grateful to the Michael Devereux, for his willingness (and patience) to discuss in detail many of the issues covered in Part II of this chapter. I am also grateful to Pedro Vasconcellos Silva, Rui Barreira and Rui Palma for their comments and suggestions on earlier drafts. The usual disclaimer applies.

¹ Also known as worldwide or unlimited tax liability, and territoriality or limited tax liability principles, respectively.

² IBFD, *International Tax Glossary* (Fourth Edition, Amsterdam: IBFD Publications, 2001), at 324.

³ Under some VAT/GST systems, such as those in force in New Zealand and South African, allocation of taxing rights is done, not through the usual set of place of supply rules, but rather on the basis of the supplier’s place of residence. Such systems have been designated by A. Schenk as “worldwide VAT systems”, see Chapter [...] in this volume; see also C. Morden, “Fifteen Years of Value Added Tax in South Africa (1991 to 2006)” in R. Krever and D. White (Eds.), *GST in Retrospect and Prospect* (Wellington: Thomson Brookers, 2007), 543.

Second VAT Directive;⁴ then in a more detailed and sophisticated level by the Sixth VAT Directive;⁵ and since 2007 in Articles 31 to 61 EC VAT Directive.⁶ The EU VAT being in essence a tax on consumption,⁷ these various place of supply rules are meant to act as proxies for one basic allocation rule: taxation should take place at the place where the goods or services are consumed. For supplies of goods this is achieved through allocation rules that follow primarily the basic destination principle,⁸ which since 1992 operates within Europe through an intra-Community transactions regime known as the transitional VAT system. Within these, the “place where the supply is effectively carried out” (PWSECO) plays an important role as an allocation rule. For supplies of services, the general allocation rule in place since the approval of the Sixth VAT Directive in 1977 is the “place where the supplier is established”, with various exceptions for specific types of services. From January 2010 onwards Business-to-Business (B2B) transactions will be subject to a different general allocation rule – the “place where the customer is established” – but exceptions will still remain in place. One of these exceptions is the PWSECO.

The aim of this paper is to establish, through the analysis of PWAECO and PWSECO as allocation rules, whether VAT place of supply rules are more effective allocation rules than international tax rules currently governing income taxation. In section II of the paper allocation rules applicable to (corporate) income under international taxation provisions will be discussed, with reference to the ECJ influence in the manner in which they operate within the EU; this will be followed by an analysis of the limitations and weaknesses of international tax rules as means of allocation, and some of the proposed solutions. In section III attention shifts to VAT: the place of supply rules under European VAT will be discussed, in particular the role of the PWSECO rule therein, with reference to the ECJ jurisprudence; then, and similarly to the approach taken in section II, an analysis of the limitations and weaknesses of the place of supply system within European VAT will be undertaken. Section IV concludes with considerations on whether VAT rules for allocation of taxing rights are more effective than direct taxation’s allocation rules, or whether VAT offers a false promise, further highlighting that in tax – as in life – the grass always seems greener on the other side.

⁴ Second Council Directive 67/228/EEC of 11 April 1967, OJ P 71, 14/04/1967, 1303.

⁵ Sixth Council Directive 77/388/EEC of 12 May 1977, OJ L145, 13/06/1977, 1.

⁶ Council Directive 2006/112/EC of 28 November 2006, OJ L347, 11/12/2006, 1-118.

⁷ The principle of VAT as a tax on consumption is regarded as a fundamental principle of the EU VAT system, see R. de la Feria, *The EU VAT System and the Internal Market* (Amsterdam: IBFD, 2009), at 262-266; and D. Butler, “VAT as a Tax on Consumption: Some Thoughts on the Recent Judgement in *Parker Hale Ltd v. Customs and Excise Commissioners*” (2000) *British Tax Review* 5, 545-553.

⁸ See E. Berglas, “Harmonisation of Commodity Taxes – Destination, origin and restricted origin principles” (1981) *Journal of Public Economics* 16, 377-387; and B. Lockwood, D. de Meza and G. Myles, “On the European Union VAT Proposals: The Superiority of Origin over Destination Taxation” (1995) *Fiscal Studies* 16(1), 1-17.

II. ALLOCATION OF TAXING RIGHTS IN DIRECT TAXATION

1. International Tax Allocation Rules

Allocation of corporate tax rights is done through international tax rules set out in national tax systems. Although in theory each country is free to choose the jurisdictional connection that best suits its needs, complete sovereignty is subject to limitations. These can be classified as follows: voluntary limitations imposed by the country itself, usually for economic policy or market-induced reasons; negotiated limitations through bilateral or multilateral conventions, such as DTTs; and externally imposed limitations, such as those imposed to countries listed as “tax heavens”.⁹

In which of these categories should limitations emerging from the EU be placed? Insofar as Member States joined the EU willingly it would be natural to conclude that any resulting limitations should be regarded as “negotiated limitations”. Yet, such a conclusion disregards the supranational nature of the EU, and the principle of supremacy of Community law. Limitations resulting from EU legislation and case-law may have been negotiated in the early stages of the European integration process, but this is today no longer the case. In many fields new Community legislation is approved by qualified majority voting, thus binding Member States which may have voted against it; and whilst unanimity still applies to tax legislation, national tax legislation is today heavily limited by the rulings of the Court of Justice. Of course, it can be argued that the Court of Justice is merely applying the provisions, namely those concerning fundamental freedoms, set out in the EC Treaty as agreed by the Member States themselves. This, however, disregards the role of the Court in the development of EU tax law: through the application of interpretative principles such as teleological interpretation, the Court has assumed powers which go far beyond its judicial function and has adopted a quasi-legislative role – a tendency towards what has been designated as “judicial activism”.¹⁰ In this context, it would be hard to sustain that limitations resulting from EU continue to be “negotiated limitations”. This might have been the case during the first stages of European integration, but at the present stage of integration it would be more accurate to characterise these limitations as “externally imposed limitations”.

2. Place Where the Activity is Effectively Carried Out (PWAECO)

⁹ See C.E. McLure, “Globalization, Tax Rules and National Sovereignty” (2001) *Bulletin for International Fiscal Documentation* 55(8), 328-341, at 333. Other classifications have also been advocated: R. Avi-Yonah contends that countries’ ability to undertake unilateral action is restricted by the two basic norms that underlie the international tax regime, the single tax principle (i.e., that income should be taxed once- not more and not less) and the benefits principle (i.e., that active business income should be taxed primarily at source, and passive investment income primarily at residence), see “Tax Competition, Tax Arbitrage, and the International Tax Regime”, *Oxford University Centre for Business Taxation Working Paper Series*, WP 07/09, June 2007.

¹⁰ Although the use of this expression is now widespread, it seems to be traced back to H. Rasmussen, *On the Law and Policy in the European Court of Justice* (Baden-Baden: Martinus Nijhoff, 1986).

Residence-based taxation has traditionally prevailed. The OECD model convention has ensured that international allocation of taxing rights is primarily residence-based, with source-basis taxation being the exception for particular types of income. Furthermore, globalisation has blurred the classical distinction between capital-exporting and capital-importing countries, leading most traditionally capital-importing countries to amend their legislation so as to tax income using residence as the main connection factor.¹¹ Yet, source-based taxation, which as mentioned above translates into PWAECO as a general allocation rule, has been advocated as the better allocation method. Amongst other problems, residence-based taxation will act as an incentive to an incentive to re-locate headquarters to low-tax countries, a phenomenon which has become wide-spread over the last decade.¹²

Amongst the main benefits which have been attributed to source taxation are the following: it is the most appropriate and logical criterion under the sovereignty principle; it fosters international competition; it eases administration and lowers administration costs; it provides an incentive to improve the productivity of government expenditure; and it eliminates the need for DTTs.¹³ Conceptually, therefore, it appears that taxation at source has the advantage over residence. Traditionally therefore economists have tended to give preference to the source principle, i.e. to the PWAECO, as an allocation of taxing rights rule, on the basis that they create less distortions and ensure higher levels of neutrality.¹⁴

From an EU perspective, it has also been argued that source-based taxation is the allocation method most suitable to achieve an internal market, as defined in the EC Treaty,¹⁵ as well as other European objectives, such as the Lisbon Strategy.¹⁶ Some have also suggested that this would be consistent with the Court of Justice, at least implicit, favouring of a source-based approach;¹⁷ To the contrary, it has also been contested that the Court has so far chosen to

¹¹ See A. Schindel and A. Atchabahan, "Source and Residence: A New Configuration of These Principles – General Report" (2005) *Cahiers de Droit Fiscal International* 90A, 21-99, at 26.

¹² See empirical evidence presented in J. Voget, "Headquarter Relocations and International Taxation", paper presented at European Tax Policy Forum (ETPF) Annual Conference, held in London, on 21 April 2008.

¹³ See A. Schindel and A. Atchabahan, n. 11 above, at 29-30.

¹⁴ See K. Andersson, "An Economist's View on Source Versus Residence Taxation – The Lisbon Objectives and Taxation in the European Union" (2006) *Bulletin for International Fiscal Documentation* 60(10), 395-401, at 398-399.

¹⁵ See E.C.C. Kemmeren, "Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach" (2006) *Bulletin for International Fiscal Documentation* 60(11), 430-452, at 442 *et seq.* For a detailed analysis of the concept of internal market see R. de la Feria, n. 9 above, at Chapter 1, as well as references cited therein.

¹⁶ See K. Andersson, n. 14 above, at 398.

¹⁷ See E.C.C. Kemmeren, n. 15 above, at 442 *et seq.* Although the author does accept that the same could not be said of secondary Community tax legislation, which seems to rely more on residence-based taxation than on source-based taxation.: the Parent-Subsidiary Directive, Council Directive 90/435/EEC of 23 July 1990 OJ L225, 20/08/1990, 6; the Interest and Royalties Directive, Council Directive 2003/49/EC of 3 June 2003, OJ L157, 26/06/2003, 49; and the Savings Tax Directive, Council Directive 2003/48/EC of 3 June 2003 OJ L157, 26/06/2003, 38-48.

interpret the Treaty, namely the fundamental freedoms, as prohibiting extra-territorial (residence-based) taxation. If it chose to do so it would certainly eliminate a lot of problems, in particular double taxation and the inherent relief mechanisms, but it is argued would result in a more fragmented internal market.¹⁸ Furthermore, recent rulings seem to suggest a more non-committal approach on the part of the Court, with “allocation of taxing rights” now being accepted as a potential justification for national restrictive measures.¹⁹

However, despite its traditional appeal, taxation at source is not without difficulties in a modern world. In a globalised world, where new business models proliferate, and production is distributed across different countries, the question is where is the source?²⁰ Where has the activity effectively been carried out? It is common today for different stages of production to take place in different countries, which of these should be deemed to be the place of taxation?²¹ This problem, which has been designated as “conceptual problems in profit splitting”,²² raises the question of whether traditional source-based allocation rules are still appropriate for the 21st century economy.²³

3. Limitations of International Tax Allocation Rules

The current international tax allocation system has been characterised as a “flawed miracle”.²⁴ The system, based on the residence and source principles, started in the 1920s and consolidated in the last 50 years mainly due to the influence of the OECD DTT model. Whilst most agree it is clear that this system no longer suited to deal with today’s world

¹⁸ B.J.M. Terra and P.J. Wattel, *European Tax Law* (The Hague: Kluwer Law International, Fourth Edition, 2005), at 80-83. See also P.J. Wattel, “Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality” (2003) *EC Tax Review* 12(4), 194-202.

¹⁹ In *Marks & Spencer* one of the justifications presented by the United Kingdom Government for the maintenance of restrictive group relief provisions was a “balanced allocation of the power to impose taxes between Member States”, case C-446/03, [2005] ECR I-10837, at paragraph 44. Commenting on the case M. Wathelet stated “this is a new name for a justification. Is this not just another way of referring to protecting tax revenue, even if the ECJ expressly defended itself by repeating that the reduction of tax revenue cannot be regarded as an overriding reason in the public interest [...]?” [...] The Advocate General considered that [the invoked justification] fell within the scope of the principle of tax coherence”, see “Marks & Spencer Plc v Halsey: Lessons to be Drawn” (2006) *British Tax Review* 2, 128-134, at 130-131. More recently, in *Lidl Belgium* the Court expressly stated that “the objective of preserving the allocation of the power to impose taxes between the two Member States concerned [...] is capable of justifying the tax regime at issue in the main proceedings”, case C-414/06, [2008] ECR I-3601, at paragraph 33.

²⁰ A question asked by K. Vogel as far back as 1988, see “Worldwide vs source taxation of income – A review and re-evaluation of arguments (Part I)”, (1988) *Intertax* 809, 216-229, at 223.

²¹ An analogy can be made here with the all important problem of how to determine the origin of goods for purposes of customs law. For an in-depth analysis of this problem see T. Lyons, *EC Customs Law*, Oxford European Union Law Library, Second Edition (Oxford: Oxford University Press, 2008), at 227-282.

²² See M. Devereux, “Taxation of Outbound Direct Investment: Economic Principles and Tax Policy Considerations” (2008) *Oxford Review of Economic Policy* 24(4), 698–719, at 713.

²³ See E.C.C. Kemmeren, n. 15 above, at 430.

²⁴ See R. Avi-Yonah, “The Structure of International Taxation: A Proposal for Simplification” (1996) *Texas Law Review* 74, 1301-1359, at 1303-1304.

economy,²⁵ discussion on the main pillars of those system has often lacked and there has been traditionally an assumption that the foundational principles of the current system, namely residence and source, enjoy universal agreement.²⁶ In recent years, however, there have been two different approaches to it: those proposing relatively minor alterations to the current system; and those proposing a more radical approach, advocating the complete substitution of the current system, by a new method of allocating taxing rights at international level.

