Brussels, 6 March 2017

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 921 REV

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Germany
REFERENCE: Article 138
SUBJECT: Substantive importance of the VAT identification number of the recipient (acquirer of the goods) for the exemption of intra-Community supplies
1. INTRODUCTION

The question submitted by Germany concerns the substantive significance of obtaining the VAT identification number of the acquirer of goods for an intra-Community supply to qualify as VAT exempt pursuant to Article 138 of the VAT Directive\textsuperscript{1} in light of the recent case-law of the Court of Justice of the European Union (CJEU).

The question of the German delegation is annexed to this Working paper.

2. SUBJECT MATTER

2.1. Relevant provisions of the VAT Directive

Pursuant to Article 138(1) of the VAT Directive Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

According to Article 214(1)(b) of the VAT Directive Member States shall take the measures necessary to ensure that – inter alia – every taxable person who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) is identified by means of an individual number.

According to Article 262(a) of the VAT Directive every taxable person identified for VAT purposes shall submit a recapitulative statement – inter alia – of the acquirers identified for VAT purposes to whom he has supplied goods in accordance with the conditions specified in Article 138(1) and (2)(c) of the VAT Directive. Pursuant to Article 264(1)(a) of the VAT Directive the recapitulative statement shall set out the VAT identification number of the person acquiring the goods in a Member State other than that in which the recapitulative statement must be submitted and under which the goods were supplied to him.

2.2. Proceedings before the CJEU

The case-law of the CJEU clarifies that an intra-Community supply is exempt from VAT if the conditions laid down in Article 138(1) of the VAT Directive are satisfied\textsuperscript{2}. In accordance with settled case-law, the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the vendor establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply\textsuperscript{3}.


\textsuperscript{2} See, to that effect e.g. CJEU, judgment of 27 September 2007, Teleos and Others, C-409/04, EU:C:2007:548, paragraph 28.

\textsuperscript{3} Teleos and Others, paragraph 42.
In addition, the purchaser must meet the subjective criteria which are specified in Article 138(1) of the VAT Directive. In this regard the CJEU notes that the condition set out in Article 138(1) of the VAT Directive (respectively the first subparagraph of Article 28c(A)(a) of the Sixth VAT Directive), according to which the person acquiring the goods must be a ‘taxable person … acting as such in [another] Member State’ does not, in itself, imply that the person acquiring the goods must trade under a VAT identification number in the course of the acquisition at issue. It rather derives from the case-law of the CJEU that the obligation of having a VAT identification number is not part of the substantive conditions for an intra-Community supply to qualify as VAT exempt. Having the VAT identification number constitutes a formal requirement which cannot undermine the right of exemption from VAT where the substantive conditions for an intra-Community supply are met.

Hereof, the question is to separate which modalities of proof can be imposed on the supplier by a Member State to give evidence that the condition of the recipient being a taxable person acting as such in another Member State are fulfilled. In this regard, according to the CJEU, a Member State is not prevented from making the exemption from VAT of an intra-Community supply subject to the provision by the supplier of the VAT identification number of the person acquiring the goods, with the proviso that the granting of that exemption should not be refused on the sole ground that that requirement was not fulfilled where the supplier, acting in good faith and having taken every measure which can reasonably be required of him/her, is unable to provide that VAT identification number but provides other information which is such as to demonstrate sufficiently that the person acquiring the goods is a taxable person acting as such in the transaction at issue.

In a recent judgment the CJEU clarifies that from this it does not follow that a taxable person who has not taken all the measures which can reasonably be required of him to provide the authority with a VAT identification number issued by the Member State of destination may be refused an exemption from VAT. The finding relating to the inability of a taxable person, acting in good faith and having taken every measure which can reasonably be required of him, to provide the VAT identification number of the person acquiring the goods, would rather cover situations in which the issue is that of establishing whether or not the taxable person has participated in tax evasion. In circumstances in which the taxable person’s participation in tax evasion has in any event been ruled out, where there is no specific evidence of tax evasion, an exemption from VAT cannot be refused on the ground that this person did not take all the measures which could reasonably be required of him/her in order to satisfy a formal obligation, namely provision of the VAT identification number issued by the Member State of destination.

