2020

EU VAT FORUM

"PREVENTION AND SOLUTION OF VAT DOUBLE TAXATION DISPUTE"

REPORT

III-20-(VAT Forum)-2

In memory of Paolo Centore, appreciated member of the VAT forum, who actively assisted and advised the development of EU VAT policy with his notable contribution.

circumstances be regarded as stating an official position of the European Commission.

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Executive Note

The subgroup's quest for the report is to improve tax certainty and tax fairness for businesses and tax authorities in cross-border situations within the EU. Ultimately, the solution is dialogue, cooperation and information. There are many available tools to address cases of VAT double taxation or, more broadly, cross-border VAT disputes but none of them – alone or combined – effectively prevent or solve all such cases. In addition, there are some loopholes leading to double non-taxation, which merit more fundamental action at EU level.

1. OBJECTIVE

The EU VAT Forum subgroup's report on prevention and solution of VAT double taxation disputes responds to the call from the EU VAT Forum's members to identify and highlight the current best practices and to analyse how to efficiently prevent and/or solve double taxation (or non-taxation) situations in the EU.

2. KEY FINDINGS

Problem description

VAT double taxation or non-taxation situations with regard to EU cross-border transactions have been undermining the internal market for a long time. VAT double taxation violates the principle of tax neutrality and imposes costs on businesses and final consumers. Tax administrations and businesses are interconnected and need to work together to tackle VAT double taxation in the internal market and to collect VAT accurately.

In 2007, the Commission launched an online public consultation to ascertain the views of the public and businesses on *the possible introduction of a dispute resolution mechanism in the area of VAT*. Today, the significant increase of cross-border transactions and the rapid changes in the economic and legal context make it necessary to explore again the accuracy and relevance of existing solutions.

The aim is to tackle these issues when they arise within the internal market. This should benefit legitimate businesses as well as Member States by ensuring tax fairness and protection of public revenue.

Overall impact of double taxation

The incidence and the economic/quantitative impact of VAT double taxation (and, a fortiori, non-taxation) are not currently being measured; the number, the amounts at stake and the overall burden linked to double taxation are not available in the EU. The sole indicator available is the number of cases dealing with tax matters that reach the Court of Justice of the EU (EUCJ). The subgroup has observed, however, that VAT double taxation, irrespective of how often or how seldom it arises, negatively affects VAT neutrality, tax fairness and equal treatment principles.

Definition and cases of VAT double taxation

The subgroup agreed on a working definition based on the one used in the public consultation in 2007, with additional elements covering both legal and economic double taxation cases. The examples and cases presented reflect the current level of harmonisation of the EU VAT system. The definition builds on VAT neutrality and fair competition principles in the integrated environment of the EU internal market.

Mapping and assessment of existing tools

The subgroup identified and assessed the efficiency of the existing tools for prevention and resolution of VAT double taxation and related disputes. Some tools proved to be of help for both purposes. It is needless to say that **better regulation** is essential to facilitate the application of VAT rules by businesses and Member States and thus to prevent situations of VAT double taxation. The involvement of stakeholders, starting at an early stage and throughout the entire legislative process, is important in this regard. **VAT Committee guidance** and the publication by the Commission services of **explanatory notes** are also seen as good tools to facilitate implementation of VAT rules by businesses as well as by tax authorities.

More recently, the establishment of pilot projects on **EU VAT Cross-Border Rulings** and the system of dialogue between relevant tax authorities on individual cases provide a useful contribution, albeit an informal and voluntary one, to the resolution of double taxation matters. Their effect is positive, but they need to be reinforced, applied to all Member States and publicised. The main advantage of these approaches is that they provide a forum for the assessment and common understanding of the background facts and nature of transactions in specific cases.

The **European Court of Justice** is the ultimate referee for VAT disputes linked to the interpretation and implementation of VAT rules. Apart from bringing a case to the CJEU - which is effectively not possible for an ordinary taxpayer – there are some potentially faster and more flexible tools to tackle VAT double taxation.

Taxable persons can use **SOLVIT**, which is a solution-oriented tool designed to solve complaints caused by incorrect application of EU law by a public authority in a cross-border situation[1].

However, the subgroup's assessment has revealed that none of the currently available tools – alone or combined – can guarantee a solution for businesses or tax administrations in all cases of VAT double taxation or, more widely, in cross-border VAT disputes.

The subgroup further concluded that mechanisms available in other areas cannot be usefully transposed as such to VAT dispute resolution.

3. PROPOSALS FOR KEY ACTIONS

To adequately address issues of VAT neutrality and tax fairness, including fair competition, the subgroup proposes key actions (short, mid-term and long-term) to deal with the identified loopholes:

i. Better communication and dialogue;
ii. Better articulation of existing tools and processes; and
iii. Taking steps towards a comprehensive legal framework.

Short-term actions:

- To provide easily accessible and updated information on the currently available solutions for taxpayers.
- To organise systematic dialogue between Member States and between Member States and businesses in double taxation cases.
- To ensure better voluntary communication between tax authorities and between tax authorities and taxpayers in cases of VAT double taxation or cross-border VAT disputes.
- To promote and potentially formalise a trilogue between tax administrations, taxpayers and the EU Commission covering all the relevant aspects of the VAT rules and processes.

Mid-term actions:

- To upgrade the existing tools, e.g. the pilot project system of EU VAT cross-border rulings, the EU cross-border dialogue between some Member States, and SOLVIT, to make them more effective and more widely used in regard to double taxation dispute prevention and resolution.
- To elaborate solutions to protect the rights of taxpayers acting in good faith until such time as a solution is found regarding the VAT treatment, e.g. in the area of invoicing.

[1] https://ec.europa.eu/solvit/index_en.htm

Long-term actions:

- To explore an EU fully-fledged mechanism involving taxpayers and Member States to prevent and/or solve VAT double taxation situations in cases where existing tools are not efficient.

