I — Introduction

1. This case raises questions on the interpretation of the Sixth VAT Directive in connection with the exemption of intra-Community supplies. The questions are closely connected with those arising in Case C-146/05 Collée and Case C-184/05 Twoh International, in which I am also delivering an Opinion today.

2. The claimants in the main proceedings, Teleos plc and 13 other undertakings (Teleos and Others), all established in the United Kingdom, have sold mobile telephones to a Spanish undertaking. The acquirer was supposed to export the goods from the United Kingdom to other Member States. It later transpired that irregularities had been committed, in which, however, Teleos and Others had had no part. Nevertheless, the tax authorities declined to exempt their supplies.

3. The referring court first asks at what point the intra-Community acquisition or intra-Community supply was concluded and an entitlement to exemption from inland VAT came into being. It needs to be clarified in particular whether the goods actually have to cross the frontier. The question also arises whether the supplier can be refused exemption if the proof supplied by the purchaser of the goods crossing the frontier subsequently turns out to be false, without the supplier having been aware of the irregularity or being deemed to have been aware of it.

4. In making this interpretation of the Sixth Directive, two objectives must be reconciled.
On the one hand, evasion of VAT must be fought. It is precisely the VAT treatment of trans-frontier transactions in high-value, easily-transportable goods that is particularly susceptible to fraud. On the other hand, in order that intra-Community trade should not be made inordinately difficult, undertakings which carry out trans-frontier transactions correctly and carefully should not be saddled with excessive risks and burdens. Finally, the question arises as to who has to bear the risk of fraudulent conduct by a third party: that party's trading partner acting in good faith, or the State.

II — Legal background

A — Community law

5. Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers inserted into the Sixth Directive a new Title XVIa (Transitional arrangements for the taxation of trade between Member States) (Articles 28a to 28m). Those provisions are still in force, since there has not so far been any definitive legislation on the trade in goods by undertakings between Member States.

6. Article 28a of Sixth Directive, so far as relevant, reads:

'(1) The following shall also be subject to value added tax:

- intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B) (1).

(3) “Intra-Community acquisition of goods” shall mean 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 to a Member State other than that from which the goods are dispatched or transported.

7. The moment when tax becomes payable is defined in Article 28d(1) of the Sixth Directive as follows:

‘The chargeable event shall occur when the intra-Community acquisition of goods is effected. The intra-Community acquisition of goods shall be regarded as being effected when the supply of similar goods is regarded as being effected within the territory of the country.’

8. Article 28bA of the Sixth Directive specifies the place of intra-Community acquisition as follows:

‘(1) The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.

9. Under Article 28c(A) of the Sixth Directive, intra-Community supplies between two Member States are exempted from the tax. So far as relevant, the provision reads:

‘Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Article 5, dispatched or transported by or on behalf of the vendor or the person
acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

that the supply in question involved both —

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another Member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that Member State corresponding, in relation to that Member State, to the provisions of section 10; and

B — National law

10. Section 30(8) of the Value Added Tax Act 1994 (VAT Act 1994) provides:

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.'

'Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the Member States or

11. Pursuant to that empowerment, Regulation 134 of the Value Added Tax Regulations 1995 makes more detailed provision for the exemption of intra-Community supplies. Further details can be found in the Commissioners' Notices 725 and 703, which in part have legal force pursuant to Section 30(8) of the 1994 Act and Paragraph 4 of Schedule 7. The referring court states that, under all
these provisions, entitlement to exemption of intra-Community supplies with the right to zero-rating is not conferred until the goods have actually left the United Kingdom.

III — Facts and questions referred

12. In 2002, Teleos and Others sold mobile telephones to the company Total Telecom SA/Ercoysys Mobil SA (TT), established in Spain. In the contracts, the destination of the goods was stipulated in most cases as France and in individual cases as Spain. The supply was made 'Ex works'.\(^5\) Under that provision, Teleos and Others were required only to deliver the goods to the warehouse of TT's forwarding agent in the United Kingdom. The forwarding agent then allegedly passed them to a carrier for transport to the destination States. In respect of each transaction, TT sent Teleos and Others by courier service a stamped and signed original CMR note as proof that the mobile telephones had reached their destination. According to the findings of the referring court, there was no occasion for Teleos and Others to doubt the genuineness of the notes or the information contained in them.

13. On the application of Teleos and Others, the supplies were zero-rated and the applicants authorised to be reimbursed for input tax paid. On checks some weeks after the last supplies, the Commissioners discovered that the CMR notes contained several false indications concerning the destination, the freight forwarder and the vehicles allegedly used. They therefore concluded that the mobile telephones had not left the United Kingdom. The referring court shares that view. The Commissioners subsequently made retrospective VAT assessments against Teleos and Others of several million pounds. They acknowledged at the same time, however, that Teleos had not been involved in a fraud, and neither did they know that the mobile telephones had not left the United Kingdom.

14. The referring court found evidence that TT had made declarations to the Spanish tax authorities of the intra-Community acquisition of the mobile telephones, claimed the
VAT payable on them as input tax, and declared their onward dispatch as an intra-Community departure not subject to VAT.