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5 CJEU, judgment of 27 September 2012, VSTR, C-587/10, EU:C:2012:592, paragraph 40.
6 CJEU, judgment of 6 September 2012, Mecsek-Gabona Kft, C-273/11, EU:C:2012:547, paragraphs 59-60 with further references; VSTR, paragraph 51.
7 VSTR, paragraph 58.
9 Plöckl, paragraph 54.
10 Plöckl, paragraph 55.
This does not prevent a Member State from imposing on the taxable person an appropriate and proportionate sanction if he/she has not taken the necessary measures to obtain a VAT identification number. This applies to both the Member State of destination as regards the acquirer who has to be given a VAT number on the basis of Article 214 of the VAT Directive and the Member State of supply as regards the supplier who might be obliged to provide the VAT number of the acquirer according to national law.

For further details as regards the importance of obtaining the VAT identification number of the acquirer for intra-Community supplies to qualify as VAT exempt, reference can be made in particular to the judgments in VSTR and Plöckl\textsuperscript{11}.

2.3. Interpretation issues raised by Germany

Germany considers that the opinion of the CJEU according to which the VAT identification number is a mere formal requirement, is too narrow and disregards the intentions of EU law. It does not take into account the significance of the VAT identification number for the control procedure in particular in ensuring the correct and straightforward application of the exemption for intra-Community supplies and preventing any possible evasion, avoidance or abuse in intra-Community trade within the meaning of Article 131 of the VAT Directive. The VAT identification number is necessary both between the parties concerned and between Member States to ensure that transactions are treated properly.

If the VAT identification number of the acquirer is not provided, then an intra-Community supply cannot, on purely technical grounds, be included in the recapitulative statement or, as a result, in the VIES database. In these circumstances, it is no longer possible to control intra-Community acquisitions in respect to the supply transactions in question in the Member State of acquisition, which leads to the intra-Community control system becoming ineffective. The case-law is leading to a situation where in respect of the intra-Community supply it is no longer necessary for the acquirer to provide their VAT identification number to obtain an exemption and it cannot be required from the supplier either under threat of loss of the exemption. This is so even in cases where the VAT status of the acquirer is unclear. An exemption could not be refused in such cases if the other conditions for the exemption were met.

If an exemption for an intra-Community supply were applied in such cases, tax fraudsters would gain a competitive advantage over honest businesses with impunity. Another possible result is that there would be no reliable controls on whether or not goods had actually left the Member State of supply and the risk of untaxed retail sales would thereby be substantially increased.

Germany considers that the acquirer's VAT identification number is an implied element of the substantive condition for the exemption of an intra-Community supply, and therefore essential for ensuring the proper VAT treatment of an intra-Community supply or an intra-Community acquisition of goods, as well as for the teleological interpretation of Article 138 of the VAT Directive, taking into account the requirements of Article 131 of that Directive. In Germany's opinion, the purpose of the exemption of an intra-Community supply cannot be fulfilled if the acquirer is not required to provide their VAT identification number, even if the supply otherwise fulfills all other conditions for the exemption.

\textsuperscript{11} See also most recently CJEU, judgment of 9 February 2017, Euro Tyre BV, C-21/16, EU:C:2017:106, as regards the significance of the registration of the recipient of an intra-Community supply in the VIES database.
supply cannot therefore be treated separately from the intra-Community registration and control procedure.

3. **THE COMMISSION SERVICES’ OPINION**

The question of whether the exemption of an intra-Community supply from VAT presupposes that the supplier has the VAT identification number of the acquirer of goods can be clearly answered from the above-mentioned case-law of the CJEU.

Thereafter, the substantive conditions for a VAT exempt intra-Community supply are conclusively regulated in Article 138(1) of the VAT Directive. Accordingly, apart from the requirements relating to

- the recipient of being a taxable person acting in another Member State as such,
- the transfer of the right to dispose of goods as owner from the supplier to the recipient, and
- the physical movement of the goods from one Member State to another,

no other conditions can be placed on the classification of a transaction as an intra-Community supply or acquisition of goods, bearing in mind that the meaning of ‘intra-Community supply’ is objective in nature and applies without regard to the purpose or results of the transactions concerned\(^\text{12}\).