The subgroup requests the EU VAT Forum to acknowledge the need to take action to prevent and solve VAT double taxation disputes and to commit itself to supporting and facilitating the implementation of these recommendations.

1. Subgroup 7.1 mandate

As agreed in the plenary meeting of the EU VAT Forum on 19 February 2018, a subgroup was established to collect Member States' and Businesses' views and practices on the most efficient way to prevent and/or solve VAT disputes and to handle financial loss resulting from VAT double taxation in a EU cross-border context.

In an internal market environment, it is a prerequisite that companies should not have to face uncertainties about the VAT treatment of their transactions or, in particular, the threat of double taxation or sanctions. For EU Member States' tax administrations, the internal market environment should not undermine public revenue collection.

The subgroup was tasked in particular with:

- Collecting Member States' and Businesses' views and practices on how to most efficiently prevent and/or settle VAT disputes and how to handle financial prejudice from VAT double taxation[2] in a EU cross-border context;
- Identifying current measures at EU level that may be useful to prevent and resolve instances of VAT double taxation; and
- Preparing a discussion paper highlighting current (best) practices as well as providing recommendations for further initiatives aimed at preventing VAT double taxation as efficiently as possible while respecting the competencies of the EU Member States.

The members of the subgroup are representatives of academics, businesses and Member States tax administrations:

Academics representatives

- Studio Paolo Centore & Associates,
- European School of Advanced Fiscal Studies (University of Bologna, Italy),

Businesses representatives

- Business Europe,
- CFE –Tax Advisers Europe,
- CLECAT – European Association of Forwarding, Transport, Logistics and Customs Services,
- EHHA – European Holiday Home Association,
- EK – Confederation of Finnish Industries,
- EPMF – European Precious Metal federation,

[2] Or VAT double non-taxation

- IVA – International VAT Association,
- Siemens,
- UEAPME – European Association of Craft, Small and Medium-Sized Enterprises,

Member States tax administrations

- Belgium,
- Denmark,
- Finland,
- Germany,
- Greece,
- Hungary,
- Ireland,
- Italy,
- Latvia,
- Lithuania,
- Malta,
- Netherlands,
- Portugal,
- Slovenia,
- Spain,
- The United Kingdom.

The subgroup established its working method[3] to deal with the different issues. This report reflects the outcome of the subgroup's work and is submitted to the EU VAT Forum for discussion during the plenary session of 16 January 2020.

[3] The subgroup can decide to work in a format of thematic workshops.

2. Working Methods

2.1. The members of the EU VAT Forum subgroup 7.1 "prevention and solution of VAT double taxation disputes" met several times[4] to discuss this issue and to prepare the present report.

2.2. The structure of the draft report was validated during the EU VAT Forum 13th plenary session of 2 July 2019[5]. The time limit to deliver this report was set at January 2020, namely the date of the 14th plenary session of the EU VAT Forum.

2.3. This report is based on the information collected and analysed by the subgroup members. It is the result of the collaboration of the subgroup members – EU tax administrations, businesses representatives and academics–supported by officials from DG TAXUD. The rapporteurs of this report ensured the overall coordination and provided substantial input.

2.4. The members of the subgroup analysed various aspects of the cases of VAT double taxation and related risks, endeavoured to update the definition of VAT double taxation and examined test cases. The subgroup also analysed possible models for dispute resolution. The cooperation between DG TAXUD and other DGs with practical experience in prevention and resolution of disputes at EU level was an essential feature of the subgroup's working methods.

2.5. The subgroup participants viewed the current economic and legal context as an opportunity to depart from the traditional thinking, beliefs and assumptions in this field and to aim for innovative, efficiency-based solutions that would better assist businesses and tax administrations.

4 See the list of the 7.1 subgroup meetings in Annex 1

5 https://circabc.europa.eu/ui/group/0c70c156-cc4a-48e0-bf7b-d535cda5d15f/library/42cb5ab9-f8b2-4b44-bc95-1b7848701099/details

3. Problem description

3.1. Policy Context

The EU VAT Forum has identified the issue of VAT double taxation as a topic of common interest for both businesses and Member States. It was decided to investigate this item, which was already seen as a bone of contention by the stakeholders. In particular, the subgroup considers that tax administrations and businesses need to work together so as to prevent VAT double taxation and ensure the accurate collection of VAT. The subgroup members also acknowledge that, in cross-border situations, EU tax administrations cannot work in isolation any longer. Cooperation between tax administrations through dialogue and other mechanisms are necessary to address this problem of VAT double taxation.

The EU VAT Forum believes that the current economic and legal context[6] provides an opportunity to re-examine efficiency-based solutions that will benefit legitimate businesses as well as for tax administrations. A new dimension is that of new technologies that are generating new business models facilitating cross-border transactions. This new economic landscape has to be investigated and VAT treatment adapted to suit it. The EUCJ has already identified this development[7].

It is important to stress that VAT double taxation is directly linked to cross-border business activity, i.e. it is not limited to certain industries and nor is it dependent on the size of the company acting cross-border (SME or MNE). Therefore, all economic sectors of activity and businesses are affected by this issue, depending on the degree of their cross-border activity.

In the beginning of 2007, the Commission launched an online public consultation[8] to establish the views of the public and businesses on the possible introduction of a dispute resolution mechanism in the area of VAT to tackle double taxation of EU cross-border transactions. Given the few number of answers received, this topic was not considered as a priority. Nevertheless, following this consultation, the Commission made some proposals[9], which were

6 https://ec.europa.eu/taxation_customs/sites/taxation/files/15_01_2019_qmv_factsheet_en.pdf

7 EUCJ 12 February 2019, C-568/17, *Geleen* – Introduction of the Advocate General Opinion http://curia.europa.eu/juris/document/document.jsf?text=&docid=210711&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=10170802

8 https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/vat-possible-introduction-a-mechanism-eliminating-double-taxation-individual-cases_en
https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/consultations/tax/rep_doubl_taxation.pdf

9 See working party n°1 documents.

not accepted. At the same time, the considerable number of preliminary requests to the CJEU in this area in the years that followed illustrated a remaining issue.