15. Before Teleos and Others entered into business relations with TT, they had assured themselves as to the reliability of this purchaser by checking its Spanish VAT number, its entry in the commercial register and its creditworthiness. They also made enquiries concerning the freight forwarder used by TT.

16. The disputed VAT assessment came before the High Court of Justice for England and Wales, Queen's Bench Division, (Administrative Court), which made an order of 7 May 2004 (received at the Court of Justice on 24 September 2004) referring the following questions for a preliminary ruling pursuant to Article 234 EC.

'(1) In the relevant circumstances, is the term “despatched” in Article 28a(3) (intra-Community acquisition of goods) to be understood as meaning that intra-Community acquisition takes place when

(a) the right to dispose of the goods as owner passes to the purchaser and the goods are supplied by the supplier by placing them at the disposal of the purchaser (who is registered for VAT in another Member State), on an Ex works contract of sale whereby the purchaser assumes responsibility for removing the goods to a different Member State from that of supply, at a secure warehouse located in the supplier’s Member State, and where the contractual documents and/or other documentary evidence state that the intention is that the goods should then be transported onwards towards a destination in another Member State, but the goods have not yet physically left the territory of the Member State of supply; or

(b) the right to dispose of the goods as owner passes to the purchaser and the goods commence, but do not necessarily complete, their journey towards a different Member State (in particular, if the goods have not yet physically left the territory of the Member State of supply); or
(c) the right to dispose of the goods as owner has passed to the purchaser and the goods have physically left the territory of the Member State of supply on their journey towards a different Member State?

Conditions for exemption

(2) Is Article 28c(A)(a) to be interpreted as meaning that supplies of goods are exempt from VAT where:

— the goods are supplied to a purchaser who is registered for VAT in another Member State; and

— the purchaser contracts to purchase the goods on the basis that, after he has acquired the right to dispose of the goods as owner in the supplier's Member State, he will be responsible for transporting the goods from the supplier's Member State to a second Member State; and

(a) the right to dispose of the goods as owner has passed to the purchaser and the goods have been supplied by the supplier by placing them at the disposal of the purchaser, on an Ex works contract of sale whereby the purchaser assumes responsibility for removing the goods to a different Member State from that of supply, at a secure warehouse located in the supplier's Member State, where the contractual documents and/or other documentary evidence state that the intention is that the goods should then be transported onwards towards a destination in another Member State, but the goods have not yet physically left the territory of the Member State of supply; or

(b) the right to dispose of the goods as owner has passed to the purchaser and the goods have commenced, but not necessarily completed, their journey towards a different Member State (in particular, the goods have not yet physically left the territory of the Member State of supply); or

(c) the right to dispose of the goods as owner has passed to the purchaser and the goods have left the territory of the Member State of supply on their journey towards a second Member State; or
Reopening liability to account for VAT

(3) In the relevant circumstances, where a supplier acting in good faith has tendered to the competent authorities in his Member State, after submission of a repayment claim, objective evidence which at the time of its receipt apparently supported his right to exempt goods under Article 28c(A)(a) and the competent authorities initially accepted that evidence for the purpose of exemption, in what circumstances (if any) may the competent authorities in the Member State of supply nevertheless subsequently require the supplier to account for VAT on those goods where further evidence comes to their attention that either (a) casts doubt upon the validity of the earlier evidence or (b) demonstrates that the evidence submitted was materially false, but without the knowledge or the involvement of the supplier?

(4) Is the answer to question 3 above affected by the fact that there was evidence that the purchaser made returns to the tax authorities in the Member State of destination, where those returns included as intra-Community acquisitions the purchases the subject-matter of these claims, the purchaser entered an amount purporting to represent acquisition tax and also claimed the same amount as input tax in accordance with Article 17(2)(d) of the Sixth Directive?

IV — Legal assessment

18. The factual content of the original dispute is characterised by the fact that appearance and reality here are clearly far apart. According to the documents which Teleos and Others received from its business partner TT and presented to the Commissioners, the party engaged by TT took possession of the mobile telephones in the United Kingdom and had them transported to other Member States. That appeared to fulfil all the requirements both for intra-
Community acquisition and for the exemption of the intra-Community supply, whichever variant of interpretation contained in the first two questions is preferred.

19. The third and fourth questions are concerned with the problem of what the legal consequences for the tax treatment of a supply are if it subsequently transpires that the documents and the reality do not correspond. Only if these questions are answered to the effect that the subsequently-discovered facts can lead to a reassessment of the situation do the first and second questions come into play.

20. These questions are intended to clarify whether intra-Community acquisition and an exempted intra-Community supply might possibly have taken place even if the telephones have not (yet) left the United Kingdom. If, however, the tax authorities were not able to hold that fact against the supplier, because the latter assumed in good faith that the consignment notes were accurate, it would be irrelevant whether and at what point the exemption takes effect.