The German view according to which the VAT identification number is an important tool to ensure that the VAT system operates properly is certainly correct. It provides proof of the VAT status of a taxable person for the purposes of applying VAT and simplifies the inspection of taxable persons with a view to ensuring the correct collection of the tax\(^\text{13}\) and is an important element of the VIES database to set up by Member States on the basis of Article 17 seq. of Council Regulation (EU) No 904/2010\(^\text{14}\). However, these findings do not justify mixing up the questions of what are (1) the substantive conditions of a VAT exempt intra-Community supply, (2) the formal requirements which have to be met by a taxable person carrying out such a supply and (3) the consequences of a taxable person not meeting these formal requirements.

3.1. **Substantive conditions of an intra-Community supply**

In contrast to the opinion of Germany the provision of the VAT identification number of the recipient is not a substantive condition for the VAT exemption of an intra-Community supply.

3.1.1. **Recipient of an intra-Community supply being a taxable person acting as such**

Such a (substantive) condition does not follow from the requirement explicitly stipulated in Article 138(1) of the VAT Directive according to which the recipient must be a taxable person acting as such in another Member State. It must be stressed that the qualification as

\(^\text{12}\) See, inter alia, *Telesos and Others*, paragraph 38.


\(^\text{14}\) Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ L 268, 12.10.2010, p. 1); as regards the importance of the registration in the VIES database, see CJEU in *Euro Tyre BV*, paragraph 28.
taxable person according to the VAT Directive does not depend on whether the recipient possesses a VAT identification number. The definition of ‘taxable person’ set out in Article 9(1) of the VAT Directive simply covers a person who independently carries out in any place any economic activity within the meaning of Article 9, whatever the purpose or results of that activity, and does not make the capacity of a taxable person subject to the possession by that person of a VAT identification number. It follows, moreover, from the case-law that a taxable person acts in that capacity where he carries out transactions in the course of his taxable activity.\(^\text{15}\)

3.1.2. Purpose of Article 138(1) of the VAT Directive

Nothing else can be derived from a teleological interpretation of Article 138 of the VAT Directive: The purpose for the VAT exemption of intra-Community supplies pursuant to Article 138 of the VAT Directive is of a systematic nature. It forms part of the mechanism for the taxation of trade between Member States, the purpose of which is to transfer the tax revenue to the Member State in which the final consumption of the goods supplied takes place. This mechanism consists of (1) the exemption by the Member State of departure of the supply giving rise to the intra-Community dispatch or transport, in conjunction with the right to deduction or reimbursement of the VAT paid as input tax in that Member State, and (2) the taxation, by the Member State of destination, of the intra-Community acquisition.

The CJEU has stated that this mechanism ensures a clear delineation of fiscal sovereignty of the Member States concerned; double taxation and, thus, an infringement of the principle of fiscal neutrality inherent in the common system of VAT will be avoided.\(^\text{16}\) However, there is no strict coherence in the sense that the exemption is only granted if the intra-Community acquisition is effectively taxed.\(^\text{17}\) The mere taxability in another Member State is sufficient.

Against this systematic background it is crucial – for the VAT exemption to be applied – that an intra-Community transaction has actually taken place, which in particular requires that the final consumption is in another Member State than that where the dispatch or transport of the goods has started. This requirement is fulfilled if the conditions explicitly stipulated in Article 138(1) of the VAT Directive are met and can be reached independently of whether or not the recipient of the supply has a VAT identification number. From the purpose of Article 138 of the VAT Directive it, thus, cannot be derived – as stated by Germany – that the VAT identification number is an implied element of the substantive conditions for the exemption of an intra-Community supply.

3.1.3. Legal context – VAT identification number as a formal requirement

Also the legal context with other provisions of the VAT Directive does not justify an extension of the substantive requirements of the VAT exemption for intra-Community supplies.

\(^{15}\) VSTR, paragraph 49 with further references.

\(^{16}\) VSTR, paragraph 28 with further references.