3.1.1. From the businesses' perspective

As a matter of principle, VAT should be neutral[10] for taxable businesses as VAT is a tax on final consumption. Instances of VAT double taxation violate the principle of neutrality and add costs to businesses and to final consumers. In an internal market environment, it is a prerequisite that companies should not have to face uncertainties about the VAT treatment of their transactions under the threat of double taxation, which affects their competitiveness and distorts exchanges within the internal market and on the international trade scene.

Neutrality should not only be reflected in day-to-day compliance requirements but should also be embedded in tax or customs reassessments[11] as well as in VAT refund rejections. Commercial agreements should rely on efficient EU mechanisms for neutralising VAT.

The fight against indirect tax evasion or under-payment by illegitimate businesses requires voluntary compliance from legitimate businesses and transparency from tax administrations. The system must be based on mutual trust. Tax authorities expect legitimate businesses to collect and pay the appropriate VAT on their behalf when it is due. Legitimate businesses expect tax authorities to maintain the neutrality of VAT. However, businesses – especially SMEs – are concerned about the lack of mechanisms to prevent and solve VAT double taxation. Measures like the court systems take too long to resolve the immediate practical issues at hand, namely how to treat (and invoice) a transaction facing a risk of VAT double taxation. Moreover, national courts can only resolve issues in one Member State. For instance, one national court cannot resolve an issue where two or more Member States believe they have the right to tax a certain supply. Furthermore, the court system does not guarantee a solution to a double taxation issue as national courts may not always align with other Member States or refer a case to the EUCJ. There are rulings though - for instance in C-416/17 Accor - indicating the requirement to take double taxation into consideration and thus have a formal requirement to refer to the EUCJ.

Businesses need easily accessible neutralisation mechanisms allowing both SMEs and MNEs to use them without involving external experts or external legal

[10] EUCJ 19 December 2012, Case C-549/11, Orfey Balgaria EOOD, points 33-34

[11] Custom reassessments could impact the VAT-base. Please refer to section 5.4 with the practical examples.

support. Mechanisms should be equally available to issues involving small and big amounts. They should not be based on any presumption of simplicity/complexity. Due to local implementation discrepancies, a complex issue in a Member State can be a very simple one in another.

3.1.2. From the EU Member States' perspective

Recent EUCJ judgments reflect a paradigm shift. Double taxation is not admissible in the internal market. Therefore, tax administrations have an obligation to prevent and solve VAT double taxation through working together and contacting each other[12].

Disputes with respect to the assessment of the facts remain within the responsibility of domestic authorities and courts and cannot be resolved by the EUCJ. In some cases, the core issue of double taxation is not the interpretation of the EU VAT rules but rather the different interpretations of the background facts by two or more tax administrations with regard to the same transaction[13].

The subgroup discussed the use of cross-border dialogues as an efficient measure in this respect. It is an initiative already used for example in transfer-pricing cases in which two or more Member States can discuss the matter at hand with the taxpayer in question. As cross-border dialogue involves oral communication rather than long written procedures, common problems related to different understanding of the facts can more easily be solved. Moreover, engaging in a dialogue among Member States is a new kind of method to assist in solving VAT double tax issues raised by businesses. The subgroup found this to be a good measure to facilitate a quick resolution or at least to achieve agreement on the facts.

3.1.3. From an academic perspective

As the EU VAT system is still not fully harmonised – particularly in the area of procedural law – EU law still leaves room for Member States to independently establish rules governing how to collect the tax, organise assessments and domestic court proceedings, conduct audits and set criteria for penalising fraud and abuse (*procedural autonomy*). Hence, disputes can be resolved and prevented by means taken at national or EU level.

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[12] EUCJ 17 December 2015, C-419/14, WebMindLicenses Kft, "3. *Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax must be interpreted as meaning that the tax authorities of a Member State which are examining whether value added tax is chargeable in respect of supplies of services that have already been subject to that tax in other Member States are required to send a request for information to the tax authorities of those other Member States when such a request is useful, or even essential, for determining that value added tax is chargeable in the first Member State."*

[13] Of course, it also happens that no taxation occurs as the Member States involved choose to abstain from levying VAT.

In other words, a distinction should be made between "disparity of laws" (non-harmonised area) and "disparity in the interpretations of a harmonised (shared) legal system" (harmonised area). In the former situation, double taxation or non-taxation can only be efficiently prevented by unilateral measures taken by one of the States; in the latter situation, disputes can be resolved by finding and agreeing on a uniform interpretation of the common legal framework.

For transactions that involve EU and non-EU countries[14], it is not an easy task to identify appropriate mechanisms for dispute prevention and resolution. It is even more difficult when the operation involves two or more Member States and a third State[15].

In any case, the dispute prevention (and resolution) mechanisms available in the context of transactions involving countries that are not bound "by a common legal framework for their consumption tax systems" would appear in principle to be equally available to prevent (or resolve) disputes in the context of transactions involving countries that are bound by such a framework and others that are not.

3.1.4. From the society perspective

Unresolved double taxation disputes are not in the interest of any stakeholder[16]. The absence of consideration of taxpayers' rights in most of the currently used Dispute Resolution Mechanisms (DRM) has been recently underlined by surveys and scholarly publications[17]. Problematic are the recognition of the taxpayer as an interested party, the absence of appeal rights in case of non-activity of the competent authorities or denial of access, the possibility for taxpayers to participate in the procedure, the lack of publicity of the decisions and the lack of transparency.