21. The third and fourth questions would, in their turn, become irrelevant if the Court of Justice came to the conclusion in answer to the first two questions that the supplier is relieved of the obligation to account for VAT even if the goods have not left the State of origin.

22. Since there is thus no logical priority of one group of questions over the other, the questions should be answered in the order in which they have been submitted by the referring court.

A — Preliminary observation on the rules for the taxation of trade between Member States 6

23. Before going into the questions in detail, I would like to make a few observations on the background of the special rules for trans-frontier supplies in intra-Community trade.

24. VAT taxes private inland consumption. Thus the inland supply of goods and services (Article 2(1) of the Sixth Directive) and the importation of goods (Article 2(2) of the

6 — See my Opinion of 10 November 2005 in Case C-245/04 EMAG Handel Eder [2006] ECR 1-3227, point 19 et seq.
Sixth Directive) are subject to VAT. In respect of trans-frontier intra-Community trade, through the transitional arrangements for the taxation of trade between Member States (Title XVIa), Directive 91/680 introduced a further chargeable event, namely intra-Community acquisition (Article 28a(1)(a)).

25. The supply of goods which are dispatched or transported to a non-Member State is exempt from the tax under Article 15(1) of the Sixth Directive, as they are not consumed within the territory. The same applies in accordance with Article 28c(A)(a) of the Sixth Directive to supplies to another Member State.

26. Before the introduction of the transitional arrangements for the taxation of trade between Member States, supplies of goods between two Member States were classified in the same way as supplies in other international trade. In accordance with those rules, a supply was in principle taxable at the place of supply within the meaning of Article 8(1)(a) of the Sixth Directive, that is to say at the place of dispatch, but was exempted from the tax upon export. Value added tax therefore became payable on import into the State of destination. The crossing of the frontier on import or export, which was the factor determining taxation or exemption from tax on each occasion, had to be proved by means of customs documents for VAT purposes also.

27. With the realisation of the internal market, controls at internal frontiers were abolished, which required a recasting of the VAT rules for intra-Community trade. The reform did not, however, go so far as to extend the rules on inland supplies to trade between two Member States. That would have meant that — contrary to the present position — the right to levy VAT would reside not with the State into which the goods were imported and in which they were consumed but with the State from which they were dispatched.

28. It is rather the case that the transitional arrangements have left the previously-existing distribution of tax sovereignty between Member States untouched. In order to ensure that the right to levy VAT continued to belong to the Member State of final consumption, Directive 91/680 introduced intra-Community acquisition as a new chargeable event for trade between Member States (Article 28a(1)(a)).

29. As the intra-Community acquisition is taxed in the State of the goods' destination, the corresponding intra-Community supply in the State of origin should be freed from tax, in order to avoid double taxation and thus an infringement of the principle of the neutrality of VAT (Article 28c(A)(a) of the Sixth Directive). While intra-Community acquisition takes the place of the taxation of imports, the exemption of intra-Community supply takes the place of exemption upon export.

30. In the main dispute, the claimants claim exemption of their supplies in accordance with Article 28c(A)(a) of the Sixth Directive as intra-Community supplies. However, the High Court in its first question seeks interpretation of Article 28a(3) of the Sixth Directive, which governs the taxation of intra-Community acquisition.

31. That approach is based on the correct assumption that, in relation to the goods supplied, the exemption under Article 28c(A)(a) of the Sixth Directive and the taxable intra-Community acquisition within the meaning of the first subparagraph of Article 28a(3) of the Sixth Directive are connected. Through intra-Community acquisition, the right to tax shifts from the State of origin to the State of destination.

B — The first and second questions referred

1. The interconnectedness of intra-Community acquisition and the exemption of the intra-Community supply

32. Because of the interconnectedness of acquisition and exemption, which is also apparent from the formulations referring to each other in the relevant provisions of the Sixth Directive, the first and second questions referred must be examined together.

33. In accordance with the first subparagraph of Article 28a(3) of the Sixth Directive,

8 — EMAG Handel Eder (cited in footnote 7, paragraph 29) and points 24 and 25 of my Opinion in that case.

9 — The findings by the authorities of the State of destination concerning intra-Community acquisition do not, however, bind the authorities in the State of origin when examining whether the requirements for exempting the intra-Community supply have been met (see point 90 below).
intra-Community acquisition comes into being where the following two requirements are met:

— The acquirer acquires the right to dispose as owner of movable tangible property\(^\text{10}\) and

— the goods in question are dispatched or transported by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.

34. Exemption of the intra-Community supply under Article 28c(A)(a) takes place under the following conditions:

— the goods are dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 of the Sixth Directive (i.e. the territory of the Member State of origin) but within the Community,

— the supplies are effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

35. Concerning the fulfilment of the conditions for intra-Community acquisition, it is common ground between the parties that TT acquired the right to dispose of the goods as owner, even if the goods did not go directly into the possession of TT itself but into the possession of a freight forwarder instructed by TT. Concerning the conditions for exemption, the second condition — supply to a taxable person who acts as such outside the State of dispatch — presents no problems.