\(^{17}\) Teleos and Others, paragraph 69 seq.
Declaration obligations

It is true that Article 264 of the VAT Directive imposes on the supplier the obligation to submit a recapitulative statement in which both his/her VAT identification number in the Member State of origin and the VAT identification number of the person acquiring the goods in the Member State of destination must be mentioned. However, also from this obligation it cannot be derived that obtaining the VAT identification number is a substantive requirement for an intra-Community supply to be VAT exempt.

Substantive conditions of a VAT exemption cannot be mixed with the VAT declaration obligations to be fulfilled by the taxable person. This is also substantiated by the fact that the exemptions are conclusively regulated under Title IX of the VAT Directive whereas Article 264 forms part of the (formal) obligations of taxable persons and certain non-taxable persons under Title XI of the VAT Directive.

VAT identification number as means of proof

Nothing else follows from Article 131 of the VAT Directive according to which the exemptions, including the exemption for intra-Community supplies pursuant to Article 138, shall apply in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. On the basis of this provision Member States are entitled to determine what evidence the taxpayer may submit to benefit from the VAT exemption.

The CJEU has stressed – as mentioned above under section 2.2 – that Member States are not prevented from making the exemption from VAT of an intra-Community supply subject to the provision by the supplier of the VAT identification number of the person acquiring the goods (thereby also getting proof of the recipient’s nature of being a taxable person). Accordingly, a provision like section 17c(1) of the German VAT Implementing Ordinance (UStDV), according to which the taxable person must prove the conditions of an intra-Community supply including the VAT identification number in the accounts, should generally be in line with the VAT Directive.

However, the right to lay down such documentation requirements does not mean that Member States are entitled to impose substantive conditions which go beyond Article 138(1) of the VAT Directive. It exclusively relates to the question of how to prove that the substantive conditions like the recipient being a taxable person acting as such are met. Consequently, the CJEU has made very clear that – despite the crucial importance of the VAT identification number as a verification tool in a mass system involving a large number of intra-Community transfers – the non-indication of the VAT identification number cannot undermine the right of exemption from VAT where the substantive conditions for an intra-Community supply are objectively satisfied (and where this can be proved by other means); this follows from the neutrality principle and the principle of proportionality.

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18 CJEU, judgment of 7 December 2010, R., C-285/09, EU:C:2010:742, paragraph 43.
19 VSTR, paragraph 58.
20 VSTR, paragraphs 46 seq., Plöckl, e.g. paragraph 57.
Logical continuation of CJEU case-law

The position held in VSTR\textsuperscript{21}, Mecsek-Gabona Kft\textsuperscript{22} and Plöckl\textsuperscript{23} that obtaining the VAT identification number as a mere formal requirement cannot undermine the right of exemption from VAT where the substantive conditions for an intra-Community supply are satisfied is a logical continuation of the case-law of the CJEU. Comparable to what has been ruled in these judgments the CJEU has clarified in two other judgments concerning input VAT deductibility that the deduction of input VAT cannot be made dependent on the requirement to provide the VAT identification number of the supplier:

In Dankowski the CJEU has ruled – inter alia – that a taxable person has the right to deduct VAT paid in respect of services supplied by another taxable person who is not registered for VAT, where the invoices contain all the relevant information required, in particular the information needed to identify the person who drew up those invoices and to ascertain the nature of the services provided. Notwithstanding the importance of the registration for the VAT system to operate properly, a failure on the part of a taxable person to meet that requirement cannot – according to the CJEU – impinge on the right of deduction conferred on another taxable person. Furthermore, Member States are not entitled to set up national legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purposes of that tax\textsuperscript{24}.

Already in Nidera the CJEU ruled that the identification for VAT is not a measure giving rise to the right of deduction but constitutes a formal requirement for the purposes of verification\textsuperscript{25}.

3.2. Burden of proof and consequences of not meeting formal requirements

Although obtaining the VAT identification number of the acquirer of goods in the case of an intra-Community transaction is not a substantive condition for the VAT exemption it is questionable whether the concerns expressed by Germany are fully justified.