A non-efficient DRM has also indirect consequences such as reduced trust in tax administration and lower voluntary compliance resulting in reduced tax collection.

Companies moving towards the so-called collaborative economy or sharing economy creates new problems also regarding double taxation. On the one hand, double taxation becomes a problem in the blurring between business and private activity, for example with cross-border house owners making a rental

[14] VAT Dispute Resolution Mechanisms between EU Member States and third countries is outside of the scope of this report. However, this report covers situations in which non-EU businesses are the recipient and/or the supplier of goods and services within the EU VAT Territory.

[15] W. HELLERSTEIN, « Dispute Resolution and Dispute Prevention under the EU VAT : A Global Perspective », *in* M. LANG et al. (Eds), *CJEU – Recent Developments in Value Added Tax 2016,* Linde Verlag, 2017, pp. 65-80. [16] UN Tax Committee (2015) Doc. E/C 18/2015 CRP 8, page 7 in particular.

[16] UN Tax Committee (2015) Doc. E/C 18/2015 CRP 8, page 7 in particular.

[17] See 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker and Pasquale Pistone.

income and being charged VAT without refund possibilities due to different interpretations between Member States. On the other hand, problems appear due to an unclear interpretation of the role of platforms as a service provider or just a "billboard" for private people providing a service.

3.2. Lack of information / awareness about existing tools

One of the highlights of the research, analysis and experience sharing performed by the members of the EU VAT Forum is that both businesses and tax administrations are not always aware of the existing tools to prevent and/or solve VAT double taxation disputes in EU cross-border transactions. As a consequence, one of the objectives of this report is to raise awareness of the existing tools, which is addressed in sections 6 and 7.

Discussions tended to recognise the existence of a 'galaxy' of different domestic formal and informal means of recourse against decisions taken by tax authorities or to enter into a dialogue with tax authorities. However, the process may not always be as efficient, and procedures may differ between Member States.

Ensuring both adequate information and, to the extent possible, streamlining the different procedures would be a beneficial first step. Without this, there is a risk of unintentionally undermining the normal process.

Taxpayers should be treated in an equal way within the EU internal market as regards their rights to benefit from a neutral VAT system, wherever the place of establishment or whatever their size. An EU structured and official process is necessary to protect these rights.

4. Overall impact of VAT double taxation

Data on double taxation is not readily available and is not easy to gather. The subgroup asked for hard data potentially available to the EU VAT Forum Members in order to quantify the magnitude of VAT double taxation. It seems that, at the moment, without further comprehensive and innovative research on statistics, it is almost impossible to quantify the impact for each stakeholder.

4.1. Limitations

The number, the amounts and overall burden of double taxation in the EU (and, a fortiori, non-taxation) are not known/measured. No hard evidence is nowadays available. There is a consensus between Member States, businesses and academics on the fact that no hard data is available. One of the reasons for the absence of data could be that a number of businesses, when having some doubts on the VAT treatment, will abstain from performing the transaction.

4.2. Tentative evaluation

Currently, the subgroup relies on the data from the EUCJ VAT judgments and SOLVIT reports in the internal market scoreboard and the information provided by the EU VAT FORUM Members.

4.2.1. EUCJ source

With regard to the EUCJ case-law, the statistics on the judicial activity of the Court of Justice[18] give a clear indication of the high number of new cases concerning taxation. From the tables in Annex 2[19], it can be observed that the number of cases has noticeably increased since 2014. The subject matters for taxation are primarily rulings. In this context, taxation refers to direct and indirect tax. There is no specific data for VAT itself, nor double taxation segmentation. However, some further research was handled and presented in Annex 3.

For instance, the analysis of the subject matter of the disputes submitted to the attention of the Court brings out the issues that can result in a double taxation: place of taxation (34 cases), right to refund or exemptions (23 cases), taxable person and place of establishment (7 cases). The Grand Chamber has not been involved in any of the cases. In 18 cases, no opinion by

[18] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/_ra_2018_en.pdf
[19] 2018 annual report of the judicial activity of the EUCJ, pages 123 and 124

an Advocate General was deemed necessary. A more detailed analysis of the EUCJ's role and activity is presented in Annex 3.

The cases are summarised in the following table:

Table 1. Summary of the EUCJ case law

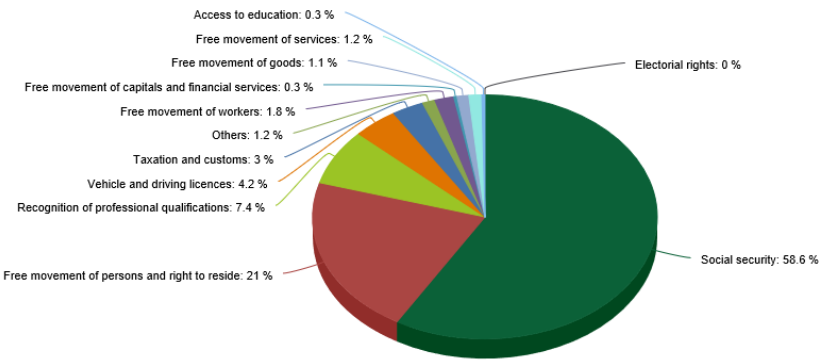
Place of supply of services	20
Exemption UE sales	15
Deduction/refund	8
Place of supply of importations	6
Place of supply of goods	5
Place of establishment	4
Taxable person	3
Taxable amount	2
Special schemes	1

4.2.2. Evidence from SOLVIT

With regard to SOLVIT, the internal Market Scoreboard[20] shows that 3% of the 2295 cases submitted in 2018 relate to complaints on taxation and custom issues. "Taxation" at the moment is a generic category not exclusively used for VAT and double taxation. During the period 2002-2018, SOLVIT handled approximately 109 VAT cases.