36. The parties are in dispute only as regards the correct interpretation of the concept of dispatch to another Member State, which similarly appears in the first subparagraph of Article 28a(3) and Article 28c(A)(a) of the Sixth Directive.

\(^{10}\) In relation to the corresponding formulation in Article 5(1) of the Sixth Directive, the Court of Justice has already ruled that it covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property (Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 7; Case C-255/02 Hilltex and Others [2006] ECR I-1689, paragraph 43).
2. Dispatch and transport within the meaning of Articles 28a(3) und 28c(A)(a) of the Sixth Directive requires at least that the goods must have actually left the State of dispatch or arrived in the State of destination. They submit that the VAT system cannot function correctly unless it is attached to that objective event. The mere intention or contractual obligation of the buyer to take the goods to another Member State is not sufficient.

37. Teleos and Others argue that, in circumstances such as the present, dispatch takes place as soon as the supplier hands over the goods in condition fit for delivery to the acquirer, where it is agreed between the parties to the contract that the acquirer will export the goods to another Member State. On that handing over, intra-Community acquisition takes place and a claim arises for the exemption of the intra-Community supply.

38. They rely first on the wording of the relevant provisions. Dispatch refers to the beginning of a transport movement but not to its conclusion through arrival in the State of destination. They also argue that, by handing the goods over to the acquirer, the seller loses control over them, and that therefore the tax liability must also pass to the acquirer.

40. The concept of dispatch is not entirely clear in any of the language versions of the Sixth Directive. From a purely linguistic point of view it is arguable that it refers only to a single action, as Teleos and Others argue.

39. By contrast, the Member States involved in the proceedings and the Commission argue that dispatch to another Member State 41. It is doubtful, however, whether dispatch has occurred in this case. Both the relevant provisions also refer to transportation. Unlike — possibly — 'dispatch', 'transportation' refers not to a single action but to a continuous movement of the goods. It cannot therefore be argued that transportation to another Member State has already been concluded, if the goods have not yet left the state of origin.
42. In my estimation, the distinction between dispatch and transportation is as follows. Dispatch takes place when the seller or the acquirer uses an independent third party for transportation, such as the post office, which, during the transportation, does not follow instructions from either the seller or the acquirer. By handing the goods over to the third party, the dispatch, the seller loses control over the goods, without the acquirer yet obtaining the powers of an owner. That power is not transferred to the acquirer until the third party hands the goods over to him in the Member State of destination. At that moment, intra-Community acquisition takes place.

43. Transportation within the meaning of the directive takes place, by contrast, if the seller or the acquirer carries out the transport of the goods himself, or through agents who follow his instructions. If the seller is responsible for transport, intra-Community acquisition takes place when the seller or his agent delivers the goods to the acquirer in the State of destination. If the acquirer assumes responsibility for transport, he obtains, directly or through his agent, the power to dispose of the goods as owner in the country of origin. But even in this case intra-Community acquisition does not take place until the transportation to another Member State has been completed.

44. In the dispute in the main proceedings, intra-Community acquisition should have taken place through the handover of the mobile telephones to the forwarding agent and transportation to the country of destination. As the forwarding agent was no independent third party, but acted on the instructions of TT, this is a case not of dispatch but of transportation. The arguments of Teleos and Others based on the literal meaning of the word dispatch are therefore irrelevant.

45. This interpretation of the concepts of dispatch and transportation leads — albeit by a different route — to the same result as the solution proposed by the Member States and the Commission: intra-Community acquisition and the concomitant exemption of the intra-Community supply are dependent on the goods actually leaving the State of origin.

46. That result accords with the sense and purpose of the transitional arrangements for the taxation of trade between Member States, as the Commission in particular has rightly pointed out. The basic assumption is that there is a transfer of the goods from one Member State to another and that the taxable end consumption of the goods is transferred correspondingly. Article 28b(A)(1) of the Sixth Directive thus also establishes the place of the taxable intra-Community acquisition as the Member State
47. It should also be borne in mind that, in its introductory sentence, Article 28c(A) of the Sixth Directive calls upon Member States to exempt intra-Community supplies 'subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse'.

48. That objective is served by the condition in section 30(8)(a)(i) of the VAT Act 1994 that zero-rating of an intra-Community supply is granted only if the goods have actually left the country. Teleos and Others are right to argue that national provisions enacted to implement the introductory sentence of Article 28c(A) of the Sixth Directive may not clash with the other provisions of the directive. As the foregoing arguments have shown, however, that is not the case.

49. According to consistent case-law, moreover, the concepts of economic activity and the supply of goods, which define the turnover which is taxable under the Sixth Directive, are wholly objective in character and are independent of the purpose or results of the turnover in question.

50. That also applies to the concept of intra-Community supply. Inasmuch as the definition of this concept takes as its criterion the physical movement of the goods across the frontier, it likewise attaches to an objective event. In the documentation of such movements of goods, fraud can never be entirely excluded, as the facts of this case illustrate. However, objective events which manifest themselves in the outside world are more amenable to verification than the intentions of the acquirer and the contractually agreed obligations which he has assumed. To that extent, the condition that the goods must be actually removed from the State of origin can contribute to the prevention of tax evasion.