Whether the conditions of the VAT exemption for an intra-Community supply are met must be finally decided by general rules of evidence. In cases of doubt, the burden of proof lies with the person claiming the application of a VAT exemption who must prove that the requirements are fulfilled.

In this context the CJEU has stressed that Member States are responsible for the question of what evidence the taxpayer may submit to benefit from the VAT exemption\textsuperscript{26}. In this context, as mentioned above\textsuperscript{27}, on the basis of Article 131 of the VAT Directive, Member States can make the exemption from VAT of an intra-Community supply subject to the provision by the supplier of the VAT identification number of the person acquiring the goods (thereby getting proof of the recipient’s nature of being a taxable person).

\textsuperscript{21} VSTR, paragraph 51.
\textsuperscript{22} Mecsek-Gabona Kft, paragraph 60.
\textsuperscript{23} Plöckl paragraph 57.
\textsuperscript{24} CJEU, judgment of 22 December 2010, Dankowski, C-438/09, EU:C:2010:818, paragraphs 33 seq.
\textsuperscript{25} CJEU, judgment of 21 October 2010, Nidera, C-385/09, EU:C:2010:627, paragraph 50.
\textsuperscript{26} VSTR, paragraph 42 with further references.
\textsuperscript{27} Section 3.1.3.
However, from the CJEU’s finding that the failure to fulfil formal requirements cannot as such lead to a rejection of granting an exemption from VAT in respect of an intra-Community supply, follows that the proof of the acquirer being a taxable person acting as such (in another Member State) can be done in a different way. It must be stressed that this applies only if

1. the breach of the formal requirements does not preclude the production of conclusive evidence that the substantive requirements have been met\(^\text{28}\),
2. the supplier has acted in good faith\(^\text{29}\) (but if the supplier has intentionally or negligently participated in a tax evasion the principle of tax neutrality cannot legitimately be invoked by such a person\(^\text{30}\)).

However, as clarified by the CJEU in *Plöckl*, there is no third condition according to which the supplier must have generally – even in cases where there is no evidence of tax evasion – taken all the measures which can reasonably be required of him/her to provide the VAT identification number of the acquirer\(^\text{31}\).

Despite the clarification in *Plöckl*, the fear expressed by Germany that the CJEU case-law ‘is leading to a situation where it is no longer necessary for the acquirer to provide their VAT identification number to obtain an exemption and it cannot be required from the supplier either under threat of loss of the exemption’ seems not to be justified. A Member State can, as explicitly stressed by the CJEU, make the granting of the VAT exemption for intra-Community supplies dependent on the provision of the VAT identification number (like in section 17c(1) UStDV) which is, although not a substantive condition, a means to prove that the recipient is a taxable person acting as such in another Member State. The violation of such formal requirements set up by a Member State may justify high demands on the alternative proof that the person acquiring the goods is a taxable person acting as such in the transaction at issue.

Furthermore, the Commission services do not follow the interpretation of Germany according to which from the case-law it might follow that the VAT exemption could be granted ‘even in cases where the tax status of the acquirer is unclear…if the other conditions of the exemption were met’. The recipient being a taxable person acting as such in another Member State is one of the substantive conditions stipulated in Article 138(1) of the VAT Directive. If this condition is not met, there is no room for the application of the VAT exemption for intra-Community supplies. Finally, the responsible national courts must be convinced – on the basis of existing evidence – that this condition is met. Every doubt is at the expense of the supplier and would lead to a refusal of the VAT exemption.

Moreover, reference must be made to the additional requirement set up by the CJEU according to which the supplier must have acted in good faith (where there is specific evidence that the transaction in question was part of a tax fraud). This is not the case if the supplier knew or should have known that the transaction carried out was part of a tax fraud committed by the purchaser. The supplier is required to take every step which could

\(^{28}\) *VSTR*, paragraph 46 with further references; *Plöckl*, paragraph 46.

\(^{29}\) *VSTR*, paragraph 58.

\(^{30}\) *VSTR*, paragraph 46, \textit{R.}, paragraph 54; *Plöckl*, paragraph 44.