[20] https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm

Graph 1. Cases solved by SOLVIT in 2018



4.2.3. National Courts (or any dispute resolution solving data) source

To the knowledge of the group, no comprehensive study on VAT double taxation resolution has so far been carried out on national Court and EUCJ case law.

4.3. Impact of double taxation and non-taxation on stakeholders

VAT double taxation and non-taxation impact businesses and tax administrations. It appears difficult for tax administrations to detect this issue since they are only aware of situations of VAT double taxation in cases where taxpayers complain about it.

4.3.1. Impact on businesses

Many businesses, especially SMEs, have limited means to analyse their VAT risks, but still want (and are clearly expected by politicians and economists) to expand internationally. However, many businesses, especially SMEs, have limited means to find out what operating internationally, in or outside the internal market, means from a VAT compliance point of view. Confronted with a doubt about a VAT treatment, they will most likely choose an alternative approach which avoids the risk of double taxation way (even though this may come with a higher cost for instance due to extra transportation or establishment) or just abstain from entering into the otherwise profitable contemplated business. SMEs may also face economic double taxation because the costs of correction compared to the VAT at stake may be disproportionate, and thus in some cases accepting the lack of deduction is cheaper than hiring an adviser to correct the VAT treatment.

Larger businesses, often more aware of the VAT risks, will either invest in the administrative resources to clarify the VAT position (sometimes asking for

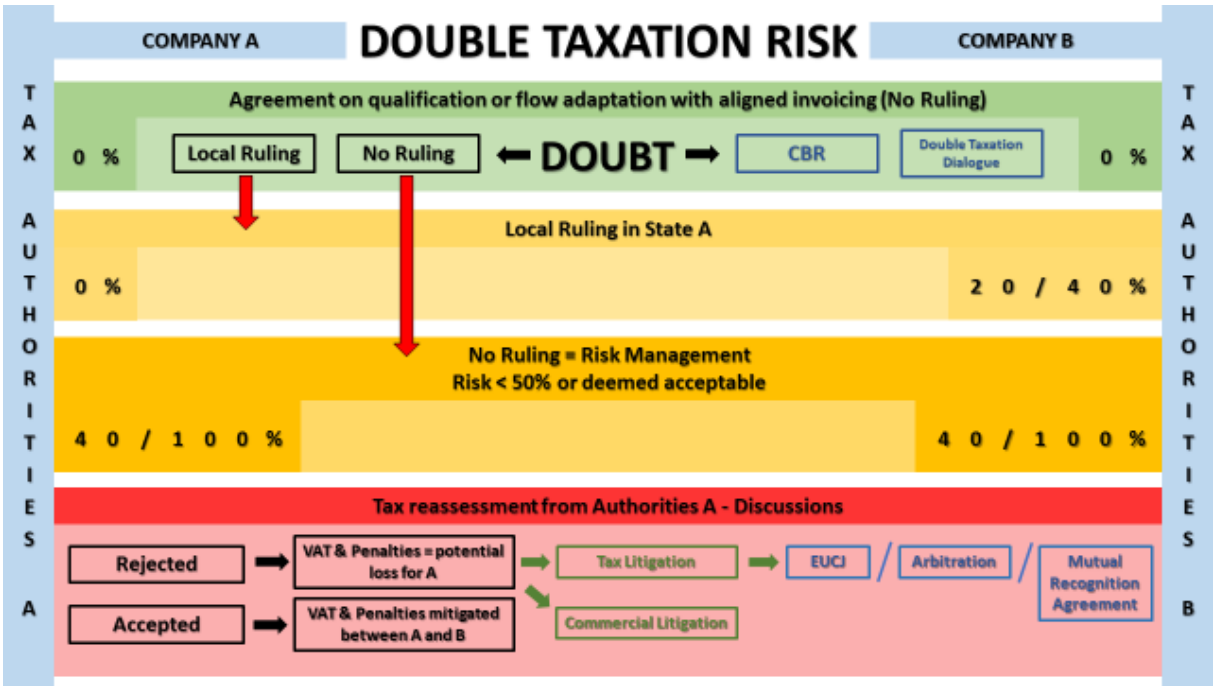
pre-approval or other legal binding measures); or continue and take a calculated risk based on their internal legal assessment of a neutral outcome. They may also pass on the VAT risk to another party (e.g. the 'EXW-DDP' game) or just abstain from entering into the otherwise profitable contemplated business (see graph 2 below).

For businesses, instances of double taxation firstly imply added costs due to VAT being levied more than once. If the double taxation is temporary, then there is not only an impact on cash flow and liquidity, but also a significant amount of administrative burden that for SMEs is an even higher threat to competitiveness.

When facing a risk of VAT double taxation, a number of businesses may try to find alternative business models to ensure a neutral taxation – often involving added transportation. This is often done out of necessity in order to make the sale, as a business has to invoice the sales within a month if not earlier in some Member States. Sometimes, it is even not possible to issue a correct invoice, for example, when two Member States cannot agree on the place of taxation. This is a critical issue, not only because of the cash-flow impact. How should the business deal with this situation until the issue is resolved? Does it need to abstain from performing the transaction or is there guidance available on how to proceed without suffering VAT double taxation or potential penalties for issuing incorrect VAT invoices. Not being able to invoice due to constraints related to administrative burden undermines the functioning and competitiveness of the internal market.

The existence of a VAT double taxation risk has an impact on the behaviour of businesses. For example, in some cases, businesses will prefer not concluding a deal with a potential commercial partner to facing a risk of VAT double taxation. In the worst-case scenario, businesses will even prefer assuming the VAT double taxation although it is an additional cost related to their activity. This is particularly the case with SMEs for financial reasons. The consequence is that VAT will not be neutral and the costs will be passed on to the customer (businesses and final consumers) as a general cost. It should be noted that double non-taxation is also an issue as it leads to distortion of competition between businesses within the internal market.