51. Taking objective circumstances as the criterion also serves the purpose of ensuring

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legal certainty and makes measures connected with the application of VAT easier.\(^{14}\)

52. In a series of further arguments, Teleos and Others complain that exemption of the intra-Community supply does not take place until the goods have left the State of origin. Essentially, they complain at the sellers being held responsible for whether or not the goods are transported even though, by handing them over to the acquirer or his forwarding agent, he lost control over them. Such an interpretation, they maintain, burdens the customary form of delivery in international trade 'Ex works' and a series of other forms of delivery governed by the Incoterms (e.g. CIF and FOB) with significant risks. That makes intra-Community trade in goods less attractive and therefore infringes Article 29 EC.

53. It is true that, in making an intra-Community supply 'Ex works', the seller incurs a particular risk. If, contrary to the contractual agreements, the buyer does not transport the goods to another Member State, the transaction does not constitute an exempted intra-Community supply, on which the acquirer must pay tax in the State of destination. The supply is then to be regarded rather as an inland supply, in respect of which the supplier is liable for tax. The latter will normally not have invoiced the acquirer for VAT, since an exempted intra-Community supply was envisaged.

54. The supplier's risk of having to pay VAT as the result of conduct in breach of contract by the acquirer is primarily a result of the way in which contractual relations are structured. If the supplier leaves transportation of the goods to another Member State to the acquirer, which is perfectly permissible under the Sixth Directive, he must as a result turn to his business partner in the event of that contractual duty not being fulfilled and retrospectively demand the VAT which he owes on an inland supply from that partner. To provide for such an eventuality, the supplier can require the buyer to provide security for the VAT until transport to another Member State has been proven, as recommended in Commissioners' Notice 703.

55. According to the interpretation suggested by Teleos and others, however, the point of acquisition would shift backwards to the point in time before transportation out of the State of origin. From that moment onwards, the State in which the acquirer was established would be entitled to levy the

\(^{14}\) To that effect, see *BLP Group* (cited in footnote 12, paragraph 24) and *Optigen* (cited in footnote 11, paragraph 45).
tax, even though the goods had not in fact arrived there but had remained in the State of origin and were probably even being used there. That interpretation would thus be contrary to the allocation of the right to tax intended by the transitional arrangements.

56. The risk of non-fulfilment of the acquirer's contractual duty to export the goods to another Member State would fall, finally, on the revenue authority of the goods' State of origin. The latter is, however, not a party to the contractual relations between the seller and the acquirer. Since intra-Community acquisition is coupled with exemption of the intra-Community supply, the revenue authority of the goods' State of origin would no longer be able to turn to the inland supplier. Instead, it would have to try to levy VAT from the acquirer, which might not even be registered for tax in that State. 15

57. It need not be determined here whether the burdens and risks for the supplier in relation to intra-Community supplies which may arise in such circumstances represent an obstacle to the movement of goods within the Community. That is because the risks depend primarily upon the structuring of the contractual performance as an 'Ex works' delivery, as the supplier has agreed, and not upon the interpretation of the relevant provisions of the Sixth Directive. Appropriate limitations would in any event be justified, as they facilitate the proper levying of VAT on trans-frontier supplies and serve the objective recognised and encouraged by the Sixth Directive of combating tax evasion. 16

58. It must, however, be examined in the answer to the third question whether liability of the supplier in special situations such as the present does not go too far and might disproportionately restrict the free movement of goods or infringe general legal principles.

15 — It would require a complex arrangement: one would have to assume a fictitious delivery back to the goods' State of origin — in this case the United Kingdom — followed by a renewed taxable intra-Community acquisition — in this case by TT — in that State. Teleos and others argue that the United Kingdom tax authorities allocated a VAT number to TT and clearly tried to levy the tax from TT also in the manner described. They object to that as double taxation. What is clear is that the tax may be levied only once, either from Teleos and others or from TT. Which of those two is primarily liable depends on the answer to the third question.

16 — Joined Cases C-487/01 and C-7/02 Gemeente Leusden and Holin Groep [2004] ECR I-5337, paragraph 76; Kittel and Ricola (cited in footnote 11, paragraph 54).
59. I therefore propose the following answers to the first two questions:

An intra-Community acquisition of goods within the meaning of the first subparagraph of Article 28a(3) of the Sixth Directive requires the acquirer to have obtained the power to dispose as owner of the goods, which are dispatched or transported to another Member State and thus have physically left the State of origin.

Exemption of an intra-Community supply for the purposes of Article 28c(A)(a) of the Sixth Directive requires the supplied goods to have been dispatched or transported to another Member State and thus have physically left the State of origin.

60. In answer to the third question, it needs to be clarified whether the supplier, who has presented to the authorities in good faith the proofs of transportation out of the State of origin provided by the acquirer, may retrospectively be refused the exemption of the supply originally granted if the proofs turn out to have been false.

