



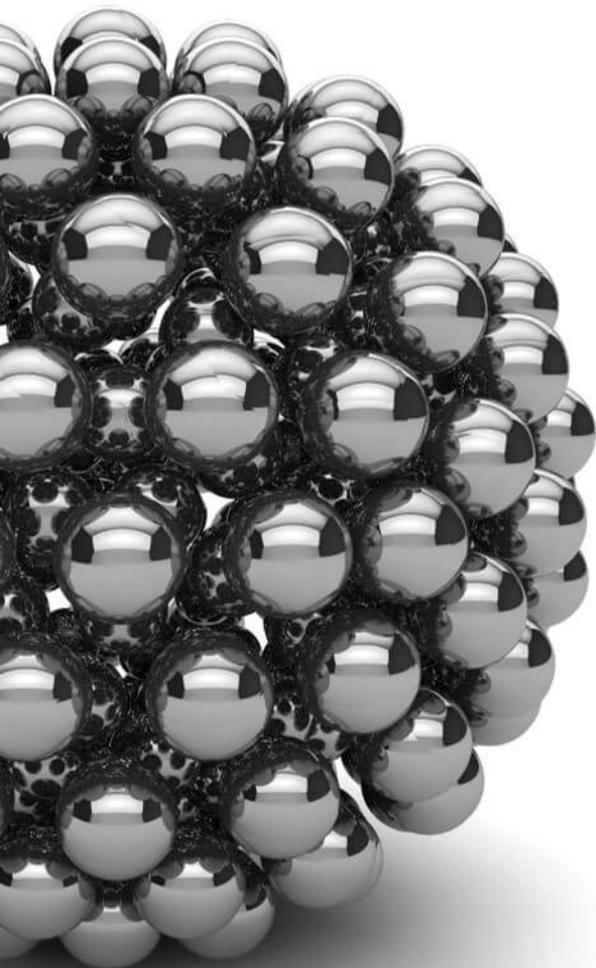
# **Intra Community Supply in the VAT Directive**

## **Substantial and formal requirements**

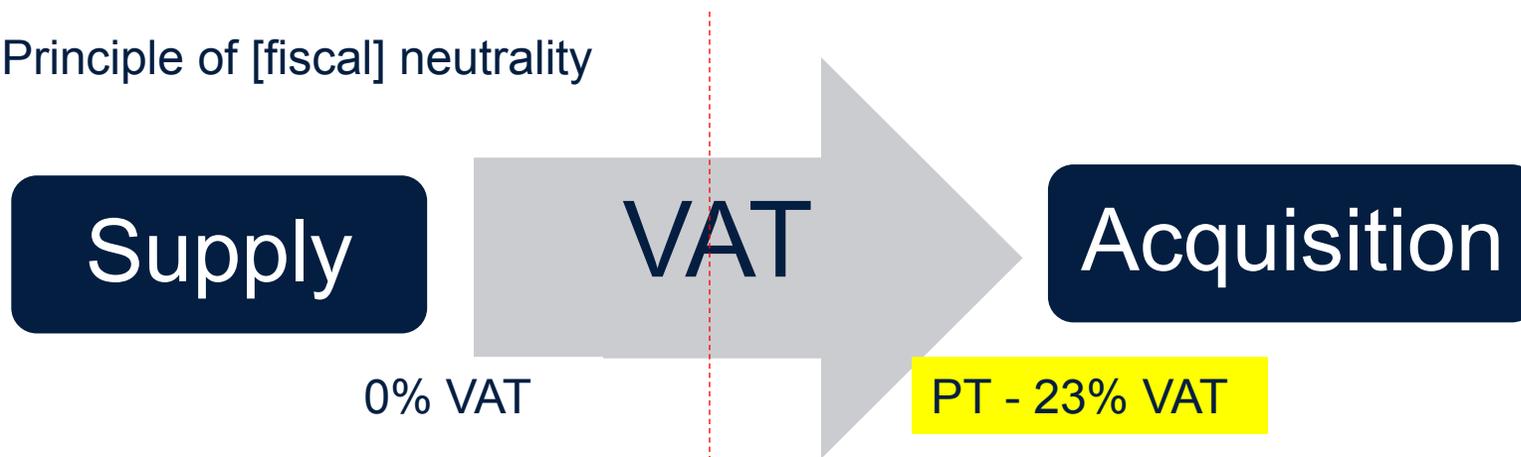
**Ellex** 



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- ✓ Intra-Community supply of goods is **VAT exempt** in the country of destination (Article 138 of the VAT Directive) and....
- ✓ Intra-Community acquisition is **VAT taxed** in the Member State of arrival of the goods (Article 138 of the VAT Directive)
- ✓ Avoidance of double taxation
- ✓ Principle of [fiscal] neutrality