Graph 2. Business decisions as regards VAT double taxation



Box 1. Business decisions as regards VAT double taxation –

Risk analysis from the business perspective

The EU VAT FORUM subgroup considers that VAT double taxation should not only be seen in a 'static' perspective of technical situations leading to double taxation issues. The behaviour of businesses facing risks of VAT double taxation must be taken into consideration. Indeed, VAT double taxation may derive in practice from the 'dynamic' of legitimate businesses' behaviour.

In other words, tools to deal with real or possible VAT double taxation must be adapted to the decision-making and problem-solving policies of businesses.

When entering into a cross-border transaction, between many other elements, VAT will be an essential element, giving rise to different situations. The following scenarios are explanations of the above graph on the typology of the businesses' decisions with regard to VAT double taxation risks.

Agreed VAT treatment – No perceived risk of double taxation - Perceived risk = low

Two businesses entering into an international transaction will agree on the VAT treatment of their respective transactions, notably through the invoicing process or when entering into a contract. A reasonable level of certainty is due to the formal VAT messaging on the invoices. VAT written contractual arrangements are rare. Beyond this, a contracting party has no means to make sure VAT is duly declared/collected/deducted by its supplier/client.

In this situation, there is no perceived risk of double taxation. The risk can be materialised in the course of business further to tax reassessment or refund rejection.

Agreed VAT treatment – Perceived risk = mild

Entering into a cross-border agreement with a doubt about taxation rules is normal and does not minimise the good faith of businesses. The complexity of the VAT system makes it impossible to achieve certainty in this matter.

No formal agreement on VAT treatment

This is the most common situation. Parties conclude their contracts and decide their VAT treatment separately. Most of the time, of course, it matches. Discrepancies in VAT messaging trigger a review and change by one of the parties.

There is also the case where a party with more negotiating power can impose a VAT treatment which is satisfactory in its country of establishment but does not fit well with the VAT rules in the country of its counterpart. In case of a VAT reassessment, the 'junior' party can only be protected in the long term if there are mechanisms allowing regularisation and neutralisation of the VAT reassessment for both parties.

Prior VAT treatment qualification - Ruling

When the timetable and size of a project allow it, businesses should be allowed to pre-qualify their cross-border operations through a prior ruling methodology. This is the purpose of the CBR[21].

Shifted transaction features to avoid VAT risk of double taxation

If risk of double taxation is perceived as too high by the businesses, they will opt to change the supply chain (adding cost and carbon) or simply shun the Member State where the risk is located.

It must be emphasised that perceived VAT risk is a matter of competition between Member States. Member States allowing regularisation and neutralisation processes are more likely to attract 'risky' VAT investments. Having common EU VAT tools and common commitment by all Member States around these tools is key to the functioning of the system.

4.3.2. Impact on tax administrations

[21] VAT Cross-Border Ruling Pilot project. More information on: https://ec.europa.eu/taxation_customs/business/vat/vat-cross-border-rulings-cbr_en

The right of Member States to collect taxes through the exercise of their sovereignty creates obstacles that affect both tax administrations and taxpayers engaged in economic activities. Double taxation is one of these obstacles. Double taxation in the VAT field involves the taxation of the same economic transaction in several Member States, resulting in a higher burden than would be the case when it is taxed in only one Member State.

Double taxation at EU level is a consequence of the overlapping of different tax sovereignties which uncoordinatedly apply their right to levy a tax on a taxable event taking place in the territory under their jurisdiction. This involves the payment of two or more levies on the same transaction.

The double payment of taxes causes multiple difficulties in relation to the investment incentive, which leads to a decrease in economic transactions, so that companies are forced to conduct negotiations considering the tax impact to a large extent, and other aspects such as, for example, the quality of goods and services or their suitability may no longer be valued.

In short, double taxation is contrary to justice, since it causes discrimination and is contrary to fair taxation, thereby undermining the neutrality of VAT.

It can be argued that double taxation in VAT is an obstacle to economic development by limiting intra-Community economic transactions. Double taxation in VAT interferes with the free movement of goods and services and, therefore, the free movement of labour, capital and knowledge. All this determines an inefficient allocation of economic resources.

A risk or perceived risk of double taxation may result in business not carrying out transactions at all or relocating them to different jurisdictions. It may also discourage business from investing in particular Member States. This is not desirable from a tax administration perspective and will have a negative impact on public revenue.

Double taxation may stimulate an increase in tax evasion by making it more profitable and therefore requires an increase in the material, human and organisational resources of tax administrations to combat it.

In addition, it has led to an increase in the complexity of tax regulations, both in the specific field of VAT and in the management and audit procedures to combat it. This complexity of regulations determines the existence of meaningful economic costs, both for taxpayers and for the tax administrations. Repeated and frequent instances of double taxation can also

lead to disputes, which may ultimately end up as court cases, which can consume a lot of time and resources that may already be scarce.

Double taxation disputes can be damaging to trust that has been built up between tax administrations and taxpayers. For the business sector to bear twice the same tax on an economic transaction often causes the tax burden to exceed the profit made, which is an insurmountable obstacle to the generation of economic activity. This complexity also means that the tax administrations are obliged to invest significant resources in information work to the damage of other important activities such as, for example, control. Incidently, double taxation (as well as double non-taxation) disputes can lead to uncertainty in quantifying the correct tax base, affecting the public revenue.

5. Definitions and cases of VAT double taxation

5.1. Working Definition

Definition has been an important topic of discussion in the subgroup, as it has to include the new business models. For the purpose of this report, the group agreed on the following working definition of VAT double taxation.

Box 2. Working definition of VAT double taxation

The group considers that there is a VAT double taxation when:

- a transaction is taxed twice in two or more Member States and does not give rise to a VAT neutralisation in one of the Member States;
- a transaction is taxed twice in the same Member State without being neutralised;
- or, more generally, when VAT is a final cost and the neutrality principle is not respected.