61. The Member States involved in these proceedings are unanimously of the view that the supplier must prove that the conditions for exemption have been met. Should the proofs presented by him turn out on verification by the tax administration to be false, the proof has not been provided and the exemption should therefore be retrospectively refused.

62. The Commission argues on the other hand that intra-Community supplies would be made disproportionately more difficult if a supplier does not enjoy the exemption even if he has done everything in his power to fulfil the conditions for exemption and prove that they have been fulfilled. It refers to a joint declaration in the minutes by the Council and the Commission at the time that Directive 91/680 was adopted. According to that declaration, the transitional arrangements should not in any event result in the exemption under Article 28c(A) being refused where it subsequently emerges that the purchaser has provided incorrect data, whereas the taxable person has taken all necessary measures in order to preclude incorrect application of the rules on VAT with respect to supplies in connection with his undertaking.
63. It should be noted at the outset that the Sixth Directive is very wide in its scope. It follows that exemptions from the tax by way of derogation from that principle are to be construed narrowly. Any person relying on such an exception must prove that the conditions for its application are met.

64. As is apparent from the introductory sentence of Article 28c(A) of the Sixth Directive, it is for the Member States to lay down the formal requirements for proving that the conditions for exemption of an intra-Community supply have been met. In using that margin for manoeuvre that the Sixth Directive has thus left to the Member States, the latter must nevertheless take account of the provisions of the EC Treaty, the sense and purpose of the directive itself, and general legal principles such as the principle of proportionality.

65. The transitional arrangements for intra-Community trade were introduced by Directive 91/680 in connection with the establishment of the internal market and the abolition of tax frontiers. The measures are thus essentially aimed at facilitating the free movement of goods between Member States, which is guaranteed by Articles 28 and 29 EC. As the Commission has rightly argued, the requirements for proving an intra-Community supply may not therefore lead to intra-Community trade in goods being made more difficult by the transitional arrangements than was the case before the abolition of frontier controls.

66. While frontier controls still existed, taxable persons could rely in proving the export of the supplied goods on the documents issued by the customs authorities. After the disappearance of the internal frontiers, taxable persons no longer have this particularly reliable means of proof at

17 — Halifax and Others (cited in footnote 10, paragraph 41); Optigen and Others (cited in footnote 11, paragraph 37); Kittel and Recolta (cited in footnote 40).


19 — See also to that effect the Order of 3 March 2004 in Case C-395/02 Transport Service [2004] ECR I-1991, paragraphs 27 and 28, and the judgment in Halifax and others (cited in footnote 10, paragraphs 90 and 91). For further details, see point 20 et seq. of my Opinion in Case C-146/05 Collée.

20 — See also to that effect in connection with Article 22(8) of the Sixth Directive Halifax and Others (cited in footnote 10, paragraph 92). To that effect in connection with the right to deduct input tax, see Joined Cases C-110/98 to C-147/98 Gahalfrisa and Others [2000] ECR I-1577, paragraph 52; Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 Molenheide and Others [1997] ECR I-7281, paragraph 48; and, in relation to Article 21(3) of the Sixth Directive, Case C-384/04 Federation of Technological Industries and Others [2006] ECR I-4191, paragraph 29.

21 — See the first and second recitals in the preamble to Directive 91/680 (cited in footnote 4).
their disposal. Instead, proof that goods were taken across the frontier can in general be provided henceforth only by the declarations of private parties.

67. Particularly suitable for that purpose is a consignment note drawn up in accordance with the provisions of the Convention on the Contract for the International Carriage of Goods by Road (CMR) and on which the recipient has noted receipt of the goods in another Member State.

68. A CMR note is signed by the sender of the goods and the forwarding agent and serves as proof that the forwarding agent has taken over the goods. A copy accompanies the goods and is handed over to the recipient on demand by him. If the recipient notes receipt of the goods on the consignment note, then at least three persons, who are usually independent of each other, will have contributed to providing proof that the goods have been taken to another Member State. That reduces the risk of fraud, but cannot exclude it entirely.

69. If the taxable person presents a note drawn up and signed in that way, that normally suffices as proof that the goods have been dispatched or transported from the State of delivery to another Member State. Where the other requirements are met, a claim to exemption of the intra-Community supply arises. That does not preclude the possibility that proof of transportation or dispatch might instead be adduced by other means, if that does not lead to any more serious obstacle to the movement of goods across frontiers than the requirements for proof which applied before the abolition of internal frontiers.

70. The question arises as to what the consequences are if the data in the consignment note subsequently turn out to be false, and it has to be assumed that the goods were not in fact transported across the frontier, in circumstances where the taxable person has not colluded with the persons drawing up the consignment note and he neither had notice nor can be deemed to have had notice of the inaccuracy of such data.

71. On the one hand, one could retrospectively classify the supply, in accordance with the factual situation which subsequently emerged, as a non-exempt inland supply and require the supplier to pay the VAT. That is the view of the Member States. The Commission, by contrast, is of the opinion that in that case VAT cannot be demanded of the supplier.