3.1 Proposals for Alterations to Current International Tax Allocation System

A new connection element has been suggested by E.C.C. Kemmeren, one based on origin, as a substitution of the traditional source criterion: he suggests that the primary rule for allocation of taxing rights should be the place where the income has originally generated, i.e. where the intellectual element is to be found, or a substantial income-producing activity is carried on.²⁷ Equally starting from the perspective of source-based taxation, D. Pinto suggests that allocation of taxing rights for income arising from international transactions conducted through electronically commerce means should be based on source, but the way in which source is defined needed to be reconfigured.²⁸

3.2 Proposals for Total Overhaul of International Tax Allocation System

In 2000 R. Avi-Yonah was the first to propose more radical modifications to the current interpretation and application of the source principle at international level: in his opinion the OECD should adopt a regime that taxes multinationals as an initial matter in the country of consumption of the goods or services provided by the multinational. As supporting argument he points to the popularity of the destination principle for consumption taxes such as VAT, and to the fact such taxes are imposed on a destination basis without the need for a coordinating tax treaty.²⁹ This proposal was made in the context of combating harmful tax competition and use of tax heavens, but more wide-scoped proposals have followed. In 2007 another proposal emerged: A. Fernandes de Oliveira suggested a new allocation on taxing rights system based on a new market access principle. Although the author refers to it as source-based taxation, where source is determined on the basis of market access, in practice the changes advocated would entail a total system overhaul, which goes far beyond minor amendments to the current source principle. Under the proposed system the right to tax

²⁵ As A. Schindel and A. Atchabahian comment “the main reasons to maintain the status quo lie, on the one hand, in a kind of “immobilism” and attachment to pre-existing systems, and, on the other, in the revenue collection purpose of more developed countries”, in n. 11 above, at 93.

²⁶ See M.J. Graetz, “The David R. Tillinghast Lecture – Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies” (2001) *Tax Law Review* 54, 261, at 269.

²⁷ See E.C.C. Kemmeren, n. 15 above.

²⁸ See D. Pinto, *E-Commerce and Source-Based Income Taxation* (Amsterdam: IBFD, 2009).

²⁹ See R. Avi-Yonah, “Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State” (2000) *Harvard Law Review* 113(7), 1573-1676, at 1670-1671.

would be allocated to the country where goods or services are sold. Going through the treatment of various types of corporate income under the envisaged market access-based taxation, the author concludes that such system would not only have significant practical advantages than the current one, but more importantly from a conceptual perspective it presents itself as more legitimate and equitable, since the creation of income occurs only at the moment the product is sold.³⁰

Similar proposals have been further developed recently by economic commentators in the context of the ongoing discussion in the United Kingdom over tax reform: the Mirrlees Review.³¹ New economic research, as well as new economic realities, namely the difficulties of establishing the PWAECO in a globalised world economy, has put the traditional bias in favour of the source principle into question. Both residence and source based taxation are now said to distort international trade to an extent that it would be difficult to argue in for the superiority of one over the other.³² Recent studies have therefore argued that a more radical approach is needed.³³ In this context, a paper by A Auerbach, M. Devereux and H. Simpson prepared for the Mirrlees Review contests that the point of sale is the one in the production chain which is both the most easily identifiable, and harder to manipulate. Thus, taxation of corporate profits should take place at this point under a destination-based tax.³⁴ The authors argue that any system of allocation of taxing rights should take into account two fundamental questions: what is the most effective place to tax from an administrative perspective; and what is conceptually the most adequate place to tax any given income. From both perspectives, the authors contend, the destination-based tax presents itself as a superior form of taxation. A destination-based cash flow tax would have various desirable characteristics, The scale and location of investment, and the use of different forms of finance, would all be

³⁰ See A. Fernandes de Oliveira, “A Residência, a Fonte e a Tributação” (2007) *Ciência e Técnica Fiscal* 420, 219-299.

³¹ The project named “Mirrlees Review: Reforming the Tax System for the 21st Century” aims at bringing together a high-profile group of international experts and younger researchers to identify the characteristics of a good tax system for any open developed economy in the 21st century, assessing the extent to which the UK tax system conforms to these ideals, and recommending how it might realistically be reformed in that direction, see <http://www.ifs.org.uk/mirrleesReview/about>.

³² As M. Devereux points out: “production efficiency cannot be achieved by residence or source based taxes unless they are fully harmonised. In the absence of sufficient agreement to achieve that outcome, a question arises as to whether it is possible to identify which of these two forms of taxation generate the greater welfare costs? Source-based taxation distorts location choice and competition generated by international trade; residence-based taxation distorts competition generated by cross-border investment and international trade. [...] any argument in favour of one form of taxation on this basis would be precarious”, see n. 102 above, at [...]. For a comprehensive analysis of the limitations of source and residence-based taxation, see A. Auerbach, M. Devereux and H. Simpson, “Taxing Corporate Income”, in Institute for Fiscal Studies (ed.), *Reforming the Tax System for the 21st Century: the Mirrlees Review – Dimensions of Tax Design* (Oxford: Oxford University Press, 2009).

³³ “Can taxes on corporate profit survive in the long run, without too much harm in distorting corporate behaviour? Perhaps a more radical reform is called for”, in M. Devereux, n. 22 above.

³⁴ Initially proposed by S. Bond and M.P. Devereux. “Cash flow taxes in an open economy” (2002) *Centre for Economic Policy Research Discussion Paper Series*, Discussion Paper 3401.

unaffected by the tax, and there would also be no incentive to shift profits to low tax-rate jurisdictions. People are considerably less mobile than capital, so allocation of production factors would be less distorted and consequently more efficient, which would constitute a significant improvement on the current system that creates significant distortions.³⁵ From a practical perspective a destination-based tax would significantly decrease the need for thin capitalisation and transfer pricing rules. In addition, the authors argue, destination would be much easier to identify than source, or even residence.

The arguments in favour of a destination-based tax are indeed convincing. In a globalised economy, countries of destination do seem to have both: substantive jurisdiction, i.e. the legitimacy to impose tax, a connection between the subject matter being taxed and the nation imposing the tax; and enforcement jurisdiction, i.e. the practical and effective means of collecting tax.³⁶ The question however would be, how would destination be identified under a destination-based tax? In short, allocation of taxing rights would have to be based in principles similar to those applied today under a consumption-type VAT:³⁷ a place of supply rules type system, which would use proxies in order to determinate the place of destination.³⁸ The risk, of course, is that application of such a system will also result in the same difficulties which currently arise from the application of the place of supply rules under the current European VAT, as described below.

III. ALLOCATION OF TAXING RIGHTS IN EUROPEAN VAT

1. Place of Supply System

Despite their central role within the European VAT system, the place of supply rules remained almost unaltered until the introduction of the so-called transitional system.³⁹ The system arose in the context of the European Commission's attempts in the 1980s to radically

³⁵ See paper by A. Auerbach, M. Devereux and H. Simpson, n. 32 above. Further developments on the characteristics of the destination-based tax are expected soon with a forthcoming paper by A. Auerbach and M. Devereux, entitled "Properties of Destination-Based Corporation Taxes" to be presented at the Annual Summer Symposium held by the Oxford University Centre for Business Taxation, on July 2009.

³⁶ The distinction between substantive and enforcement jurisdictions is proposed by W. Hellerstein, see "Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective" (2003) *Georgia Law Review* 38(1), 1-69, at 3-4; see also R. Millar, "Source and Residence: do they have counterparts in VAT jurisdiction rules?", Chapter [...] in this volume.

³⁷ As acknowledged by A. Auerbach, M. Devereux and H. Simpson, n. 32 above. In this regard, it is note worthy that, in economic terms, the dividing line between consumption and income taxes is rather thin.

³⁸ The inevitability of having to use proxies in this context is acknowledged by R. Avi-Yonah, see n. 29 above, at 1671-672.

³⁹ The exception being the amendments introduced to former Article 9 in respect of the hiring out of movable tangible property by the Tenth Council Directive 84/386/EEC of 31 July 1984, OJ L208, 03/08/1984, 58.

alter the rules applicable to intra-Community sales of goods, making them subject to what it designated as the principle of origin.⁴⁰ The move ultimately failed to obtain political approval, and in practice although, the introduction of the transitional system entailed some amendments to the existing rules,⁴¹ ultimately the main changes resulted from the need to introduce simplification measures to an otherwise increasingly complex place of supply system.⁴² In the last ten years however several amendments have been introduced to the place of supply of services' rules – Articles 43 to 59 EC VAT Directive – reflecting primarily the need to adapt VAT rules to the emergence of new technologies. The first wave of amendments dealt with specific types of services. This was the case with the rules regarding the place of supply of telecommunication services,⁴³ of radio, television broadcasting services and electronically supplied services⁴⁴ and also of electricity and gas.⁴⁵ Equally, new rules regarding the place of supply of postal services have been proposed by the Commission.⁴⁶ More important, however, was the approval in February 2008, as part of the so-called VAT package, of new general rules for place of supply of services.⁴⁷

Despite these consecutive amendments, the general rule which has been amended is that applicable to services supplied on Business to Business (B2B) transactions has been amended: from January 2010 onwards the place of supply for these transactions will be deemed to be the place where the recipient of services is established (Article 44 EC VAT

⁴⁰ Whether the Commission's proposals at the time actually constituted a genuine move to origin-based taxation is a more dubious matter. Within VAT the principle of origin is usually taken to mean that the total amount of VAT paid is determined by the rate levied in the jurisdiction of its origin, and the aggregate revenue goes to the country of origin, see L. Ebrill et al, *The Modern VAT* (Washington D.C.: International Monetary Fund, 2001), at 176 et seq; see also K. Messere, "Consumption Tax Rules" (1994) *Bulletin for International Bureau of Fiscal Documentation* 12, 665-681, a 665. Yet, under the Commission's proposals only collection would be made at the Member State of origin, whilst the revenue would be channelled to the Member State of destination under a clearing-house mechanism. The proposal would therefore respect the principle of VAT as a tax on consumption: revenue accrual would continue to reflect consumption patterns.

⁴¹ Mostly to accommodate the new concepts of intra-Community acquisition and intra-Community supply, amendments were introduced to Articles 28b and Article 8 of the Sixth Directive by Council Directive 91/680/EEC of 16 December 1991, OJ L376, 31/12/1991, 1, known as the Abolition of Fiscal Frontiers Directive. For an analysis of the transitional VAT system, and the process which resulted in its approval, see R. de la Feria, *The EU VAT System and the Internal Market* (Amsterdam: IBFD, 2009), at Chapter 2.

⁴² Considerable amendments to former Articles 8 and 28b were introduced by Council Directive 92/111/EEC of 14 December 1992, OJ L384, 30/12/1992, 47, known as the First *Nettoyage* Directive, regarding triangular operations; and Council Directive 95/7/EC, of 10 April 1995, OJ L102, 05/05/1995, 18, known as the Second *Nettoyage* Directive, intended to simplify arrangements applicable to chain transactions.

⁴³ Council Directive 1999/59/EC of 17 May 1999, OJ L162, 26/06/1999, 63.

⁴⁴ Council Directive 2002/38/EC of 7 May 2002, OJ L128, 15/05/2002, 41.

⁴⁵ Council Directive 2003/92/EC of 7 October 2003, OJ L260, 11/10/2003, 8.

⁴⁶ See *Proposal for a Council Directive amending Directive 77/388/EEC as regards Value Added Tax on services provided in the postal sector*, COM(2003) 234 final of 5 May 2003; and *Amended proposal for a Council Directive amending Directive 77/388/EEC as regards value added tax on services provided in the postal sector*, COM(2004) 468 final, 8 July 2004.

⁴⁷ Council Directive 2008/8/EC of 12 February 2008, OJ L44, 20/02/2008, 11-22.

Directive). Other general place of supply rules have not been altered since the entry into force of the Sixth Directive: where the goods are not dispatched or transported, the place of supply of goods is where the goods are located at the time the supply takes place (Article 31 EC VAT Directive);⁴⁸ where the goods are dispatched or transported, the place of supply of goods is where the goods are when dispatch or transport ends (Article 40 EC VAT Directive);⁴⁹ and, the place of supply of services on B2C transactions is the place where the supplier has established his business or has a fixed establishment from which the service is supplied (currently Article 43, after January 2010, Article 45 EC VAT Directive).⁵⁰ What has dramatically changed is the quantity of exceptions to these basic rules.

In 1996 the Commission reported the existence within the Sixth Directive of twenty-five different rules for determining the place of supply of goods or services.⁵¹ Since then, the introduction of new rules for telecommunications, radio broadcasting, television broadcasting, electronically supplied services, electricity and gas and the VAT package as probably increased the number of rules to over forty.⁵² This quantitative increase in the number of rules reflects the reality of an extremely complex place of supply system. Table 1 contains a summary of the place of supply rules currently in force.⁵³ In practice, the place of supply, and thus the applicable taxing rules, may depend on a range of factors, as follows: the place at which the supplier and the person acquiring the goods / services are established; the tax status of the person acquiring the goods / services, and where it is a taxable person, its respective VAT identification number, and the value of supplies undertaken during that year; where it is a supply of services, the nature of the services supplied and, since the approval of Directive 2008/8/EC, the time at which the services was supplied; and, where it is a supply of goods, the location of the goods at the time of supply, whether it involves transfer of goods, and the conditions of that supply.

⁴⁸ Former Article 8(1)(b) of the Sixth Directive.

⁴⁹ Former Article 8(1)(a) of the Sixth Directive.

⁵⁰ Former Article 9(1) of the Sixth Directive.

⁵¹ See *A common system of VAT – A programme for the Single Market*, COM(96) 328 final, 22 July 1996, at 9.