The group chose a definition that covers both legal and economic double taxation.

5.2. Background: the public consultation of 2007

In the 2007 public consultation,[22] the definition of VAT double taxation was based on the identification of the following situations:

(i) Different points of view between tax administrations on the classification of the nature of the transactions performed – supply of goods or services;
(ii) Different means and proofs accepted by tax administrations to justify the application of a VAT exemption in intra-EU supplies;
(iii) Different domestic rules and administrative criteria to justify that a transaction is performed by a headquarter or by a permanent establishment;
(iv) Difference of interpretation from tax authorities of a particular situation.

5.3. Real VAT double taxation versus perceived VAT double taxation situations

From a business perspective, perception is as important as reality. Businesses will never voluntarily create a double taxation situation. Businesses will tend to

[22] https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/vat-possible-introduction-a-mechanism-eliminating-double-taxation-individual-cases_en

use VAT routes where they do not see VAT neither as a risk nor as an additional cost related to VAT double taxation. VAT neutrality merely means no final taxation or VAT cost on businesses[23]. In some cases, businesses will rather incur extra (general) costs in order to reduce or eliminate a VAT risk.

Box 3. Real double taxation and perceived double taxation

The VAT system gives rise to a number of local interpretations, either authorised by the Directive or just through local interpretations which may vary. Some rules are not written. In the absence of centralised documentation or guidelines, most businesses have no way to be up-to-speed with all 28 Member States' VAT rules and usages. Even when businesses have access to this knowledge (provided they know the language), misinterpretation of foreign legislations is common.

- **Real double taxation**

Double taxation may appear by default, generally due to misinterpretation of a foreign rule or practice, or IT system implementation issues, or dispute with a supplier/client, which gives rise to a tax reassessment or refund rejection. A VAT double taxation occurs when no regularisation process is immediately available and/or two Member States qualify the same transaction differently. There must be cross-border mechanisms to tackle this type of double taxation situation, a posteriori. We assume that administrative errors can easily be corrected by the businesses themselves.

- **Temporary double taxation**

Temporary double taxation exists in the period between the occurrence of double taxation and its correction/neutralisation. If procedures outbalance the VAT due in terms of cost and/or time, then a temporary double taxation will become a permanent double taxation. In case of errors, businesses can in principle correct them, but practical/legal procedures in the MSs may in reality prevent businesses from doing so or make it economically impossible. In this case, a temporary double taxation becomes a real double taxation issue.

- **Perceived / anticipated double taxation**

Perceived double taxation prior to starting operations is a significant drag on the good functioning of the VAT system because it may impact business decisions in a negative way, for instance driving longer supply chains resulting in increased carbon emissions[24]. Knowing that fair and efficient mechanisms exist to neutralise VAT double taxation that may occur in the course of business is important when making

[23] The report addresses situation where the taxpayer has full right of VAT deduction.

[24] See the typology of business behaviours Section 4 of this report.

investments or supply-chain decisions. Qualification of supplies is still a complex affair.

It is a legitimate expectation that businesses could submit cross-border contemplated schemes for approval by the Member States and receive a coordinated answer, in the short term and in an efficient manner.

5.4. Practical examples of double taxation

The group characterised several situations of cross-border transactions:

- Domestic transactions involving businesses established outside the jurisdiction, such as:
  - example (i): domestic transactions performed by a non-established business;
- Cross-border EU transactions by EU or non-EU established businesses (supply of goods or services), such as:
  - example (ii): different characterisation of a transaction/place of supply
  - example(iii): different possible status of taxable persons;
- Non-recovery of tax in case of exports/imports or cross-border EU transactions such as:
  - example (iv) : non recovery of tax further to an import in the EU;
  - example (v) : non recovery of tax due to different prescription periods within the EU;
- Limitation to the right of deduction in complex processing/manufacturing, such as:
  - example (vi): input VAT incurred without full right to deduction in one country;
- Chain transactions involving more than one of the above cases.

(i) Domestic transaction performed by a non-established business

According to the EUCJ jurisprudence[25], there is a fixed establishment in cases where the establishment is characterised by an adequate structure in terms of human and technical means, own or subcontracted, with a sufficient degree of permanence. This same

[25] EUCJ 4 July 1985, C-168/84, *Günter Berkholz*.
EUCJ 2 May 1996, C-231/94, *FaaborgGelting*.
EUCJ 17 July 1997, C-190/95, *ARO Lease BV*.
EUCJ 20 February 1997, C-260/95, *DFDS A/S*
EUCJ 28 June 2007, C-73/06, *Planzer Luxembourg*.

criterion has been enshrined in Council Implementing Regulation (EU) No 282/2011 of March 15, 2011, which establishes provisions for the application of Directive 2006/112/EC on the common system of VAT (DOUE of March 23)[26].

Consequently, a person not resident in Spain, but established in another Member State, who owns a home in Spain leased to a direct real estate administrator (for example tourist apartments), will NOT be considered established in Spain and the rule of reverse charge will be applicable to the operations performed. This taxpayer must request the VAT refund of VAT amounts charged in Spain, by means of the refund procedure of Directive 2008/9/CE for taxable persons not established in the Member State of refund, but established in another Member State. Rented premises are in the same situation. When going the aforementioned way to obtain the refund of the VAT amounts charged in Spain, the taxpayer may find that the administration of his country does not have a proof that it is an entrepreneur and will not submit the request for refund to the Spanish Tax Administration. Failure to obtain the return of the VAT amounts charged in Spain to the taxable person may be classified as a case of double taxation of the subject transactions. The challenge is that there are different VAT treatments between Member States regarding leasing rules and status of taxable person.

In this case, VAT double taxation comes from a "census" insufficiency. This problem could be solved through a dialogue between the Tax Administrations involved.