22 — See Articles 5(1) and 9(1) CMR.
23 — See Articles 5(1) and 13(1) CMR.
72. I do not share the view of the Member States. It leads to a disproportionate burdening of the supplier and thus to an obstacle to the free movement of goods. The risk that the supplier might be liable for VAT in the event of his purchaser not actually exporting the goods but feigning transport by means of fraudulent transport documents could deter the supplier from trans-frontier transactions. The approach advocated by the Member States would thus conflict with the aims of the transitional arrangements.

73. As is clear from the joint declaration in the minutes by the Council and the Commission at the time that Directive 91/680 was adopted, which the Commission has cited in its argument, it was also not the intention of the legislature that the liability of the supplier should go that far.

74. It is true that the aim recognised and encouraged in the Sixth Directive of ensuring regular collection of VAT and fighting tax evasion may justify restrictions on the free movement of goods. The approach advocated by the Member States is also suitable for preventing loss of tax revenue through criminal behaviour. It does, however, lead to an unreasonable allocation of risk between the supplier and the revenue authority in relation to the criminal conduct of a third party, and therefore offends the principle of proportionality.

75. Certainly the supplier is under an obligation to do all in his power to ensure that the intra-Community supply is properly carried out. If, by contract, he leaves the transport of the goods to another Member State to the acquirer, he must — as stated in the explanations accompanying the first question — in certain circumstances bear the consequences of non-performance of that obligation by the acquirer.

76. The seller must also satisfy himself of the seriousness of his business partner. The objective of preventing tax evasion justifies heavy requirements being involved in fulfilling that obligation. It is for the national court to decide whether the supplier has fulfilled it. According to the information which it has supplied in the reference, it appears that Teleos and Others exhausted all the possibilities at their disposal in scrutinising TT.

77. It would, on the other hand, be excessive to go so far as to hold the supplier liable for

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24 — Gemeente Leusden and Holin Groep (cited in footnote 15, paragraph 76) and Kittel and Ricolta (cited in footnote 11, paragraph 54).
25 — See point 57 above.
26 — Federation of Technological Industries and Others (cited in footnote 19, paragraph 33) and Kittel and Ricolta (cited in footnote 11, paragraph 51).
criminal conduct of his business partner, against which he cannot protect himself. It would, for example, be of no help to the supplier in this case to require security in the amount of the VAT from the acquirer until proof of the transportation of the goods to another Member State, as recommended in Commissioners’ Notice 703. That is because the presentation of the consignment note, which so far as the supplier can determine contains no discernible false information, appears to provide just that proof. The supplier would thus be obliged to release the security on receiving the consignment note, even if — as it later turns out — transport across the frontier has not in reality taken place.

78. Nor do the judgments in *Faroe Seafood and Others*[^28] and *Pascoal & Filhos*[^29] lend themselves to argument against that result.

79. Those cases concerned the levying of customs duty on goods from non-member States. In each case, the importer had secured an exemption from customs duty on the strength of a certificate of origin issued by the exporting State. It later turned out that the certificates of origin were incorrect, so that the customs preference had been wrongly granted. In the abovementioned judgments, the Court of Justice did not see it as a disproportionate burden on the importer for customs duty to be recovered retrospectively in those circumstances, even though the importer had relied in good faith on the (incorrect) certificate of origin of the exporting State.[^30]

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[^27]: The idea that, in the levying of VAT, a careful and honest taxable person should not have to assume liability for the fraudulent conduct of others, is expressed in a series of decisions on carousel frauds (see in particular *Federation of Technological Industries and Others* cited in footnote 19, paragraph 33), *Optigen and Others* cited in footnote 11, paragraph 33), and *Kittel and Ricolta* (cited in footnote 11, paragraph 33). Those cases are, however, not entirely comparable with the present set of circumstances, since those cases concerned several transactions which could be distinguished from each other, whereas in this case all that was supposed to take place was one intra-Community supply, albeit one in the implementation of which several persons were involved.


[^30]: See in particular *Faroe Seafood and Others* (cited in footnote 27, paragraph 114) and *Pascoal & Filhos* (cited in footnote 28, paragraph 55).
whose name the import declaration was made.\(^{31}\) No other debtor takes that person's place in answering to the importing State for the customs duty, in the event that the certificate of origin turns out to be incorrect.

81. In addition, unrestricted trade with non-member States does not constitute a right of the individual, protected by a fundamental freedom in the Treaty. Therefore, less strict standards apply to restrictions on trade with non-member States than to restrictions on the movement of goods within the Community.

82. As the Commission has further correctly argued, those judgments concerned the application of a specific provision of customs law\(^{32}\) which expressly governed the case of retrospective correction of the certificate of origin. According to that provision, waiver of post-clearance recovery of the customs duty was possible only in the event of error by the relevant customs authorities. There are no corresponding provisions in this case.

83. I am aware that the interpretation I am suggesting here carries a certain risk. It could lead the supplier into carelessness if he did not have to reckon with liability for VAT in the event of the acquirer merely feigning transport over the frontier. For that reason, I reiterate that the supplier can escape retrospective liability for VAT only if there were no indications that he was involved in the deceptions, or knew anything about them, and if he did everything in his power to ensure the proper levying of the VAT.