⁵² It is interesting to note that when the new rules regarding radio and television broadcasting and electronically supplied services were approved, it was announced that these amendments would be the last individual amendments to Article 9 Sixth Directive before a more general and thorough review of the rules governing the place of supply of services in totality, Directive 2002/38/EC of 7 May 2002, OJ L 128, 15/05/2002, 41, also known as the E-Commerce Directive. However, “increasing liberalization of the gas and electricity distribution sector led to an urgent need for a review of the current VAT rules”, and the vow was broken, in *Proposal for a Council Directive Amending Directive 77/388/EEC as regards the rules on the place of supply of electricity and gas*, COM(2002) 688 final, 5 December 2002.

⁵³ See also R. Laires, *A Incidência e os Critérios de Territorialidade do IVA* (Coimbra: Almedina, 2008); and as regards place of supply of services’ rules, C. Celorico Palma, “As regras de localização das prestações de serviços em sede do Imposto sobre o Valor Acrescentado” in C. Celorico Palma (ed.), *Estudos de Imposto sobre o Valor Acrescentado* (Coimbra: Almedina, 2006), 219-244.

2. Place Where the Supply is Effectively Carried Out (PWSECO)

As Table 1 highlights, the PWSECO is often used as an allocation rule, insofar as supplies of goods are concerned. However, whilst it should in principle operate as an allocation rule for all supplies of goods, under the destination principle, in practice the European legislator has opted to exclude some of transactions from this general allocation rule primarily for practical reasons. This is particular the case when the acquirer of the goods is a non-taxable person (either an individual or a legal person).⁵⁴

On the contrary, as regards supplies of services, the PWSECO is a special allocation rule, only applicable to an exhaustive list of services set out in the EC VAT Directive. Under the Directive the PWSECO will operate as an allocation rule for the following services: transport, other than intra-Community transport of goods [Article 46]; cultural, artistic, sporting, scientific, educational, entertainment or similar activities [Article 52(a)]; ancillary transport activities, such as loading, unloading, handling and similar activities [Article 52(b)]; valuations of movable tangible property or work on such property [Article 52(c)]. Following the amendments introduced by Directive 2008/8/EC, from January 2010 onwards some of these services will be removed from this list, whilst others will be added on, as follows: the place of supply of cultural, artistic, sporting, scientific, educational, entertainment or similar activities, other than admissions, where supplied to taxable persons, will be the place where the recipient of the service is established [new Article 44]; the place of supply ancillary transport activities, such as loading, unloading, handling and similar activities, where supplied to taxable persons, will be deemed to be the place where the acquirer of the services has established his business or has a fixed establishment from which the service is supplied [new Article 44]; similarly, the place of supply of valuation or work on movable tangible property to taxable persons, will be deemed to be the place where the acquirer of the services has established his business or has a fixed establishment from which the service is supplied [new Article 44]; on the contrary, the supply of restaurant and catering services, other than those carried out on board ships, aircrafts or trains during passenger transport, will be deemed to be the PWSECO [new Article 55]; equally, the short-term hiring of means of transport will be taxed in the PWSECO [new Article 56]. In addition, from 2013 onwards the place of supply of the long-term hiring of pleasure boats to non-taxable persons will also be deemed to be the PWSECO [new Article 56(2)].

When should these provisions be applied? The interconnection between the current general rule in Article 43 and the rules applicable to specific services listed in Articles 45, 46, 52, 56 and 57 has given rise to significant controversy. The problem lies in whether the rules

⁵⁴ See also R. Millar, "Jurisdictional Reach of VAT" in R. Krever (ed.), *VAT in Africa* (Pretoria: Pretoria University Press, 2008), 175-214, at 185 et seq.

contained in Articles 45, 46, 52, 56 and 57 should or should not be regarded as exceptions to the general rule in Article 43, and as such interpreted restrictively. The Court referred for the first time to the relationship between this set of rules in *Berkholz*, when it stated that: “[Articles 45, 46, 52, 56 and 57] set out a number of specific instances of places where certain services are deemed to be supplied, whilst [Article 43] lays down the general rule on the matter.”⁵⁵ However, it was not until *Trans Tirreno* that the Court gave more specific guidance as to interconnection between the rules in Articles 45, 46, 52, 56 and 57 and the main rule in Article 43.⁵⁶ The case concerned the interpretation of what is now Article 46 EC VAT Directive. The Court stated in that case that:

“[Article 43] by way of derogation from the strict principle of territoriality, lays down the general rule that the service is deemed to be supplied at the place where the supplier has established his business or has a fixed establishment from which the service is supplied.

[Articles 45, 46, 52, 56 and 57 provide] for certain derogations from that general rule for specific services where the fiction that the services are supplied at the supplier’s place of business is inappropriate and it lays down other criteria defining the place at which those services are deemed to be supplied.”⁵⁷

The Court’s ruling did not totally clarify matters, as it failed to provide any guidance as to the interpretative consequences of qualifying Articles 45, 46, 52, 56 and 57 rules as “derogations” and “exceptions”: the questions of whether Article 43 took interpretative precedent over Articles 45, 46, 52, 56 and 57, and whether those Articles’ rules were to be interpreted restrictively remained unanswered.

Some years latter the Court delivered its judgment in *Hamann*,⁵⁸ which concerned the interpretation of the former Article 9(2)(d) Sixth Directive, now revoked.⁵⁹ The issue in that case was whether the hiring out of sailing yachts was to be regarded as the hiring out of movable tangible property – and thus subject to Article 9(2)(d) – or whether these yachts should be considered as means of transport, and therefore falling within the scope of what is now Article 43.⁶⁰ The Court started by reiterating the position already expressed in *Trans Tirreno*, “[Articles 45, 46, 52, 56 and 57 of the CVSD lay] down a number of exceptions to this general rule [Article 43]”.⁶¹ It then went on to conclude that:

⁵⁵ Case 168/84, *Berkholz*, [1985] ECR 2251, at paragraph 14.

⁵⁶ Case 283/84, *Trans Tirreno*, [1986] ECR 231.

⁵⁷ *Id* at paragraphs 15-16.

⁵⁸ Case 51/88, *Hamann*, [1989] ECR 767.

⁵⁹ This rule was deleted by the Tenth Council Directive 84/386/EEC of 31 July 1984, OJ L 208, 03/08/1984, 58.

⁶⁰ Interestingly, the new Directive 2008/8/EC includes special rules for hiring out of pleasure boats, see above and at Table 1.

⁶¹ Case 51/88, *Hamann*, [1989] ECR 767, at paragraph 12.

“In view of the reasons for the exclusion of all forms of transport from the exception laid down in Article 9(2)(d) of the Sixth Directive and the fact that exceptions to the general rule laid down by the [Directive] must be interpreted narrowly, ocean-going sailing yachts, even if used by the hirers for sporting purposes, must thus be regarded as forms of transport within the meaning of the aforesaid provision of the [Directive].”⁶²

This passage of the ruling seems to indicate that the Court considers Articles 45, 46, 52, 56 and 57 – former Article 9(2) rules – to constitute exceptions to the main rule in Article 43, and as such to be interpreted strictly. However, this reading of the Court’s ruling is not without controversy. According to Advocate-General Fennelly the Court of Justice’s ruling in *Hamann* provided “no intimation of the priority, as a matter of interpretative principle, of the first paragraph over the second.”⁶³ The Advocate-General’s reading of the Court’s ruling in *Hamann* reflected the need for clear and final guidance from the Court in relation to the interconnection between Articles 45, 46, 52, 56 and 57 and Article 43. This was finally provided in *Dudda*, which concerned the interpretation of what is now Article 52 EC VAT Directive.⁶⁴

The question referred to the Court in *Dudda* was whether the sound-engineering services supplied by Mr. Dudda should be regarded as “cultural, artistic, entertainment or similar services” within the meaning of Article 52, or whether they should be deemed to fall within the scope of the general rule set out in Article 43. At the hearing, the German Government referred to the legislative history of former Article 9 of the Sixth Directive, now Articles 43, 45, 46, 52, 56 and 57 EC VAT Directive, and to the rulings in *Trans Tirreno* and *Berkholz* to defend that Articles 45, 46, 52, 56 and 57 constituted derogations to the general rule in Article 43 and as such should be interpreted strictly. The Commission took an opposite approach arguing that Articles 43 on one hand, and 45, 46, 52, 56 and 57 on the other, should not be seen as setting out a general rule subject to specific exceptions. They had a shared objective: to specify the place of supply of services. Articles 45, 46, 52, 56 and 57 should therefore be seen as providing a *lex specialis* in respect of the various specialised services to which it applies, with Article 43 providing for a residual *lex generalis*. Thus, a deliberate policy of reading Articles 45, 46, 52, 56 and 57 in a restrictive fashion would be a mistake. The Court, following the opinion of Advocate-General Fennelly, agreed with the Commission, stating:

“[T]he Court has already held that [Articles 45, 46, 52, 56 and 57 set] out a number of specific instances of places where certain services are deemed to be supplied, whereas [Article 43] lays down the general rule on the matter [...]. It follows that, when [those

⁶² Id at paragraph 19.

⁶³ Case, C-327/94, *Dudda*, [1996] ECR I-4595, Advocate-General Fennelly Opinion, at paragraph 28.

⁶⁴ Case C-327/94, *Dudda*, [1996] ECR I-4595.

Articles are] interpreted, [Article 43] in no way takes precedent over [Articles 45, 46, 52, 56 and 57]. In every situation, the question which arises is whether it is covered by one of the instances mentioned in [Articles 45, 46, 52, 56 and 57]; if not, it falls within the scope of [Article 43]. Accordingly, it is necessary to determine the scope of [Articles 45, 46, 52, 56 and 57] in the light of its purpose...”⁶⁵

Following the Court’s ruling in *Dudda*, it seems that the controversy surrounding the interconnection between Articles 45, 46, 52, 56 and 57 and Article 43 EC VAT Directive has been settled. Thus, the PWSECO as an allocation rule, as set out in Articles 46 and 52, should be regarded as *lex specialis*, which must therefore be interpreted not narrowly but rather in light of their objectives. This approach has been confirmed by the Court in latter cases.⁶⁶

3. Limitations of Place of Supply Rules

The effectiveness of the European place of supply rules can be evaluated from two different perspectives, namely from the perspective of the overall place of supply system, as well as from the perspective of the effectiveness of individual place of supply rules, such as the PWSECO rule. On both cases, however, effectiveness should be assessed in similar fashion, namely through answers to two fundamental questions: do the system / individual rules accomplish the aim they set out to achieve, i.e. do they ensure that taxation takes place at the country of consumption? And even if this is the case, what are the collateral costs?

3.1 Ineffective Proxies

As a whole place of supply goods rules, guided by the principle of destination, usually ensure that taxation does indeed takes place in the country of consumption. The same, however, cannot be said as regards place of supply of services rules. The first difficulty that arises is with the current general place of supply rule. As discussed above this rule establishes that the place of supply is deemed to be the place where the supplier has its fixed establishment. As recognised by the Commission:

“Since work first started in the 1960s on the introduction of a common VAT system in the Community, the view has been that taxation of services should take place in the Member State of consumption. However, during discussions on the Sixth Directive it was recognised that systematically defining the place of consumption as the place of taxation could lead to some serious practical problems. As a result, it was decided that the basic rule for the place of supply of services – and therefore the place of taxation – is where the

⁶⁵ Id at paragraphs 20-22.

⁶⁶ See for example case C-429/97, *Commission v France*, [2001] ECR I-637, at paragraph 41.

supplier is located. For any service to be taxed anywhere else it must explicitly be excluded from the basic rule.

At the time, to a very large degree, these rules in fact resulted in the tax accruing to the country of consumption. However, the realities of the Internal Market, globalisation, deregulation and technological progression have all combined to create enormous changes in the volume and pattern of trade in services. It is increasingly possible for a number of services to be supplied at a distance.”⁶⁷

This conceptual limitation has also been acknowledged, albeit in indirect terms, by Advocate-General Poiares Maduro in *RAL*. He argued in that case for the application of what is currently Article 58(c) EC VAT Directive, instead of Article 43, on the basis of the principle of VAT as a tax on consumption:

“I see clear advantages militating in favour of the application of [Article 58(c)] to the present case. The services described in that article are subject to the connection factor of the place where they are provided, precisely because that place can without difficulty be physically identified and will coincide with the place of consumption. The application of the connecting factor of the place where the activities are carried out is, moreover, far more in conformity with the general principle that VAT should be charged at the place of consumption”⁶⁸

Therefore, application of the general rule for place of supply of services does not necessarily result in taxation in the country of consumption, and consequently taxation of services under the current VAT system does not follow the pattern of consumption of those same services. This will necessarily have an impact upon the allocation of revenues amongst Member States: Member States which are net importers of services may therefore feel defrauded in terms of revenue, as they are not entitled to tax consumption which takes place within their territory. The recently approved legislation on place of supply of services is aimed at addressing this problem, at least insofar as B2B transactions are concerned.⁶⁹ In fact, one of the principal features of the new legislation on place of supply of services is the amendment of the main place of supply of services rule on B2B transactions to “the place where the customer is established”, which would in practice “ensure the general principle of taxation at the place of

⁶⁷ In *Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services*, COM(2003) 822 final, 23 December 2003, at 2.

⁶⁸ Case C-452/03, *RAL*, [2005] ECR I-3947, at paragraph 30.