\(^{31}\) According to a widespread opinion such a general condition followed from the findings of the CJEU in case *VSTR*, paragraph 58; in this respect see e.g. German Federal Fiscal Court (BFH), judgment of 28 May 2013, XI R 11/09.
reasonably be asked of him/her to satisfy himself/herself that the transaction which he/she carried out has not resulted in his/her participation in tax fraud.\(^3\)

To meet the last requirement a prudent businessman can be expected to aim at fulfilling formal requirements set up by national law like the provision of the VAT identification number of the acquirer according to German law, section 17c(1) UStDV. Accordingly, if there is specific evidence of tax fraud (in contrast to the relevant circumstances in \(Plöckl\)), the supplier must – in addition to proving that all substantive conditions pursuant to Article 138 of the VAT Directive are met – prove that he/she has taken every measure to obtain the VAT identification number of the acquirer or, in a situation where the purchaser has just started the taxable activity, obtained conclusive evidence that the purchaser has taken the necessary measures to receive a VAT identification number. It must be stressed that for a prudent business the missing VAT number of its acquirer should be a signal of risk so that the demands on the supplier to satisfy himself/herself that the transaction carried out has not resulted in a participation in tax fraud are very high.

To conclude, in practice it will be of utmost interest for the supplier to provide the VAT identification number (1) because this is the easiest way to prove that the requirement of the acquirer being a taxable person acting as such in another Member State is met and (2) to avoid being forced to prove that all reasonable measures of obtaining a VAT identification number have been taken in a situation where there is specific evidence of tax fraud.

Against this background the case-law of the CJEU will most probably not lead to a situation where the EU control system becomes ineffective because taxable persons will no longer provide any VAT identification number. The vast majority of suppliers will prove the condition foreseen in Article 138(1) of the VAT Directive of the acquirer being a taxable person acting as such by obtaining the VAT identification number of the recipient.

Cases where the supplier does not provide a VAT identification number at all do not seem to be of high practical relevance in contrast e.g. to those cases where the supplier is in the possession of such a number which was initially validated but later on removed from the register with retroactive effect.

Finally it must be stressed that, as already stated under section 2.2., a Member State is not prevented from imposing an appropriate and proportionate sanction on the taxable person if he/she has not taken the necessary measures to obtain a VAT identification number. This applies to both the Member State of destination as regards the acquirer who must register for VAT on the basis of Article 214 of the VAT Directive and the Member State of supply as regards the supplier who might be obliged to provide the VAT number of the acquirer according to national law.

### 3.3. Conclusions

The Commission services would draw the following conclusions:

\(^3\) CJEU, judgment of 9 October 2014, \(Traum\), C-492/13, EU:C:2014:2267, paragraphs 41-42.
The possession of the VAT identification number of the acquirer by the supplier is a formal requirement but not a substantive condition of an intra-Community supply to qualify as VAT exempt.

In order for a supplier to prove the acquirer's nature of being a taxable person Member States can make the exemption from VAT of an intra-Community supply subject to the provision by the supplier of the VAT identification number of the person acquiring the goods.

If the supplier does not succeed in obtaining the VAT identification number, the status of the acquirer being a taxable person acting as such (in another Member State) can be proved in a different way, but only if

- the breach of the formal requirements does not preclude the production of conclusive evidence that the substantive requirements have been met, and
- the supplier has acted in good faith and taken all measures which can be reasonably required to satisfy himself/herself that the transaction carried out had not resulted in a participation in tax fraud; in a situation where there is specific evidence of tax fraud this also encompasses every measure to obtain the VAT identification number of the acquirer.

A Member State is not prevented from imposing an appropriate and proportionate sanction on the taxable person if he/she has not taken the necessary measures to obtain a VAT identification number. This applies to both the Member State of destination as regards the acquirer who must register for VAT on the basis of Article 214 of the VAT Directive and the Member State of supply as regards the supplier who might be obliged to provide the VAT number of the acquirer according to national law.

4. **DELEGATIONS' OPINION**

The delegations are requested to give their opinion on this matter.

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ANNEX

Question from Germany

Substantive importance of a VAT identification number

Due to grey areas in the application of EU law in this matter, I would like to submit the following question for examination by the VAT Committee.