- ✓ Competence:
  - ✓ An exemption in VAT Directive that is applied for the intra-Community supply of goods (taxable person might be required to provide evidence to apply it)
  - ✓ evidence required from the taxable persons in order to be exempt from VAT falls within the competence of the Member States
  - ✓ Member States are to lay down for the purpose of ensuring preventing any evasion, avoidance or abuse of VAT system
- ✓ **HOWEVER...**
- ✓ Requirement must be in accordance with the principles of
  - ✓ **proportionality** and
  - ✓ **fiscal neutrality**.
- ✓ Focus on the substantive rather than formal requirements
- ✓ Other principles to be taken into account:
  - ✓ **Legal certainty**
  - ✓ **Good faith (prohibition of the abuse of law)**
  - ✓ **Effectiveness, equivalence and sincere cooperation**



- ✓ Following the principle of fiscal neutrality,

*a measure which, in essence, makes the right of exemption from VAT in respect of an intra-Community supply subject to compliance with **formal** obligations, without any account being taken of the **substantive requirements** and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct collection of the tax*

- ✓ Collée, C-146/05 par. 29
- ✓ VSTR, C-587/10 par. 45



- ✓ Capacity of the **taxable person**
- ✓ **Transfer of the right to dispose** of goods as the owner,
- ✓ **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

✓ *Teleos C-409/04 par. 70*

# When formal requirements are important?



Failure to comply with some of the formal requirements might result in denying VAT exemption only if :

- 1) Non-compliance with such formal requirements would effectively prevent evidence that the substantive requirements have been satisfied (see *Collée*, par. 31)
- 2) Taxable person has intentionally participated in tax evasion which has jeopardized the operation of the common system of VAT (see *VSTR*, par. 46)



## Non-fulfillment of the formal obligations

**FACTS.** Cars should have been sold from Germany to Belgium (B). Because of territorial protection grounds German company was entitled to claim commission only for local sales. Therefore it issued invoices to S (German intermediary) which re-sold cars to B. German tax authorities refused to deduct input VAT for S, because sale was sham. Then Collee canceled invoices to S and issued invoices for intra-Community supply (VAT exempt). Tax authorities refused to apply VAT exemption as accounting records must be updated regularly and immediately after the relevant transaction has been completed and this was not the case.

**CJEU:** It is precluded to deny the exemption from VAT solely on the ground that the evidence of such a supply was not produced in good time (substantive requirements are more significant than formal requirements).

When examining the right of exemption from VAT in relation to such a supply, the referring court should take into account the fact that the taxable person initially knowingly concealed the fact that an intra-Community supply had occurred only if there is a risk of a loss in tax revenues and that risk has not been wholly eliminated by the taxable person in question.



## Intentional participation in the tax evasion

**FABULA.** Mr R, a Portuguese national, the CEO of a German company engaged in the luxury car trade. Since 2001 it had sold more than 500 vehicles per year. The buyers were, for the most part, car dealers established in Portugal. Mr R carried out a series of manipulations, concealing the identity of the true purchasers of the vehicles in order to enable the distributors established in the Portugal to evade the payment of VAT in Portugal. This allowed him to sell the vehicles at a more advantageous price and thereby to make more substantial profits. All the conditions to apply 0% VAT on intra-community supply were formally met (cars were actually brought to Portugal). Mr R was convinced guilty for tax fraud in Germany.

**CJEU:** Even if intra-Community supply of goods has actually taken place, but at the time of that supply the supplier concealed the identity of the true purchaser in order to enable the latter to evade payment of VAT, his right to apply 0% VAT might be denied.



## Capacity of the taxable person

**FABULA.** VSTR (DE) sold two stone-crushing machines to Atlantic (USA), which had a subsidiary in Portugal but was not registered in EU for VAT purposes. Atlantic provided VSTR a VAT number of Finnish company, which acquired the machines from Atlantis. Goods were transported by sea to Finland. Invoice was issued from VSTR to Atlantic, bearing Finnish VAT identification number. Tax authorities denied 0% VAT on the ground that Atlantis did not provide its own identification number to VSTR.