⁶⁹ Council Directive 2008/8/EC of 12 February 2008, OJ L44, 20/02/2008, 11-22. Referring to the initial legislative proposal, Commissioner for Taxation Laszlo Kovacs, commented “the economic potential of telecom services, broadcasting, and e-services makes it imperative to ensure that the VAT revenues from such services accrue to the Member State where those services are consumed. This proposal is designed to ensure that Member States are better able to collect VAT in services consumed by their residents”, see *VAT: Commission proposes changes to taxation rules for services supplied to private consumers*, IP/05/997, 20 July 2005.

consumption”⁷⁰. Yet, it is important to acknowledge that by their own nature, patterns of consumption for services are difficult to establish: the place where the acquirer of the services is established is not necessarily the place of consumption. Moreover, despite the Commission’s initial efforts, even after the entry into force of the new legislation conceptual limitations will still remain for B2C transactions, as for those transactions the current general rule will continue to apply.⁷¹

So, place of supply of services rules are to some extent ineffective proxies. On the contrary, the application of PWSECO rules to supplies of goods, and to a limited extent to supplies of services, guided by the principle of destination, usually ensure that taxation does indeed take place in the country of consumption. Yet, despite the success of these rules in achieving their aims as allocation rules within the framework of VAT, i.e. in ensuring taxation at the country of consumption, the question is: do they give rise to significant collateral costs?

3.2 Complexity and Proxy Chains

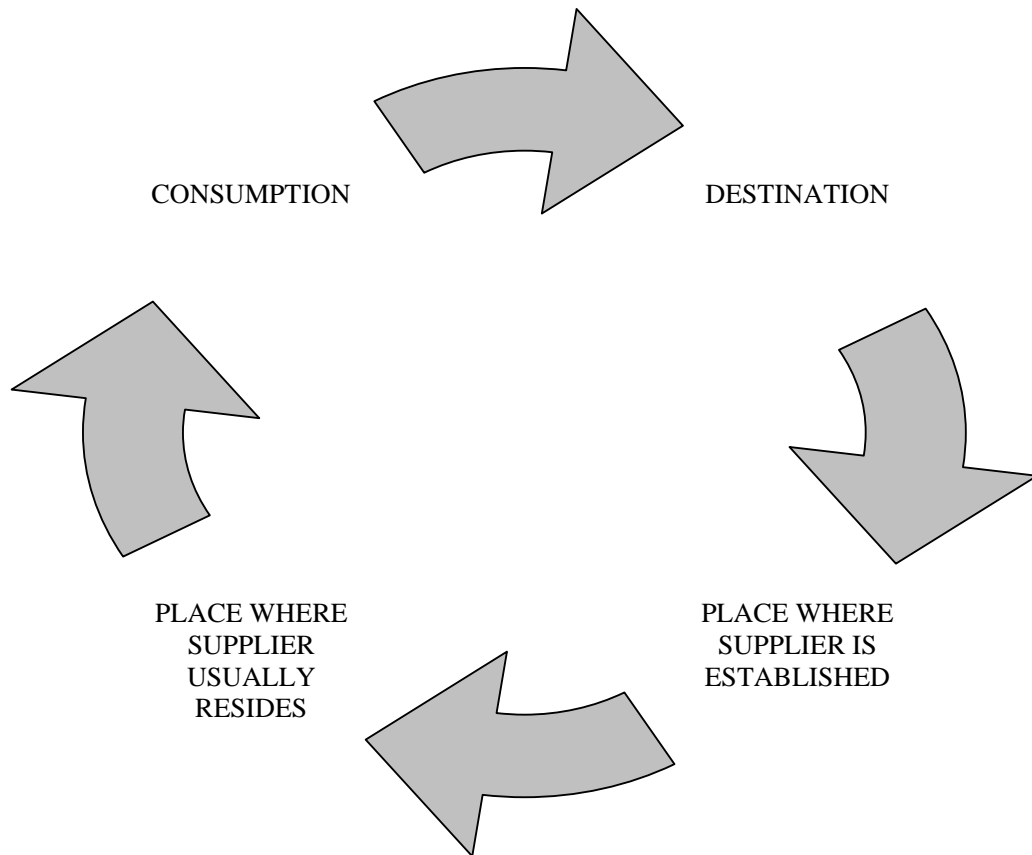
When considering the collateral costs of the place of supply system as a whole the main focus is unavoidably its complexity.⁷² In practice, companies engaging in intra-community trade experience serious difficulties in determining whether they are the entity liable to pay tax, and, if so, in which Member State. The problem is grave in the case of supplies of goods, but it is even more severe in the case of supplies of services,⁷³ largely due to what can be designated as proxy chains: VAT should be taxed on the country of consumption, so taxation at the country of destination is a proxy for the country of consumption; taxation at the place of where supplier is established is in turn a proxy for destination; taxation at the place where the supplier usually resides can then be a proxy for the place where the supplier is established; and so on, as exemplified in the diagram below. Establishing the place of supply of a specific transaction may be dependent on a chain of proxies – how many links the chain will be composed of will depend on the circumstances of the supply of goods or services.

⁷⁰ *Amended Proposal for Council Directive amending Directive 77/388/EEC as regards the place of supply of services*, COM(2005) 334 final, 20 July 2005, at 6.

⁷¹ See *VAT – The Place of Supply of Services to Non-Taxable Persons*, Summary Report on the outcome of the public consultation from DG TAXUD, 30 May 2005, at 6-7.

⁷² This complexity is well illustrated in B. Terra’s examples, see “VAT in the EEC: The place of supply” (1989) *Common Market Law Review* 26, 449-473, at 464.

⁷³ It was an acknowledgement of this complexity which led the Commission to launch in May 2003 a public consultation on place of supply of services, see *VAT – The Place of Supply of Services*, Consultation Paper, TAXUD/C3/2357, May 2003. The results of this consultation can be credited as having motivated the Commission to present the proposal to amend the place of supply of services rules, see *Summary Report on the outcome of the TAXUD Consultation [May-June 2003]: VAT – The Place of Supply of services*, TAXUD/C3/2357, 12 September 2003.

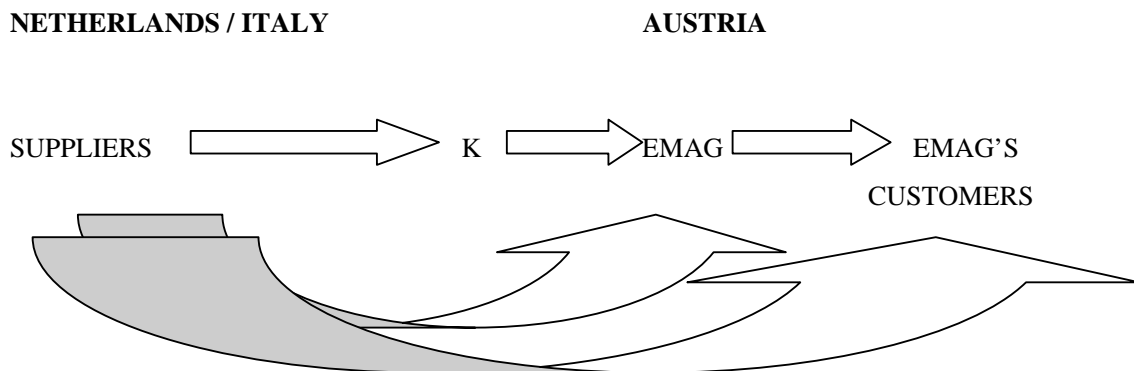


From the perspective of specific allocation rules, and namely PWSECO rules, despite the apparent simplicity, their application both within the context of supplies of goods, and within the context of supplies of services, is in practice far from simple. Insofar as supplies of goods are concerned, application of PWSECO rules within may depend on a range of factors: the place at which the supplier and the person acquiring the goods are established; the tax status of the person acquiring the goods, and where it is a taxable person, its respective VAT identification number, and the value of supplies undertaken during that year; and, where it is a supply of goods, the location of the goods at the time of supply, whether it involves transfer of goods, and the conditions of that supply.

This complexity has more than one negative consequence. The most obvious, and also most relevant, is the increase in compliance costs. Determining the applicable place of supply rule can be time-consuming, separating between supplies subject to different rules even more so. In many cases the assistance of a professional tax adviser is unavoidable. This economic burden is undoubtedly an obstacle to intra-Community trade and can potentially act as a deterrent, most notably in the case of SMEs. It also signifies that VAT considerations will impact on traders' decisions, which might have a distortive impact on competition. Another negative consequence of the system's complexity is the scope it provides for differing interpretations and applications of the rules by tax administrations.

The most evident effect of this difference is the possible creation of situations of non-taxation or, more commonly, of double-taxation.⁷⁴ These situations should be avoided, at least in relation to the supply of services, through the application of Article 58 EC VAT Directive, also known as the use and enjoyment clause, which is not without difficulties itself.⁷⁵ The same cannot be said, however, as regards supplies of goods, as the recent *EMAG* case well demonstrates.⁷⁶

EMAG concerned a chain of transactions, which operated as follows: suppliers of non-ferrous metal established in either the Netherlands or Italy, sold the metal to K; K, which is established in Austria, then sold the metal to EMAG; it is not disputed that EMAG did not know who the suppliers of K were; after each transaction was concluded, K instructed its suppliers to hand over those goods to a forwarding agent it had engaged to deliver those goods directly either to EMAG or to EMAG's customers, both in Austria. In practice therefore there were up to three transactions – sometimes only two, as the chain did not always involve EMAG's customers – but only one movement of goods. Although the factual circumstances of the case are rather complex, they can be briefly summarised in the following diagram.



The main question referred to the Court of Justice was essentially what VAT treatment should be attributed to the second supply, i.e. had there been two successive exempted intra-

⁷⁴ In 1989 *B. Terra* defended that examples of double taxation or non-taxation were abundant, see n. 72 above, at 465. See also chapters in this volume by T. Kardach and Z. Kukulski; E. Traversa and C.A. Helleputte; and R. Millar.

⁷⁵ The results of the Commission's consultation on the place of supply of services showed that the rule is viewed with suspicion and a number of respondents expressed their wish to see the clause reviewed. Firstly, because there is a concern about the frequency of the use of this clause, overriding the general rules; secondly, as the concept of use and enjoyment is not defined, it results in uncertainty and the potential for double taxation, see *TAXUD/C3/2357*, n. 41 above, at 6.

⁷⁶ Case C-245/04, *EMAG*, [2006] ECR I-3227. Whilst until 2004 there were no decisions from the Court of Justice as regards the interpretation of place of supply of goods rules, since 2005, and for no apparent reason, there have been three new rulings by: *Kohler*, decided in 2005, which deals with supply of goods on board cruises, case C-58/04, [2005] ECR I-8219; *EMAG* decided in 2006; and *Aktiebolaget*, decided in March 2007, which concerns the installation of telecommunications cables across different Member States, case C-111/05, [2007] ECR I-2697.⁷⁶

Community supplies of goods, or merely one, and if there had been only which should the supply be deemed to have taken place. The Court started by making lengthy considerations on the rationale and ethos of the transitional system. It then goes on to state that the two successive supplies could only be regarded as being both exempt if the single intra-Community movement of goods were ascribed to both supplies equally. The Court goes on to explain what would be the consequences of such a ruling, to conclude that:

“Such a supply chain would be both illogical and contrary to the scheme of the transitional arrangements for the taxation of trade between Member States. [...]

[Thus] where two successive supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax”⁷⁷

Thus, only one of the transactions in the chain can be regarded as an intra-Community supply of goods. The Court pointed out that if the movement of goods could only be attributed to one of the transactions, then only the place of supply of that transaction would be determined in accordance with Article 32 EC VAT Directive, and thus deemed to be in the Member State of the departure of the dispatch or transport of the goods. However, for the other transaction, as no movement of goods can be attributed to it, Article 32 could not apply. Thus, according to the Court, the place of supply should be deemed to be the place where the goods are when that supply takes place, as per Article 31 EC VAT Directive.

It is interesting to note that in its ruling the Court did not actually choose which of the successive transactions should be regarded as intra-Community, and which should be regarded as internal. On the case, it did not matter as the national court had already decided that the first transaction between the suppliers and Z was an intra-Community transaction, and the question referred to the Court concerned solely the treatment of the second transaction. Thus, the Court did not have to make a choice in this occasion, but that of course will not always be the case. In practice, the ruling does not respond to all the questions raised by chain transactions, and it highlights the weaknesses not only of the current place of supply of goods rules, but equally of the transitional VAT system. Yet, the circumstances of the case in EMAG are in practice quite frequent, thus future cases can easily be envisaged where the Court will be specifically asked which of the transactions involved in a chain, should be given the intra-Community status, which ones should be regarded as internal, and what should be the criteria for choosing.

⁷⁷ Id at paragraphs 37 and 45.

It is also worthy of notice that this interpretative subjectivity has also the potential to violate the principle of fiscal neutrality, as defined by the Court of Justice;⁷⁸ as well as distorting competition, as some tax administrations may be more flexible and understanding than others, thus giving traders established in those Member States an unfair advantage.

3.3 Qualification Problems

Directly related to the difficulties of interpretative subjectivity described above, are those of a qualification nature: how to determine which rule applies to a specific supply of goods or services? The problem seems to be more dramatic in relation to the supplies of services, as several place of supply of services rules are dependent on the nature of the service. However, it is also relevant as regards the place of supply of goods rules which are dependent not only on the location of the goods, but also the taxable status of the recipient of the supply, and the conditions of that supply.