1. Legal basis

Chapter 4, Title IX of Directive 2006/112/EC regulates exemptions for intra-Community transactions. In this chapter, for example, Article 138 of the Directive stipulates that ‘Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began’.

Pursuant to Article 131 of the Directive, the exemptions provided for in Chapter 4 ‘shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse’.

Directive 2006/112/EC does not contain any further explicit requirements for the exemption of intra-Community services.

2. Background

In accordance with the settled case-law of the Court of Justice, the intra-Community supply of goods is exempt from VAT if the substantive conditions laid down in Article 138(1) of Directive 2006/112/EC are satisfied\(^1\). This exemption becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser and the vendor establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply\(^2\). These three substantive conditions are conclusive under the case-law of the Court of Justice\(^3\).

With regard to the VAT identification number of the purchaser, the Court of Justice ultimately established that this number is not one of the substantive conditions for the tax exemption of an intra-Community supply\(^4\). Although in certain cases the Court of Justice recognised in principle that a VAT identification number provides proof of the tax status

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\(^1\) See judgment of 27 September 2007 in Case C-409/14 Teleos, paragraph 28; judgment of 6 September 2012 in Case C-273/11 Mecsek-Gabona, paragraph 29; judgment of 9 October 2014 in Case C-492/13 Traum, paragraph 22.

\(^2\) See judgment of 27 September 2007 in Case C-409/14 Teleos, paragraph 42; judgment of 6 September 2012 in Case C-273/11 Mecsek-Gabona, paragraph 31; judgment of 9 October 2014 in Case C-492/13 Traum, paragraph 24.

\(^3\) See judgment of 6 September 2012 in Case C-273/11 Mecsek-Gabona, paragraph 59.

\(^4\) See judgment of 6 September 2012 in Case C-273/11 Mecsek-Gabona, paragraph 60.
of the purchaser, it also decided that it is only a formal requirement which cannot undermine the right of exemption from VAT where the substantive conditions for an intra-
Community supply laid down in Article 138(1) of Directive 2006/112/EC are satisfied.

Germany considers that the opinion of the Court of Justice, i.e. that the VAT identification number is merely a formal requirement, is too narrow and disregards the intentions of EU law. This assessment inevitably has an adverse effect on internal market controls and does not take into account the significance of the VAT identification number for the control procedure.

Under Article 262 of Directive 2006/112/EC, every taxable person identified for VAT purposes must submit a recapitulative statement listing in particular the VAT identification number of each acquirer to whom he has supplied goods in accordance with the conditions specified in Article 138(1) of that Directive (Article 262(a) of Directive 2006/112/EC).

The recapitulative statement must include at least the information set out in Articles 264 and 265 of Directive 2006/112/EC. Article 264(1)(b) of the Directive stipulates that the statement must include the VAT identification number of the person acquiring the goods in a Member State other than that in which the recapitulative statement must be submitted and under which the goods were supplied to him.

In addition, in accordance with Article 17 of Regulation (EU) No 904/2010, each Member State (of supply) must store in an electronic system the information which it collects pursuant to Articles 262 et seq. of Directive 2006/112/EC (the VIES database). In accordance with Article 19 of Regulation (EU) No 904/2010, the Member States (of supply) must ensure that the information available in the electronic system referred to in Article 17 of that Regulation is accurate. Under Article 21 of the same Regulation, the Member State of acquisition must obtain from the Member state of supply via the VAT identification number of the acquirer the information it requires to check that the correct VAT rate is applied to an intra-Community acquisition on its territory.

This demonstrates that giving the VAT identification number of the acquirer is a prerequisite for the smooth functioning of the internal market control system. If the VAT identification number of the acquirer is not provided, then an intra-Community supply cannot, on purely technical grounds, be included in the recapitulative statement or, as a result, in the VIES database. In these circumstances, neither the supplier nor the Member State of supply can meet their obligations under EU law. Consequently, it is no longer possible to apply intra-Community acquisition controls to the supply transactions in question in the Member State of acquisition, which leads to the intra-Community control system becoming ineffective.