**CJEU:** 0% VAT should not be refused on the sole ground that that requirement was not fulfilled where the supplier, acting in good faith and having taken all the measures which can reasonably be required of him, is unable to provide that 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.



## Non-fulfillment of the formal obligations

**FABULA.** Between February and May 2008, Nidera (NL) purchased wheat in Lithuania from suppliers of agricultural production and exported that grain to third countries, applying the 0% VAT rate for export. On 12 August 2008, Nidera was registered as VAT payer in Lithuania. Nidera in its VAT declaration for the period from 12 to 31 August 2008 declared that the above amount of VAT had been paid and requested a VAT refund. Tax authorities refused to refund input VAT, because it was paid during period when Nidera was not registered as VAT payer in Lithuania (direct requirement in Lithuanian Law on VAT).

**CJEU.** In case taxable person meets the substantive conditions for the right of deduction and identifies himself as a taxable person for VAT purposes within a reasonable period following the completion of transactions giving rise to that right of deduction, it is precluded to deny the possibility of exercising that right by national legislation which prohibits the deduction of VAT paid on the purchase of goods if the taxpayer was not identified as a taxable person for VAT purposes before using those goods in his taxable activity



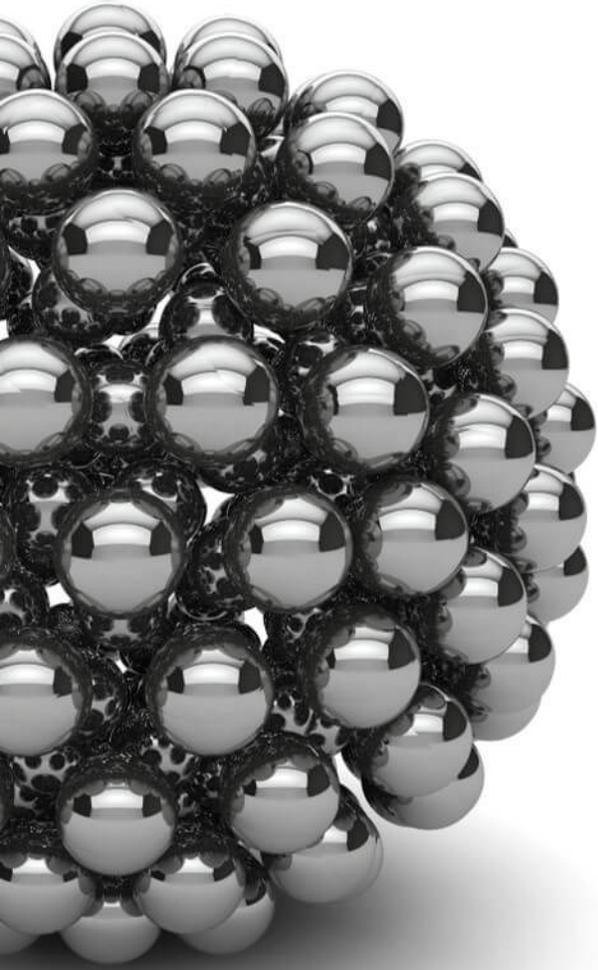
## Non-fulfillment of the formal obligations

**FABULA.** Enteco Baltic imported fuel into Lithuania from Belarus and placed it under the customs procedure '42', which allows goods to be released for free circulation without being subject to VAT on importation if goods are further subject to intra-Community supply. In the import declarations Enteco Baltic specified the VAT identification numbers of purchasers in another Member State to whom it intended to supply the goods. In some cases fuel was sold also to other taxable entities (which were not indicated in the import declarations).

**CJEU.** The substantive requirements for the application of 0% VAT are the same as those to apply 0% VAT on intra-community supply. Thus it is precluded to refuse exemption from import VAT on the sole ground that, following a change of circumstances after the importation, the goods in question have been supplied to a taxable person other than the person whose VAT identification number was stated in the import declaration, where the importer has communicated all the information on the identity of the new purchaser to the competent authorities of the Member State of import, provided that it is shown that the substantive conditions for the exemption of the subsequent intra-Community supply are actually satisfied.

# Questions?

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