The difficulties determining the exact nature of services were highlighted in the results of the Commission's consultation on the place of supply of services. According to the Commission's report a number of respondents complained that for some services, namely composite or bundled services, it was difficult to determine the nature of the service. For other services, notably leasing, advertising, repair of services and forms of transport, it was suggested that a common definition would help clarify the application of a provision. Equally demonstrative of the qualification problems posed by the place of supply of services rules is the number of consultations on this matter to the VAT Committee,⁷⁹ as well as the number of decisions from the Court of Justice which focus on the qualification of services under Articles 43 to 59 EC VAT Directive:⁸⁰

RAL is well demonstrative of the type of difficulties which the system faces: PWSECO being *lex specialis* the main problem resides in whether to apply it, or the *lex generalis* for place of

⁷⁸ The Court of Justice has consistently ruled that the fiscal neutrality principle precludes similar activities from being treated differently as far as the levying of VAT is concerned. See as regards the scope of VAT, cases 286/86, *Happy Family*, [1988] ECR 3655, C-111/92, *Lange*, [1993] ECR I-4677, and C-283/95, *Fischer*, [1998] ECR I-3369; as regards application of reduced rates, cases C-481/98, *Commission v France*, [2001] ECR I-3369, C-109/02, *Commission v Germany*, [2004] ECR I-12691, and C-309/06, *Marks & Spencer II*, Judgment of 10 March 2008; and as regards exemptions case C-216/97, *Gregg*, [1999] ECR I-4947. See also papers presented at this conference by G. Alarcon Garcia and D. Rueda Cruz; B. Kolozs; D. Nerudova and J. Siroky; and R. Bufon and A. Opre.

⁷⁹ Some decisions of the VAT Committee were recently included in a Regulation laying down implementing measures for the EC VAT Directive, see Council Regulation (EC) No. 1777/2005 of 17 October 2005, OJ L288, 29/10/2005, 1. The Regulation contains several provisions on the qualification of services for the purposes of Articles 43 to 59, therefore highlighting that this was one of the areas in relation to which the advice of the VAT Committee was most sought.

⁸⁰ See in particular the following: For an analysis of the referred cases concerning the definition of cultural and similar services for the purposes of Article 52, see above.

supply of services, to each specific type of service.⁸¹ However, many others cases can be cited as examples: *Lipjes*, as regards the definition of intermediary services for the purposes of Article 44;⁸² *Heger*, as regards the definition of services relating to immovable property for the purposes of Article 45;⁸³ *Dudda*, *RAL*, and *Gillian Beach*, as regards the definition of cultural and similar services for the purposes of Article 52;⁸⁴ *Commission v France*, *Commission v Luxembourg*, and *Commission v Spain*, as regards the definition of advertising services for the purposes of Article 56;⁸⁵ and, *von Hoffman*, *Levob*, and *Commission v Germany*, as regards consultancy and similar services.⁸⁶ Surprisingly, although tellingly, some of the respondents to the Commission’s consultation considered the jurisprudence on such matters to be troublesome. In practice, therefore, it appears that the Court has ultimately failed to settle the qualification problems arising from the application of the place of supply of services provisions. Such problems give rise to a climate of legal uncertainty, which can prove to be extremely expensive, for both businesses and tax administrations alike.

3.4 Compliance Effects

It can be argued that there are two collateral compliance effects to the current place of supply system as a whole: first, the need to make use of foreign VAT reclaim procedures; and second, the need for multiple VAT registrations. As regards the first point, the application of many of the current place of supply rules – both applicable to goods and services – often results in taxable persons (established within or without the Community) incurring VAT in a Member State where they are not established, and thus the right to deduct has to be exercised under the Eighth or Thirteenth Directive procedures.⁸⁷ The problem, however, it is that the refund procedures under those directives are both complicated and costly. Indirectly therefore, the need to resort to VAT refund claims under the Eighth and Thirteenth Directives constitutes yet another problem arising from the application of the place of supply rules. The Commission acknowledges the problem:

“A general problem that arises from [Article 43 of the CVSD] is the obligation for taxable persons who receive a service but not established in the same country as the supplier of the service, to ask for a refund under the Eighth or Thirteenth Directives. The refund

⁸¹ For a detailed analysis see R. de la Feria, “‘GAME OVER’ for Aggressive VAT Planning?: *RAL v Commissioners of Customs & Excise*” (2005) *British Tax Review* 4, 394-401.

⁸² Case C-68/03, *Lipjes*, [2004] ECR I-5879.

⁸³ Case C-166/05, *Heger*, [2006] ECR I-7749.

⁸⁴ Cases C-327/94, *Dudda*, [1996] ECR I-4595; C-452/03, *RAL*, [2005] ECR I-3947; and C-114/05, *Gillian Beach*, [2006] ECR I-2427, respectively.

⁸⁵ Cases C-68/92, *Commission v France*, [1993] ECR I-588; C-69/92, *Commission v Luxembourg*, [1993] ECR I-5907; and C-73/92, *Commission v Spain*, [1993] ECR I-5997, respectively.

⁸⁶ Cases C-145/96, *von Hoffman*, [1997] ECR I-4857; C-41/04, *Levob*, [2005] ECR I-9433; and C-401/06, *Commission v Germany*, [2007] ECR I-11295.

⁸⁷ Eighth Council Directive 79/1072/EEC of 6 December 1979, OJ L331, 27/12/1979, 11; and Thirteenth Council Directive 86/560/EEC of 17 November 1986, OJ L326, 21/11/1986, 40.

procedure can be complicated and time-consuming. In order to avoid this procedure, there is often a tendency to inappropriately use the reverse charge mechanism.”⁸⁸

The source of the problem is evidently more to do with the Eighth and Thirteenth Directive procedures themselves than the place of supply rules. Moreover, from 2010 onwards the Eighth Directive will be repealed by Council Directive 2008/9/EC of 12 February 2008, which will allow traders to submit refund applications in electronic form to the Member State where they are established, thus facilitating the refund process.⁸⁹ However, it is worthy of notice that traders view the obligation of using these procedures as one of the main problems caused by place of supply rules.⁹⁰

The second collateral compliance effect is a need for multiple VAT registrations: in some instances the place of supply rules may give rise to the obligation for traders to register for VAT purposes in more than one Member State. The typical case is that of a service provider which supplies services which do not fall within the scope of the general rule, and thus is deemed to have taken place in a Member State other than the one where it is established. According to recent estimates from the Commission based on information received from Member States there are currently 250,000 VAT registrations in the European Union which relate to traders established in other Member States.⁹¹ For many businesses this can prove to be administratively onerous, especially where they carry out activities in several Member States.⁹²

In addition to the above, further compliance obligations are present in the case of intra-Community supplies of goods. Whilst these obligations have been an inherent part of the application PWSECO rules to goods as a means of statistical and fraud control, they have changed significantly with the introduction of the transitional VAT system. Prior to 1992 border controls, within the Community, were the points of imposition of VAT on imports

⁸⁸ In COM(2003) 822 final, 23 December 2003, n. 57 above, at 6.

⁸⁹ OJ L44, 20/02/2008, 23-28.

⁹⁰ See n. 71 above, at 3-4. Also, symptomatic of this is the fact that in its proposal as regards the place of supply of services, the Commission argued that one of the main advantages of the proposed amendments would be the extension in practice of the use of the reverse-charge mechanism, *i.e.*, the Commission argued for the modification of place of supply rules on B2B transactions on the basis that they would minimise the use of the Eighth and Thirteenth Directives refund procedures, and thus constitute “major simplifications”, see COM(2003) 822 final, 23 December 2003, n. 57 above, at 7.

⁹¹ See *Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations*, COM(2004) 728 final, 29 October 2004, at 4.

⁹² These compliance costs are behind the Commission’s still pending proposal for a one-stop VAT scheme for non-established taxable persons. The one-stop shop scheme, which would be limited to B2C supplies, would allow a trader to register only once, in the Member State where he / she is established, and to use a single VAT number for all B2C supplies made within the scope of the scheme. The presentation of this proposal followed a favourable feedback from traders and other interested parties, which emerged from the public consultation undertaken by the Commission see: *VAT: public consultation on One-Stop-Shop project*, Press release IP/04/654, 18 May 2004; and *Consultation Paper: Simplifying VAT obligations – the one-stop system*, TAXUD/590/2004, March 2004.

from other Member States and also of collection of statistical information on intra-Community trade. The removal of internal fiscal frontiers entailed the imposition of new tax arrangements, which until recently remained almost entirely unaltered since their introduction. As a result of the latest legislative approvals as regards the Intrastat system and the administrative cooperation rules, the basic tax arrangements stand as follow. In addition to reporting intra-Community acquisitions on the domestic VAT return:

- Intra-Community acquisitions of goods have to be reported under the Intrastat system for statistical purposes – legal basis, Regulation (EC) No 638/2004 of the European Parliament and of the Council and implementing legislation;⁹³ and,
- Intra-Community supplies and acquisitions of goods have to be reported under the VIES system for control purposes – legal basis, Council Regulation (EC) No. 1798/2003 and implementing legislation.⁹⁴

The Community statistical data collection system, known as the Intrastat system, was set up in 1993 to collect intra-Community trade data in the absence of data collected at borders. Traders are required to report, usually on a monthly basis, almost all transactions whether commercial or not (information on intra-company transactions for example, has also to be reported), which lead to an intra-Community movement of goods. However, since its introduction Member States and businesses, particularly small enterprises, have experienced difficulties complying with Intrastat rules. It was in view of these difficulties, that Intrastat was chosen in 1996 as a pilot project for the SLIM initiative. The assessment that the SLIM team made of Intrastat confirmed the realities of a costly and inefficient system:

“The system is costly both to enterprises and to administrations. The statistics produced at EU level are not of sufficient quality and become available too late. Efforts have been made to overcome these problems, but all proposals for simplification are confronted with a conflict between the desire of firms to be relieved of reporting burdens and the demands of users of the statistics for detailed information.”⁹⁵

These two opposite interests were tested in *Kieffer and Thill*,⁹⁶ which did not concern the interpretation of specific provisions of that Regulation, but rather the nature of the Intrastat system itself, and namely its compatibility with the free movement of goods provisions in the

⁹³ Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004, OJ L 102, 07/04/2004, 1; and Commission Regulation (EC) No 1982/2004 of 18 November 2004 implementing Regulation (EC) No 638/2004 of the European Parliament and of the Council, OJ L 343, 19/11/2004, 3.

⁹⁴ Council Regulation (EC) No. 1798/2003 of 7 October 2003, OJ L 264, 15/10/2003, 1; and Commission Regulation (EC) No. 1925/2004 of 29 October 2004, OJ L 33, 05/11/2004, 13.

⁹⁵ In Commission of the European Communities, *The SLIM Pilot Project – Simpler Legislation for the Internal Market*, Report from the Commission, COM(96) 559, at 3.

⁹⁶ Case C-114/96, [1997] ECR I-3629.

EC Treaty. The defendants in the main proceedings, Rene Kieffer and Romain Thill, were the managers of a company operating in Luxembourg, which engaged in intra-community transactions. Having failed to submit Intrastat returns, Mr. Kieffer and Mr. Thill were charged by the Luxembourg authorities with infringing the obligation under Regulation No. 3330/91 to transmit information on imports and exports by their company. Both defendants acknowledged that the business conducted by the company they managed exceeded the simplification threshold, and that they should therefore have submitted Intrastat monthly returns. They argued, however, that to comply with this obligation they would have to either take on staff, or have the obligations carried out by third parties, incurring additional expense in either case. These additional expenses, they claimed, would have the effect of curbing, at least indirectly, their efforts to export in excess of the annual threshold and would encourage the sale of goods on the national market.

The referring court in Luxembourg considered that the detailed declaration required by Regulation No. 3330/91 did indeed constitute an additional constraint to which traders doing business in the national market alone are not subject. Moreover, it stated that the requirement to make that declaration, and the consequent increase in the obligations to be complied with by the undertakings concerned, could have a deterrent effect on small and medium-sized undertakings in Luxembourg whose activities extend beyond the national territory. In those circumstances, it considered that it should be ascertained whether such an impediment was justified from the point of view of the objectives of the Regulation and whether those objectives could not be attained by means constituting less of a constraint. Therefore, it essentially asked the Court of Justice the following: whether the obligations imposed upon traders under Regulation No. 3330/91 should be regarded as measures having equivalent effect to quantitative restrictions within the meaning of Articles 28 and 29 EC Treaty; and alternatively, whether these same obligations constitute a restraint upon traders that is unjustified and disproportionate having regard to the objective of general interest pursued, and thereby in breach of the principle of proportionality as defined in Article 5 EC Treaty.

The Court of Justice acknowledged that “it is common ground that the detailed nature of the declarations required and the fact that it is obligatory to make a declaration in both the Member State of consignment and that of destination of the goods have restrictive effects with regard to the free movement of goods”.⁹⁷ However, the Court noted that barriers to the free movement of goods may be accepted if they are essential in order to obtain reasonably complete and accurate information on movements of goods within the Community, and in this context it considered that the obligations imposed by Regulation No. 3330/91 were not

⁹⁷ Id at paragraph 28.

“measures having equivalent effect to quantitative restrictions” for the purposes of Articles 28 and 29 EC Treaty. Nor were they disproportionate:

“[W]hile the obligation to make declarations under the Regulation does specifically affect cross-frontier trade, and drawing up the declarations takes time and involves expense, particularly for small and medium-sized undertakings, it does not necessarily follow that those restrictive effects are disproportionate to the aim pursued.”⁹⁸

The Court’s ruling in this case might have resolved the controversy surrounding the Intrastat system, namely as regards its compatibility with the EC Treaty rules on the free movement of goods and the principle of proportionality. However, it did not help resolve the practical difficulties which it gives rise to, namely from the traders’ point of view. Meantime, following on from the SLIM initiative recommendations, the afore mentioned Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 was approved. For traders the main advantages of the new Regulation seem to be the following: clarity and simplicity of its rules; limitation of the scope of the Intrastat system to strictly Community statistics;⁹⁹ and simplification of the thresholds system. However, some problems remain such as the content of the data collected.¹⁰⁰ Additionally, the new Regulation grants Member States the freedom to choose the method for the collection of data, which has the potential to create serious discrepancies between the several Member States and also adds to traders’ uncertainties and, consequently, increase compliance costs. The new Regulation has only been applicable since 1 January 2005. Therefore, a more extensive period will have to pass until it can be ascertained whether it has achieved its professed aim of improving and adapting the statistical system in order to take better account of both users’ needs and the burden on information providers.