The VAT identification number within the meaning of Article 214 et seq. of Directive 2006/112/EC thus plays a crucial role in the intra-Community control procedure, in particular in ensuring the correct and straightforward application of exemptions for an intra-Community supply and preventing any possible evasion, avoidance or abuse in intra-Community trade within the meaning of Article 131 of Directive 2006/112/EC. The

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5 See judgment of 6 September 2012 in Case C-273/11 Mecsek-Gabona, paragraphs 59 and 60; judgment of 27 September 2012 in Case C-587/10 VSTR, paragraphs 51 and 52; judgment of 9 October 2014 in Case C-492/13 Traum, paragraph 35.
VAT identification number is necessary both between the parties concerned and between Member States to ensure that transactions are treated properly.

If the case-law of the Court of Justice is confirmed, there is a real concern that the intra-Community control procedure will be increasingly circumvented and undermined. The case-law is leading to a situation where it is no longer necessary for the acquirer to provide their VAT identification number to obtain an exemption and it cannot be required from the supplier either under threat of loss of the exemption. This is so even in cases where the tax status of the acquirer is unclear. An exemption could not be refused in such cases if the other conditions for the exemption were met.

If an exemption for an intra-Community supply were applied in such cases, tax fraudsters would gain a competitive advantage over honest businesses with impunity. Another possible result is that there would be no reliable controls on whether or not goods had actually left the Member State of supply and the risk of untaxed retail sales would thereby be substantially increased.

In addition, it would make it impossible for the supplier to comply with the law and meet their obligation under Article 262 et seq. of Directive 2006/112/EC with regard to the recapitulative statement.

The aim of allocating a VAT identification number under Article 214 et seq. of Directive 2006/112/EC is to ensure that the VAT system operates properly. The Court of Justice has already held, in a case addressing whether it is permissible for a Member State not to allocate a VAT identification number under certain circumstances, that the allocation of a VAT identification number provides proof of the tax status of the taxable person for the purposes of applying VAT and simplifies the inspection of taxable persons with a view to ensuring the correct collection of the tax.

In addition, the VAT identification number is an important piece of evidence of the operations carried out. Directive 2006/112/EC states, in the provisions relating, in particular, to invoicing, declarations and summary statements, that this identification number of the taxable person or the recipient of the goods or services must be referred to in those documents.

Therefore, it should be noted that giving a VAT identification number is a useful tool to clearly identify a business and an essential classification criterion that enables Member States to properly apply VAT to supplies and services within the EU's internal market.

Germany considers that the acquirer's VAT identification number too is an implied element of the substantive condition for the exemption of an intra-Community supply, and therefore essential for ensuring the proper VAT treatment of an intra-Community supply or an intra-Community acquisition of goods, as well as for the teleological interpretation of Article 138 of Directive 2006/112/EC, taking into account the requirements of Article 131 of that Directive. In Germany's opinion, the purpose of the exemption of an intra-Community supply cannot therefore be treated separately from the intra-Community registration and control procedure. This procedure was introduced when the internal

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6 See judgment of 14 March 2013 in Case C-527/11 Ablessio, paragraph 18.
7 See judgment of 14 March 2013 in Case C-527/11 Ablessio, paragraph 19.
8 See judgment of 14 March 2013 in Case C-527/11 Ablessio, paragraph 20.
market was established and at the same time transitional VAT measures were implemented to replace the removal of physical border controls and to ensure that the correct level of VAT continues to be charged on final consumption in the internal market.

Germany's understanding is that a similar approach is used in practice in the other Member States.

3. Question

As both the Member States and the Commission have a strong interest in preventing VAT fraud, ensuring that the intra-Community control procedure remains reliable in the future and hence in implementing the clear intentions of EU law in this area, it is imperative to find a way to properly apply the case-law of the Court of Justice to date.

On the basis of the above description of the issue, I ask that the VAT Committee examine how best to achieve the function clearly intended by EU law for the VAT identification number in the treatment of intra-Community transactions and, at the same time, to ensure the proper functioning of intra-Community control procedure.

I would be very grateful if this question could be added to the agenda of the VAT Committee’s next meeting.