84. Finally, I should consider briefly the consequences which flow from the above findings. The Commission puts forward the following alternatives. Under the first, one could regard the conditions for exemption as having already been met through the presentation of the documents, which were not obviously false, and exclude a retrospective reassessment of the subject-matter (the solution by subject-matter). The Commission favours that solution. Alternatively, it suggests, one could reassess the subject-matter afresh in the light of the subsequent discoveries, but without, as the result, retrospectively withdrawing from the taxable person the exemption already granted to him (the procedural solution).

85. The solution by subject-matter seems to me to be preferable. It allows one to assume

\(^{31}\) — Pascoal & Filhos (cited in footnote 28, paragraph 49).

\(^{32}\) — Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1).
an intra-Community acquisition by the buyer — in this case TT — in the original State of supply, corresponding to the exemption of the supply. 33 The second solution on the other hand could, so to speak, lead into a no man's land of taxation law. In relation to the subject-matter, the supply would be retrospectively classified as an inland supply, without being able to demand the tax from the taxable supplier intrinsically liable for it. At the same time, it would be hard to conceive how a taxable intra-Community acquisition could have taken place without there being any concomitant intra-Community supply.

D — The fourth question referred

87. This question asks whether the declaration of intra-Community acquisition in the State of destination has an impact on tax treatment in the State of origin. The parties which have taken a position on this question maintain that it does not.

88. As already explained, exemption in the State of origin and taxation of the acquisition in the State of destination in principle go hand in hand and serve to allocate the authority to tax. 34

89. Nevertheless, it would be an invitation to fraud if the State of origin were obliged automatically to exempt a supply, once the buyer has lodged a tax declaration concerning the intra-Community acquisition of the relevant goods in the State of destination. By presenting a false tax declaration in the State

If the supplier, acting in good faith, presents objective proofs that the goods supplied by him have left the State of origin and the authorities of that State thereupon exempt the supply from tax in accordance with Article 28c(A)(a) of the Sixth Directive, payment of the tax cannot be retrospectively demanded from the supplier in the circumstances of the main dispute in this case if it turns out that the proofs presented contained false information but the supplier neither knew nor could have known anything of it. That does, however, apply only where the supplier has done everything in his power to ensure the proper application of the provisions on VAT.

33 — On this complicated solution, which was clearly nevertheless actually attempted by the United Kingdom authorities, see footnote 14 above.

34 — See points 29 and 31 et seq. of this Opinion.
of (alleged) acquisition, the buyer could manipulate the place of taxation and, for example, choose a State with a particularly low rate of tax. Even in the event of insufficient examination of the information concerning the acquisition in the State of destination, the incorrect declaration would nevertheless trigger exemption of the supply in the State of origin.

90. The principle of the proper levying of tax is far better served if the conditions both for the intra-Community acquisition and for the exemption of the corresponding supply are examined independently of each other by the tax authorities of the respective States. The latter must in any event ensure — through tax rebates if necessary — that correct implementation of the supply and the acquisition does not lead to double taxation.

91. In the context of the proof that an exempt intra-Community supply has taken place, it can be at most a supplementary indicator that the buyer has actually taken the goods out of the country if he presents a tax declaration lodged in the State of destination on the intra-Community acquisition of the goods. Such a declaration gives only an indirect indication that the goods were taken from the State of origin to the State of destination. The supplier cannot rely upon that alone because the tax declaration lodged in the State of destination concerning the acquisition does not bind the tax authorities in the State of origin in their determination on the exemption.

92. The answer to the fourth question must therefore be that it is not of decisive significance in proving an exempt intra-Community supply that the acquirer has lodged a tax declaration on the intra-Community acquisition of the goods in question with the tax authorities of the State of destination.

V — Conclusion

93. On the basis of the above considerations, I propose that the questions referred should be answered as follows:
(1) An intra-Community acquisition of goods within the meaning of the first subparagraph of Article 28a(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment requires the acquirer to have obtained the power to dispose as owner of the goods, which are dispatched or transported to another Member State and thus have physically left the State of origin.

(2) Exemption of an intra-Community supply for the purposes of Article 28c(A)(a) of the Sixth Directive requires the supplied goods to have been dispatched or transported to another Member State and thus to have physically left the State of origin.

(3) If the supplier, acting in good faith, presents objective proofs that the goods supplied by him have left the State of origin and the authorities of that State thereupon exempt the supply from tax in accordance with Article 28c(A)(a) of the Sixth Directive, payment of the tax cannot be retrospectively demanded from the supplier in the circumstances of the main dispute in this case if it turns out that the proofs presented contained false information but the supplier neither knew nor could have known anything of it. That does, however, apply only where the supplier has done everything in his power to ensure the proper application of the provisions on VAT.

(4) It is not of decisive significance in proving an exempt intra-Community supply that the acquirer has lodged a tax declaration on the intra-Community acquisition of the goods in question with the tax authorities of the State of destination.