The VIES system was also set up in 1993. The abolition of customs controls and import / export documentation within the Community created the need for the establishment of another control method in order to avoid widespread VAT fraud. Under this system, taxable persons are required to report their intra-Community supplies of goods to taxable persons, including their VAT identification numbers, on recapitulative statements (normally on a quarterly basis). The same applies to taxable persons making intra-Community acquisitions of goods. The exchange of VIES data should enable tax administrations to verify if the

⁹⁸ Id at paragraph 34.

⁹⁹ However, Member States remaining free to compile more detailed national statistics to meet national needs.

¹⁰⁰ According to the Commission, the choice to maintain the content of the data to be collected is based on the results of three studies: an opinion poll of information providers in six Member States, a sample study of users of Community statistics and a study on problems with the product nomenclature in Sweden, see *Proposal for a Regulation of the European Parliament and of the Council on the statistics relating to the trading of goods between Member States*, COM(2003) 364 final, 20 June 2003, at 3.

reverse-charge mechanism has been appropriately applied, *i.e.*, if intra-Community supplies effected by each taxable person match intra-Community acquisitions by taxable persons in other Member States. The system, however, has been seen by tax administrations and traders alike as a source of significant practical problems.

For years, tax administrations have been pointing out that the overall system is susceptible to fraud.¹⁰¹ Traders, on the other hand, complain that the system is a source of practical difficulties, errors and compliance costs. The results of the consultation undertaken by the Commission regarding the place of supply of services is extremely demonstrative of the widespread view that VIES is an inefficient and costly system. On the question of whether the VIES system should be extended to (intra-Community) supplies of services, a large majority of the respondents strongly opposed the idea.¹⁰² Moreover, new measures, either already approved, or currently on the table, are expression of a move in the direction of intensifying administrative requirements in order to combat fraud, rather than loosening.¹⁰³ Whilst this is understandable from the perspective of the pressing need to deal with the problem of fraud, it also means that the difficulties caused to traders by the VIES system – namely the considerable extra compliance costs it creates – will not only remain unresolved, but are likely to increase in the coming years.

In light of the above, what should be the overall assessment of the current tax arrangements under the CVSD, Intrastat legislation, and administration cooperation legislation, under the transitional VAT system? In 1997 the Commission published a report, prepared by PriceWaterhouse, which aimed at studying the impact for traders of the abolition of customs and fiscal controls at internal Community borders and the consequent introduction of the new VAT transitional system and the Intrastat system. The report estimated that the abolition of customs and fiscal border controls had reduced the costs for intra-Community traders by approximately two-thirds. Paradoxically, however, when asked about the new system only 49% of respondents preferred the new system to the previous customs regime. This paradox can be perhaps partially explained by traders' level of expectations. In fact, as the report points out:

¹⁰¹ See point 3.5 below.

Despite this opposition the Commission decided to go ahead with the proposal of extending the VIES system to services, although the measure did not survive negotiations at the Council and did not become law, see COM(2003) 822 final, 23 December 2003, n. 35 above.

¹⁰³ There are however indications that the reaction from businesses to the proposals is negative. A study published by PWC in November 2007 indicates that businesses overwhelmingly perceive the proposed changes as an additional burden (cost) for their business, without clear advantage in return, see *Study in respect of introducing a change in the requirements to recapitulative statements – increased level of detail*, Final Report to the European Commission, 15 November 2007, at 6. See also J. Arnold, "More costs, more compliance, more risk" (2008) *Tax Journal* 928, 12-14.

“There was a widespread expectation by business that the abolition of frontiers controls would result in an abolition of the associated workload. Instead, the inconvenience of the fiscal and statistical burden workload was seen by business as not being abolished, but simply transferred from frontiers right into their own offices. This was, understandably, perceived by many as a greater personal inconvenience than before.”¹⁰⁴

Similarly Ball’s survey carried out in 1993 in all Member States found that 61% of respondents believed that the abolition of border controls was predominantly advantageous. However, other independent surveys were more sceptical regarding the advantages of the new system. According to Haase’s survey only 18.3% of respondents believed that the abolition of border controls had reduced compliance costs.¹⁰⁵ Verwaal and Cnossen’s survey reveals that compliance costs of intra-Community transactions of firms in the Netherlands are on average 5% of the value of their intra-Community trade, which in the words of the authors, represents “a sizable border tax”.¹⁰⁶ While admittedly this survey is limited to only one Member State, the results are perhaps indicative of a wider problem. These studies highlight the imperfections of the VAT transitional arrangements, and the costs it entails for traders. As the Commission’s report states:

“It should be noted at the outset that these transitional systems were seen from their inception as no more than a very imperfect solution. By the very nature of their being transitional, they failed in a number of ways to fulfil the aims of the single market. The simpler, definitive systems originally proposed for 1993 were not, in the end, those which were accepted at the time, and only as we go to press are new proposals being tabled for the definitive systems which, it is widely hoped, will reduce the cost and complexity of compliance down to more reasonable levels.”

This view is confirmed by the fact that Verwaal and Cnossen’s survey also shows that over two-thirds of respondents wanted to move on from the transitional to the definitive system.¹⁰⁷ The impact of these compliance costs on intra-Community trade are also highlighted in the study, essentially concluding that the level of compliance costs has a significant negative effect on intra-Community trade intensity, which increases as firm size decreases. These

¹⁰⁴ In “Dismantling of barriers. Customs and fiscal formalities at frontiers”, *The Single Market review, Subsidies III: Volume 3* (Office for Official Publications of the European Communities, 1997), at 3-4.

¹⁰⁵ These surveys are referred to by E. Verwaal and S. Cnossen, *Europe’s New Border Taxes*, Research Centre for Economic Policy (OCFEB), Research Memorandum 008, Erasmus University Rotterdam, 2001, at 9-13. As Verwaal and Cnossen are quick to point out, they all display some methodological shortcomings, namely lack of transparency of the sampling procedures and low responses, however, the results are still note worthy.

¹⁰⁶ Id at 13-20.

¹⁰⁷ There was a substantial majority in favour of the move in France, Germany, Italy and Spain, with a majority in all the others, except Ireland and Luxembourg (where the sample sizes were too small to draw general conclusions).

conclusions are confirmed by the findings of a European Tax Survey, published in 2004, which looked at the potential costs of lack of tax harmonisation: compliance costs are larger for SMEs than for larger companies; compliance costs are higher with companies with at least one subsidiary in another EU Member State compared with companies without subsidiaries in another Member State; and, compliance costs increase with the number of subsidiaries abroad.¹⁰⁸ One of the consequences of this state of affairs in relation to compliance costs, according to the Commission, is that a substantial part of traders seem to abstain from having VAT activities in another Member State due to the burden of having to comply with VAT obligations there.¹⁰⁹ This demonstrates that in practice the level of compliance costs represents a true obstacle to intra-Community trade, most particularly in the case of SMEs.

3.5 Fraud

For years, tax administrations have been pointing out that the European VAT system is overall susceptible to fraud.¹¹⁰ In 2000, both the Commission and the *Ad Hoc* Working Party appointed by the Council to assess the situation regarding tax fraud, confirmed this view.¹¹¹ In 2004, the Commission accepted that it had become clear that administrative cooperation as well as national control systems were not fully adapted to the tax arrangements introduced in 1993, arguing that:

“Though the detection rate of fraud is uncertain and the exact amount of money involved difficult to quantify, the amounts are undoubtedly considerable. Some Member States

¹⁰⁸ *European Tax Survey*, Commission Staff Working Paper, SEC(2004) 1128, 7 September 2004. Although, the study looked at all aspects of taxation, and not exclusively to VAT, the fact that the overall conclusions include VAT considerations, is indicative of the situation in relation to VAT. This is confirmed by the Commission in their proposal for a one-stop VAT scheme where it stated that “the recently published European Tax Survey conducted by the Commission in the second half of 2003 confirmed that taxable persons who have VAT obligations in a Member State where they are not established are those for which the burden of compliance is the highest”, see *Proposal for a Council Directive amending Directive 77/388/EEC with a view to simplifying value added tax obligations*, COM(2004) 738 final, 29 October 2004, at 2.

¹⁰⁹ “This is confirmed by a document produced by the European Consumer Centre Network in 2003 on e-commerce. This report identifies the current VAT regime as one of the reasons why operators refuse to sell goods to consumers who are living in a Member State other than the Member State of establishment of the company”, in COM(2004) 738 final, 29 October 2004, n. 76 above, at 2.

¹¹⁰ For a detailed analysis of the phenomenon of fraud, and especially VAT fraud, see P.C. van Duyne, “VAT fraud and the Policy of Global Ignorance” (1999) *European Journal of Law Reform* 1(4), 425-443. Of course, the VAT fraud problem is not exclusive to Europe, see G. Harrison and R. Krelove, “VAT Refunds: A Review of Country Experience”, *IMF Working Paper Series*, WP/05/218, November 2005, particularly at 21-23.

¹¹¹ *Third Article 14 Report on the application of Council Regulation (EEC) No. 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) and Fourth Report under Article 12 of Regulation (EEC, Euratom) No. 1553/89 on VAT collection and control procedures*, Report from the Commission to the Council and the European Parliament, COM(2000) 28 final, 28 January 2000; and *Final Draft Report: - Context of the Ad Hoc Party's Mandate in the fight against fraud – Assessment of the current situation regarding tax fraud – Identification and analysis of weak points which hamper the fight against fraud, and recommendations*, Document Number 8053/00, 27 April 2000.

have estimated such losses as up to 10% of net VAT receipts. VAT fraud has therefore become a real worry in many Member States. In addition to the loss of national revenue, this fraud jeopardises legitimate trade in certain economic sectors and distorts competition to the benefit of dishonest traders.”¹¹²

One of the most well-known and frequent types of fraud, made possible under the transitional arrangements, is the so-called “carousel fraud”, also known as “missing trader fraud”, whereby fraudulent traders take advantage of the intra-Community arrangements in order to obtain significant amounts of VAT through a succession of transactions between traders established in different Member States.¹¹³ As highlighted by Advocate-General Poiares Maduro in *Optigen, Fulcrum and Bond*:

“Endless variations on the chain transactions are imaginable [...] and in reality the same goods may be ‘sent around’ several different chains. Still, the problem fundamentally remains the same: a trader collects an amount paid to him as VAT but does not account for it to the tax authorities. The defaulting trader may use a ‘hijacked’ VAT number or it may register itself for VAT and simply disappear before the tax authorities take action.”¹¹⁴

The cases concerned a practice adopted by the United Kingdom tax authorities as regards unwitting participants in carousel fraud: according to the authorities, transactions forming part of carousel fraud do not qualify as economic activities, within the meaning Article 9 of the CVSD, and as such do not entitle the taxpayer to the right to deduct input tax. It follows that traders carrying out transactions, which form part of carousel fraud, were refused the right to deduct input VAT, even where they had no knowledge of the fraud, and therefore could be broadly qualified as “innocent”. The Court concluded in that case:

¹¹² *Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud*, COM(2004) 260 final, 16 April 2004, 5.

¹¹³ For these fraudsters carousel fraud can be a very profitable tool, as confirmed by media reports, see e.g. J. Oliver “On the run: the plumber who worked a £15m VAT fraud”, in *The Guardian*, 4 March 2005. In the UK the problem of carousel fraud has been qualified by a Customs & Excise official as “the single biggest threat to the UK VAT system”, with estimated losses growing £0.5 billion per year, see A. Legget, “VAT Fraud & Control of Refunds and Credits – A Strategic Approach to Tackling VAT Losses”, Paper presented at *International Tax Dialogue VAT Conference, Rome, March 15-16, 2005*, for a detailed analysis of the scale of the problem in the UK and the strategies for tackling it adopted by Customs & Excise Commissioners. For an economic analysis of the phenomenon see also M. Keen and S. Smith, “VAT Fraud and Evasion: What Do We Know and What Can Be Done?” (2006) *National Tax Journal* LIX(4), 861-887.

¹¹⁴ Opinion of the Advocate-General on joint cases C-354/03, C-355/03 and C-484/03, [2006] ECR I-483, at paragraph 8. In its decision in *Bond*, the Manchester VAT Tribunal provides a clear (and detailed) explanation of what is normally regarded as carousel fraud, see *Bond House Systems Ltd v Customs and Excise Commissioners* (2003) VAT decision 18100, at paragraphs 15-18.

“[T]ransactions such as those at issue in the main proceedings, which are not themselves vitiated by VAT fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of [Articles 2, 9 and 14 of the CVSD], where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge. The right to deduct input VAT of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing.”¹¹⁵

Soon following its decision in joint cases *Optigen, Fulcrum Electronics* and *Bond House* the Court of Justice was once again asked to decide on the VAT treatment of transactions forming part of carousel fraud. Joint cases *Axel Kittel* and *Recolta Recycling* concerned the refusal by Belgian tax authorities to allow the right to deduct VAT paid on transactions allegedly connected such fraud, where it was clear that the recipient of the supply of goods was a taxable person who did not and could not know that the transaction concerned was part of a fraud committed by the seller.¹¹⁶ The Court reiterated its decision in *Optigen, Fulcrum Electronics* and *Bond House*, stating that “the question whether the VAT payable on prior or subsequent sales of the goods concerned has or has not been paid to the Treasury is irrelevant to the right of the taxable person to deduct input VAT”.¹¹⁷

The Court’s approach was welcomed by tax law practitioners,¹¹⁸ and justifiably so considering the nature of the United Kingdom and Belgian’s tax authorities practice. What is most interesting about these cases (and the administrations’ practice) is on one hand the implicit recognition of the financial costs caused by the inefficient functioning of the current tax administrative arrangements, particularly the VIES system; and on the other hand, the willingness to have that cost shifted to the taxpayer, regardless of the consequences in terms of the potential creation of additional obstacles to legitimate intra-Community trade. It is

¹¹⁵ Id at paragraph 55. For a comprehensive analysis of these joint cases and the Court’s decision, see S. Vandenberghe and H.J. Sharkett, “Rights of Taxable Persons Involved in VAT Carousel Fraud from an EU, Belgian and UK Point of View Today and Tomorrow” (2006) *International VAT Monitor* 17(4), 254-263.

¹¹⁶ Joint cases C-439/04 and C-440/04, [2006] ECR I-6161.

¹¹⁷ Id at paragraph 49.

¹¹⁸ See R. Cordara, “Economic activity for VAT purposes” (2005) *British Tax Review* 2, 181-182, at 182; and G. Richards, “Carousel fraud: absolving the innocent: *Optigen Ltd and Others v Commissioners of Customs & Excise*” (2006) *British Tax Review* 2, 147-149.

against this background that in the last few years the issue of VAT fraud has been picking up momentum.¹¹⁹

Less than two years after the entry into force of the new administrative cooperation Regulation, which aimed at resolving the problem of VAT fraud, namely through the intensification and facilitation of the level of information exchange,¹²⁰ the Commission implicitly admitted defeat by issuing a communication concerning the need to develop a co-ordinated strategy to improve the fight against tax fraud.¹²¹ In November 2007, the Commission presented a follow-up communication focussing specifically on VAT fraud, at the request from the Council, where it recognises that far reaching amendments to the EU VAT system might be necessary in order to deal with the endemic problem.¹²² The following month, the Court of Auditors issued a damaging report concerning administrative cooperation in the field of VAT. Amongst its main conclusions was the statement that “the weaknesses of VIES should be urgently addressed”.¹²³ It is in this context that the new Commission proposals for combating tax fraud emerge.¹²⁴ According to the Commission, these proposals are aimed solely at speeding up the collection and exchange of information on intra-Community transactions. Broader measures are also currently under consideration, including the establishment of a system called Eurofisc, suggested by the expert group on Anti-Tax Fraud Strategy, aimed at improving administrative cooperation between the Member States.¹²⁵

IV. CONCLUSION

It is clear that the current international tax allocation system is out of date and unfit to deal with the commercial realities and challenges of the modern world. A move to a destination based tax, under which allocation of taxing rights would be undertaken through the establishment of place of supply rules in similar manner to that under a VAT system, has been

¹¹⁹ For an overview of the current legal state of play as regards carousel fraud, see J. Swinkels, “Carousel Fraud in the European Union” (2008) *International VAT Monitor* 19(2), 103-113.

¹²⁰ Council Regulation (EC) No. 1798/2003 of 7 October 2003, OJ L 264, 15/10/2003, 1.

¹²¹ *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud*, COM(2006) 254 final, 31 May 2006.

¹²² *Communication from the Commission to the Council concerning key elements contributing to the establishment of the VAT anti-fraud strategy within the EU*, COM(2007) 758 final, 23 November 2007.

¹²³ *Special Report No. 8/2007 (pursuant to Article 248(4), second subparagraph, EC) concerning administrative cooperation in the field of value added tax*, November 2007, at 8.

¹²⁴ COM(2008) 147 final, 17 March 2008, n. 333 above. This proposal was preceded by a study: *On measures to change the VAT system to fight fraud*, Commission Staff Working Paper, SEC(2008) 249, 22 February 2008.

¹²⁵ Alternative measures to combat carousel fraud are also being proposed by commentators, see W.A.P. Nieuwenhizen, “The solution for combating VAT carousel frauds” (2007) *EC Tax Review* 16(5), 213-215; and F. Borselli, “Pragmatic Policies to Tackle VAT Fraud in the European Union” (2008) *International VAT Monitor* 19(5), 333-342.

proposed as a potential solution. Although, the destination country would most likely enjoy both substantive and enforcement jurisdictions to impose such tax on corporate income, identifying the country of destination might prove problematic than advocates of a destination-based tax have envisaged. As demonstrated above allocation of taxing rules under a VAT have significant limitations: the imposition of legal proxies, with its inherent difficulties, is in most cases unavoidable; they are often complex, giving rise to interpretative and qualification problems; they create high compliance and administrative costs; and in some cases they are susceptible to widespread fraud. Furthermore, a VAT has other problems, which are not present in income taxes: certain types of services are just too-difficult to tax, such as financial and insurance services.¹²⁶ It is therefore necessary to debunk the myth that a destination tax, VAT type system, is the ultimate panacea for taxing corporate income. The current international tax allocation system for corporate income tax might be beyond improvement, and its substitution by a destination-based tax, VAT type system, might well constitute a potential solution. Yet, significant research on how to improve the operation of a VAT is still required before it can be regarded as a promising substitution model for corporate income tax in its current form.

¹²⁶ See R. de la Feria, “The EU VAT Treatment of Insurance and Financial Services (Again) Under Review” (2007) *EC Tax Review* 2, 74-89, and references cited therein.

TABLE 1: PLACE OF SUPPLY RULES IN EUROPEAN VAT

PLACE OF SUPPLY OF GOODS		
RULES	PLACE OF SUPPLY	EC VAT DIRECTIVE LEGAL BASIS
General rule: where goods are not dispatched or transported.	Place where the goods are at the time when the supply takes place.	Article 31
Goods dispatched or transported either by the supplier or by a third person where transport begins in a Member State.	Place where the dispatch or transport of goods begins.	Article 32
Goods dispatched or transported by or on behalf of the supplier from a Member State other than that of arrival of the dispatch or transport; where the following conditions are fulfilled: — the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person; — the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.	Place where the dispatch or transport ends.	Article 33
Goods dispatched and transported, where the supply is of goods other than products subject to excise duty; Article 33 shall not apply to supplies of goods dispatched or transported to the same Member State of arrival of the dispatch or	In principle, place where the dispatch or transport of goods begins; however, Member State shall grant taxable persons eligible under this exception, the	Article 34

<p>transport where:</p> <ul style="list-style-type: none"> — the total value of such supplies, less VAT, does not in one calendar year exceed the equivalent in national currency to EUR 100 000 and, — the total value, less VAT, of the supplies of goods in the previous calendar year did not exceed the equivalent in national currency to EUR 100 000. 	<p>right to choose that the place of supply will be the place where the dispatch or transport ends.</p>	
<p>Member State limit this threshold to EUR 35 000 where it fears that a higher threshold might cause serious distortions to competition.</p>		
<p>Second-hand goods, works of art, collectors' items and antiques shall not be subject to Articles 33 and 34, as defined in points (1) to (4) of Article 311(1) subject to VAT in accordance with the relevant special arrangements.</p>	<p>Place where the dispatch or transport of goods begins.</p>	<p>Articles 32, 35 and 314</p>
<p>Goods installed and assembled, with or without a trial run, by or on behalf of the supplier.</p>	<p>Place where the installation or assembling of goods is carried out.</p>	<p>Article 36</p>
<p>Anti-double taxation on goods installed and assembled. Where the installation or assembling is carried out in a Member State other than that of the supplier, the Member State within the territory of which the installation or assembly is carried out shall take any necessary steps to avoid double taxation in that State.</p>	<p>Place within which the installation and assembling of goods is carried out, but it is obliged to take measures to avoid double taxation.</p>	<p>Article 36</p>
<p>Goods supplied on board ships, aircrafts or trains on board ships, aircraft or trains during the section of a passenger transport operation effected within the Community.</p>	<p>Place point of departure of the passenger transport operation.</p>	<p>Article 37</p>

<p>Natural gas and electricity supplied through distribution systems to taxable dealer (taxable person whose principal activity in respect of purchases of gas or electricity is reselling those products and whose own consumption of those products is negligible).</p>	<p>Place where taxable dealer has established his business or has a fixed establishment for which the goods are supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p>	<p>Article 38</p>
--	---	-------------------

<p>Natural gas and electricity, supplied through natural distribution systems not to a taxable dealer.</p>	<p>Place where the consumer has effective use and consumption of the goods. Where goods are not consumed these non consumed goods are deemed to have been used and consumed at the Member State where the customer has established his business or has a fixed establishment for which the goods are supplied.</p>	<p>Article 39</p>
---	--	-------------------

PLACE OF INTRA-COMMUNITY ACQUISITIONS OF GOODS

RULES	PLACE OF SUPPLY	EC VAT DIRECTIVE LEGAL BASIS
<p>General rule: 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</p>	<p>Member State where goods are at the time when dispatch or transport to the person acquiring them ends.</p>	<p>Article 40</p>

began.

General rule: 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.	Member State where goods are at the time when dispatch or transport to the person acquiring them ends.	Article 40
---	--	------------

Anti-double taxation rule. The place of the intra-Community acquisition of goods shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods, unless the person acquiring the goods establishes that that acquisition has been subject to tax in accordance with paragraph 1's general rule. If, however, the acquisition is subject to tax in accordance with Article 40, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition.	Member State which issued the VAT identification number of the person acquiring the goods. However, this Member State will not tax the acquisition or a tax credit will be given if VAT has been paid under the general rule on the Member State where the dispatch or transport ended.	Articles 41 and 42
--	---	--------------------

This anti-double taxation rules shall not apply where the following conditions have been met:

- 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;
- the person acquiring the goods has satisfied the obligations laid down in Article 265 relating to submission of the recapitulative statement.
-

PLACE OF IMPORTATION OF GOODS

RULES	PLACE OF SUPPLY	EC VAT DIRECTIVE LEGAL BASIS
General rule.	Member State within whose territory the goods are located when they enter the Community.	Article 60
Temporary arrangements: on entry into the Community, goods which are not in free circulation are placed under one of the arrangements or situations referred to in Article 156, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements.	Member State within whose territory the goods cease to be covered by those arrangements or situations.	Article 61

PLACE OF SUPPLY OF SERVICES

RULES	PLACE OF SUPPLY	EC VAT DIRECTIVE LEGAL BASIS
General rule for B2C transactions: services supplied to non-taxable persons.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010:</i> Article 45

	or fixed establishment, the place where he has his permanent address or usually resides.	
General rule for B2B transactions: services supplied to taxable persons.	<p><u>Until December 2009:</u> Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p> <p><u>From January 2010:</u> Place where the acquirer of the services has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p>	<p>Article 43</p> <p>Article 44</p>
Intermediaries: services supplied by an intermediary acting in the name and on behalf of another person.	Place where the underlying transaction is supplied.	<p><i>Until Dec 2009:</i> Article 44</p> <p><i>From Jan 2010:</i> Article 46</p>
Anti-double taxation rule for intermediaries: where the customer of the services supplied by the intermediary is identified for VAT purposes in a Member State other than that within the territory of	Member State which issued the customer with the VAT identification number under which the service was rendered to him.	<p><i>Until Dec 2009:</i> Article 44</p> <p><i>From Jan 2010:</i> Repealed</p>

which that transaction is carried out.

Immovable property: supply of services connected with immovable property, including the services of estate agents and experts, and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision.	Place where the immovable property is located.	<i>Until Dec 2009:</i> Article 45 <i>From Jan 2010:</i> Article 47
Passenger transport.	Place where the transport takes place, proportionately in terms of distances covered.	<i>Until Dec 2009:</i> Article 46 <i>From Jan 2010:</i> Article 48
Transport services other than the intra-Community transport of goods to non-taxable persons.	Place where the transport takes place, proportionately in terms of distances covered.	<i>Until Dec 2009:</i> Article 46 <i>From Jan 2010:</i> Article 49
Intra-Community transport of goods for non-taxable persons. However, Member States need not apply VAT to that part of the intra-Community transport of goods to non-taxable persons taking place over waters which do not form part of the territory of the Community.	Place of departure of the transport.	<i>Until Dec 2009:</i> Article 47 and 51 <i>From Jan 2010:</i> Articles 50 and 52
Anti-double taxation rule for intra-Community transport of goods: where intra-Community transport of goods is supplied to customers identified for VAT purposes in a Member State other than that of the departure of the transport.	Member State which issued the customer with the VAT identification number under which the service was rendered to him.	<i>Until Dec 2009:</i> Article 47 <i>From Jan 2010:</i> Repealed
Intra-Community transport of goods by intermediaries, acting in the name and on behalf of another person.	Place of departure of the transport.	<i>Until Dec 2009:</i> Article 50 <i>From Jan 2010:</i> Repealed
Anti-double taxation rule for intra-Community transport of goods by	Member State which issued the customer with the VAT	<i>Until Dec 2009:</i> Article 50

intermediaries: where the customer of the services supplied by the intermediary is identified for VAT purposes in a Member State other than that of the departure of the transport.	identification number under which the service was rendered to him.	<i>From Jan 2010: Repealed</i>
Cultural, artistic, sporting, scientific, educational, entertainment services or ancillary services, or similar activities, such as fairs and exhibitions, including the activities of the organisers of such activities, supplied to non-taxable persons.	Place where activities are physically carried out.	<i>Until Dec 2009: Article 52(a)</i> <i>From Jan 2010 / Until Jan 2011: Article 53</i> <i>From Jan 2011: Article 54</i>
Cultural, artistic, sporting, scientific, educational, entertainment services or ancillary services, or similar activities, such as fairs and exhibitions, including the activities of the organisers of such activities, supplied to taxable persons.	Place where activities are physically carried out. Place where recipient of services is established.	<i>Until Dec 2009: Article 52(a)</i> <i>From Jan 2010 / Until Jan 2011: Article 53</i> <i>From Jan 2011: Article 44</i>
Admission to cultural, artistic, sporting, scientific, educational, entertainment services or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person.	Place where activities are physically carried out. Place where those events actually take place.	<i>Until Dec 2009: Article 52(a)</i> <i>From Jan 2010 / Until Jan 2011: Article 53</i> <i>From Jan 2011: Article 53</i>
Ancillary transport activities, such as loading, unloading, handling and similar activities supplied to non-taxable persons.	Place where the services are physically carried out.	<i>Until Dec 2009: Article 52(b)</i> <i>From Jan 2010: Article 54(a)</i>
Ancillary transport activities, such as loading, unloading, handling and similar activities supplied to taxable persons.	Place where the services are physically carried out. Place where the acquirer of the services has established his business or has a fixed	<i>Until Dec 2009: Article 52(b)</i> <i>From Jan 2010: Article 44</i>

establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

Movable tangible property: valuations or work on such property supplied to non-taxable persons.	Place where the services are physically carried out.	<i>Until Dec 2009:</i> Article 52(c) <i>From Jan 2010:</i> Article 54(b)
Movable tangible property: valuations or work on such property supplied to taxable persons.	Place where the services are physically carried out. Place where the acquirer of the services has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 52(c) <i>From Jan 2010:</i> Article 44
Anti-double taxation rule for movable tangible property: valuations or work on such property supplied to customers identified for VAT purposes in a Member State other than that in the territory of which the services are physically carried out. However, only applies where goods are dispatched or transported out of the Member State in which the services were physically carried out.	Member State which issued the customer with the VAT identification number under which the service was rendered to him.	<i>Until Dec 2009:</i> Article 55 <i>From Jan 2010:</i> Repealed
Restaurant and catering services, other	Place where the supplier	<i>Until Dec 2009:</i> Article

<p>than those physically carried out on board ships, aircraft or trains during the section of a passenger transport operation effected within the Community.</p>	<p>has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p>	<p>43</p>
	<p>Place where the services are physically carried out.</p>	<p><i>From Jan 2010: Article 55</i></p>
<p>Restaurant and catering services physically carried out on board ships, aircraft or trains during the section of a passenger transport operation effected within the Community.</p>	<p>Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p>	<p><i>Until Dec 2009: Article 43</i></p>
	<p>Point of departure of the passenger transport operation.</p>	<p><i>From Jan 2010: Article 57</i></p>
<p>Short-term hiring of a means of transport, i.e. use of the means of transport throughout a period of not more than thirty days and, in the case of vessels, not more than ninety days.</p>	<p>Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.</p>	<p><i>Until Dec 2009: Article 43</i></p>
	<p>Place where the means of</p>	<p><i>From Jan 2010: Article</i></p>

transport is actually put at the disposal of the customer. 56

Long-term hiring of means of transport, except pleasure boats, supplied to non-taxable persons.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010 / Until Dec 2012:</i> Article 45
	Place where the customer is established, has his permanent address or usually resides.	<i>From Jan 2013:</i> Article 56(2)

Long-term hiring of pleasure boats, supplied to non-taxable persons.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010 / Until Dec 2012:</i> Article 45
	Place where the pleasure boat is actually put at the disposal of the customer, where this service is actually provided by the supplier from his place of business or a fixed establishment situated in	<i>From Jan 2013:</i> Article 56(2)

that place.

Electronically supplied services to non-taxable persons who are established in a Member State, or who have their permanent address or usually reside in a Member State, by a taxable person who has established his business outside the Community or has a fixed establishment there from which the service is supplied, or who, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides	<i>Until Dec 2009:</i> Article 57 <i>From Jan 2010:</i> Article 58
Electronically supplied services to non-taxable persons who are established or have their permanent address or usually reside outside the Community.	Place where customer is established, has his permanent address or usually resides	<i>Until Dec 2009:</i> Article 56(1)(k) <i>From Jan 2010/ Until Dec 2014:</i> Article 59(k) <i>From Jan 2015:</i> Article 58(c)
Electronically supplied services to non-taxable persons who are established or have their permanent address or usually reside inside the Community.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides. Place where customer is established, has his permanent address or usually resides	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010 / Until Dec 2014:</i> Article 45 <i>From Jan 2015:</i> Article 58(c)
Electronically supplied services to	Place where the customer	<i>Until Dec 2009:</i> Article

taxable persons established in the Community but not in the same country as the supplier.	has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides.	56(1)(k) <i>From Jan 2010:</i> Article 44
Transfers and assignments of copyrights, patents, licences, trade marks and similar rights supplied to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(a) <i>From Jan 2010:</i> Article 59(a)
Advertising services supplied to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(b) <i>From Jan 2010:</i> Article 59(b)
Services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information supplied to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(c) <i>From Jan 2010:</i> Article 59(c)
Obligations to refrain from pursuing or exercising a business activity or a right referred to in this Article where supplied to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(d) <i>From Jan 2010:</i> Article 59(d)
Banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes supplied	Place where the non-taxable person (customer) is established, or where he	<i>Until Dec 2009:</i> Article 56(1)(e)

to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	has his permanent address or usually resides.	<i>From Jan 2010: Article 59(e)</i>
Supply of staff to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009: Article 56(1)(f)</i> <i>From Jan 2010: Article 59(f)</i>
Hiring out of movable tangible property, with the exception of all means of transport supplied to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009: Article 56(1)(g)</i> <i>From Jan 2010: Article 59(g)</i>
Natural gas and electricity distribution systems: provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other services directly linked thereto to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009: Article 56(1)(h)</i> <i>From Jan 2010: Article 59(h)</i>
Intermediaries: the supply of services by intermediaries, acting in the name and on behalf of other persons, to a non-taxable person who is established or has his permanent address or usually resides outside the Community, where those intermediaries take part in the supply of the services referred to in Article 56.	Place where the non-taxable person (customer) is established, or where he has his permanent address or usually resides.	<i>Until Dec 2009: Article 56(1)(l)</i> <i>From Jan 2010: Repealed</i>
Telecommunications services to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where customer is established, has his permanent address or usually resides	<i>Until Dec 2009: Article 56(1)(i)</i> <i>From Jan2010/ Until Dec 2014: Article 59(i)</i> <i>From Jan 2015: Article</i>

Telecommunications services to non-taxable persons who are established or have their permanent address or usually reside inside the Community.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010 / Until Dec 2014:</i> Article 45
	Place where customer is established, has his permanent address or usually resides.	<i>From Jan 2015:</i> Article 58(a)
Telecommunications services to taxable persons established in the Community but not in the same country as the supplier.	Place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(i) <i>From Jan 2010:</i> Article 44
Radio and television broadcasting services to a non-taxable person who is established or has his permanent address or usually resides outside the Community.	Place where customer is established, has his permanent address or usually resides	<i>Until Dec 2009:</i> Article 56(1)(j) <i>From Jan 2010/ Until Dec 2014:</i> Article 59(j) <i>From Jan 2015:</i> Article 58(b)
Radio and television broadcasting services to non-taxable persons who are established or have their permanent address or usually reside inside the Community.	Place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence	<i>Until Dec 2009:</i> Article 43 <i>From Jan 2010 / Until Dec 2014:</i> Article 45

	of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.	
	Place where customer is established, has his permanent address or usually resides.	<i>From Jan 2015:</i> Article 58(b)
Radio and television broadcasting services to taxable persons established in the Community but not in the same country as the supplier.	Place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides.	<i>Until Dec 2009:</i> Article 56(1)(j) <i>From Jan 2010:</i> Article 44
Effective use and enjoyment rule: In order to avoid double taxation, non-taxation or distortion of competition, Member States may, with regard to the supply of the services referred to in Article 56(1), except for those referred to in point (k) (electronically supplied services), where those services are rendered to non-taxable persons:	Place where effective use and enjoyment of the services takes place.	<i>Until Dec 2009:</i> Article 58 <i>From Jan 2010:</i> Article 59a
— consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community, if the effective use and enjoyment of the services takes place outside the Community;		
— consider the place of supply of any or all of those services, if situated outside the Community, as being situated		

within their territory, if the effective use and enjoyment of the services takes place within their territory.

Effective use and enjoyment rule: In order to avoid double taxation, non-taxation or distortion of competition, Member States may, with regard to hiring out of means of transport:	Place where effective use and enjoyment of the services takes place.	<i>Until Dec 2009:</i> Article 58 <i>From Jan 2010:</i> Article 59a
--	--	--

- consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community, if the effective use and enjoyment of the services takes place outside the Community;
- consider the place of supply of any or all of those services, if situated outside the Community, as being situated within their territory, if the effective use and enjoyment of the services takes place within their territory.

Effective use and enjoyment rule: In order to avoid double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44 and 45 (general rules):	Place where effective use and enjoyment of the services takes place.	<i>Until Dec 2009:</i> - <i>From Jan 2010:</i> Article 59a
---	--	--

- consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community, if the effective use and enjoyment of the services takes place outside the Community;
 - consider the place of supply of any or all of those services, if situated outside
-

the Community, as being situated within their territory, if the effective use and enjoyment of the services takes place within their territory.

OXFORD UNIVERSITY CENTRE FOR BUSINESS TAXATION
WORKING PAPER SERIES

- WP09/06** de la Feria, Rita, Place Where the Supply/Activity is Effectively Carried Out as an Allocation Rule: VAT vs. Direct Taxation
- WP09/05** Loomer, Geoffrey T., Tax Treaty Abuse: Is Canada responding effectively?
- WP09/04** Egger, Peter, Loretz, Simon, Pfaffermayr, Michael and Hannes Winner, Corporate Taxation and Multinational Activity
- WP09/03** Simpson, Helen, Investment abroad and adjustment at home: evidence from UK multinational firms
- WP09/02** Becker, Johannes and Clemens Fuest, EU Regional Policy and Tax Competition
- WP09/01** Altshuler, Rosanne and Harry Grubert, Formula Apportionment: Is it better than the current system and are there better alternatives?
- WP08/30** Davies, Ronald B. and Johannes Voget, Tax Competition in an Expanding European Union
- WP08/29** Pfaffermayr, Michael, Stöckl, Matthias and Hannes Winner, Capital Structure, Corporate Taxation and Firm Age
- WP08/28** Desai, Mihir A. and Dhammika Dharmapala, Taxes, Institutions and Foreign Diversification Opportunities
- WP08/27** Buettner, Thiess, Riedel, Nadine and Marco Runkel, Strategic Consolidation under Formula Apportionment
- WP08/26** Huizinga, Harry, Voget, Johannes and Wolf Wagner, International Taxation and Takeover Premiums in Cross-border M&As
- WP08/25** Barrios, Salvador, Huizinga, Harry, Laeven, Luc and Gaëtan Nicodème, International Taxation and Multinational Firm Location Decisions
- WP08/24** Devereux, Michael P., Taxation of Outbound Direct Investment: Economic Principles and Tax Policy Considerations
- WP08/23** Fuest, Clemens, The European Commission's Proposal for a Common Consolidated Corporate Tax Base
- WP08/22** de Mooij, Ruud A. and Sjef Ederveen, Corporate Tax Elasticities: A Reader's Guide to Empirical Findings

- WP08/21** Loretz, Simon, Corporate taxation in the OECD in a wider context
- WP08/20** Dharmapala, Dhammika, What Problems and Opportunities are Created by Tax Havens?
- WP08/19** Zodrow, George R., Corporate Income Taxation in Canada
- WP08/18** de la Feria, Rita and Michael Walpole, Options for Taxing Financial Supplies in Value Added Tax: EU VAT and Australian GST Models Compared
- WP08/17** Maffini, Giorgia and Socrates Mokkas, Transfer-pricing and Measured Productivity of Multinational Firms
- WP08/16** Becker, Johannes and Nadine Riedel, Cross-Border Tax Effects on Affiliate Investment - Evidence from European Multinationals
- WP08/15** Haufler, Andreas and Marco Runkel, Firms' financial choices and thin capitalization rules under corporate tax competition
- WP08/14** Freedman, Judith, Loomer, Geoffrey and John Vella, Alternative Approaches to Tax Risk and Tax Avoidance: Analysis of a face-to-face corporate survey
- WP08/13** Keuschnigg, Christian, Corporate Taxation and the Welfare State
- WP08/12** Devereux, Michael P. and Simon Loretz, Increased efficiency through consolidation and formula apportionment in the European Union?
- WP08/11** Egger, Peter, Loretz, Simon, Pfaffermayr, Michael and Hannes Winner, Firm-specific Forward-looking Effective Tax Rates
- WP08/10** Haufler, Andreas, Klemm, Alexander and Guttorm Schjelderup, Economic integration and the relationship between profit and wage taxes
- WP08/09** Huizinga, Harry, Voget Johannes and Wolf Wagner, International Taxation and Takeover Premiums in Cross-border M&As
- WP08/08** de la Feria, Rita, The EU VAT Treatment of Public Sector Bodies: Slowly Moving in the Wrong Direction
- WP08/07** Freedman, Judith and Graeme Macdonald, The Tax Base for CCCTB: The Role of Principles
- WP08/06** Crawford, Claire and Judith Freedman, Small Business Taxation
- WP08/05** Heinemann, Friedrich and Eckhard Janeba, Viewing tax policy through party-colored glasses: What German politicians believe
- WP08/04** Dourado, Ana Paula and Rita de la Feria, Thin Capitalization Rules in the Context of the CCCTB
- WP08/03** Weichenrieder, Alfons J., and Jack Mintz, What Determines the Use of Holding Companies and Ownership Chains?