(ii) Different characterisation of a transaction/place of supply

Mediation services, for example by lettings agency, in the lease of an apartment in case where the property owner also provides services similar to the hotel industry, such as daily cleaning of the apartment or weekly change of bed linen or laundry services for clothes, can generate a situation of a VAT double taxation. For Spain, the aforementioned services would not be regarded as related to real estate because they are excluded as such by Article 31a (3d) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying

[26] « For the purpose of applying Article 44 of the VAT Directive, "permanent establishment" means any establishment, other than the headquarters of the economic activity referred to in Article 10 of its Regulation, which is characterised by a sufficient degree of permanence and an adequate structure in terms of human and technical resources that allow it to receive and use the services provided for the needs of said establishment". (Article 11.2 ☺

down implementing measures for Directive 2006/112/EC on the common system of value added tax. These services would be regarded as intermediation services in the provision of accommodation services in the hotel sector or in sectors with a similar function. For Denmark, when the minimum rental period is one month, these services would be regarded as related to real estate in accordance with the provisions of Article 31a (2p) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

This is an example of an issue about the place of taxation of a transaction. This situation also raises an issue about the invoicing of the transaction until the place of taxation is agreed.

(iii) Different possible status of taxable persons

The sharing economy is increasing significantly, as the sector grows and the business models evolve (B2B / B2C / C2C). One of the characteristics of the sharing economy is the blurred lines between the participants themselves as well as their status. It is thus not so easy to qualify the person supplying services through a platform, or the platform itself, as a taxable person. Firstly because the participation of each in the supply is difficult to discern and secondly because the notion of taxable person is not equally perceived by Member States.

In fact, the notion of taxable person has been subject to jurisprudence of the EUCJ and the development of the sharing economy, involving an increasing number of people offering goods and services against consideration, is a new reality.

Sharing economy platforms, for example, allow the users to rent their spare rooms/apartments/houses to travellers looking for accommodation. Some Member States consider that, when a private person leases his own apartment on a regular basis, he is not considered to be a taxable person; but others have an opposite opinion.

To prevent VAT double taxation or even double non-taxation, legal certainty about this issue is needed because of the consequences in cross-border transactions, in particular regarding the place of supply and registration for VAT purposes.

Another issue relates to the tax treatment of services provided via collaborative platforms and the different approach by Member States

can lead to distortions of competition. For example, this is the case of an online booking of a hotel or any other type of accommodation. Where Member States do not agree on the treatment of the supply – some consider it as being an electronically supplied service and others as a service linked to the accommodation, e.g. the immovable property – there will be VAT double taxation within the EU VAT territory and this is not negligible.

Finally, as the role of platforms is not just about advertising the service, but often providing the booking service itself, the problem is much more complex.

(iv) Non recovery of tax further to an import in the EU

Example from Member State A[27] involving an import from a non-EU country. A company established in a third country hires a transportation and customs agent for an export to EU Member State A. A T1 document is issued but the truck driver forgets to pass through the EU Member State A customs (case which is common in the EU). Because this is a local obligation, the client in EU Member State A reverse-charges the VAT on the purchase but still EU Member State A customs also reassess the import VAT on the import which has never been correctly declared. EU Member State A authorities do not allow the recovery of this import VAT, which makes it in fact a 100% penalty. This situation matches most criteria of double taxation and breach of the neutrality principle.

(v) Non-recovery of tax due to different prescription periods within the EU

A Belgian business, active in B2C supplies of goods to the Netherlands, wrongly applied the distance sales regime and collected Belgian VAT instead of Dutch VAT. The business regularised its situation by paying the due Dutch VAT in the Netherlands and asking for a refund of the undue Belgian VAT in Belgium. However, an issue occurred since the limitation period of paying/refunding VAT is not harmonised and Belgium and the Netherlands apply different statutes of limitation. Indeed, the unpaid Dutch VAT must be regularised up to 5 years back whereas the undue Belgian VAT can only be recovered up to 3 years back. Hence, the business faced a period of 2 years of effective double taxation since it could not recover the VAT amount unduly paid to the Belgian tax authorities.

[27] This example is anonymised as the case is still pending.

(vi) Input VAT incurred without full right to deduction in one country

This example is provided by the business representatives. An import of goods is performed in France by a German partial taxpayer (e.g. 40% prorate in Germany). The goods are processed in France over multiple years before being transferred to Germany. French VAT is only deductible at 40% using the German recovery ratio. When the finished goods are transferred from France to Germany, this is a deemed intra-community acquisition transfer in Germany. The German VAT on Intra-EU acquisition is only deductible at 40%. In this example, the double application of the prorate is a final double taxation for the taxpayer.

5.5. Recent case-law: Seminar Case

The "seminar case"[28] is a textbook case of a risk of double (or double non-) taxation. It illustrates situations where there could be no real agreement on the implementation of EU legislation on the place of supply among Member States.

Background facts

Employees of Taxable Person A, established in Member State (MS) 1, attend a seminar held in MS 3 for professional purposes. The event is organised by Taxable Person B, established in MS 2. The participation fee is invoiced by Taxable Person B to Taxable Person A.

MS 1 considers that the supply of seminar services falls within the scope of Article 44 of the VAT Directive and taxes the transaction. Taxable person A is then requested to apply the reverse charge mechanism[29] by paying and deducting the VAT due in MS 1 through the same VAT return.

Due to a difference of interpretation in the implementing of Article 53 of the VAT directive, MS 3 considers that the supply of the same seminar services falls within the scope of Article 53 of the VAT Directive and taxes the transaction as well. Taxable Person B is then requested to charge VAT due in MS 3 to Taxable Person A. The latter is entitled to recover this input VAT via a cross-border VAT

[28] See Annex 4
[29] Article 196 of the VAT Directive.

refund request[30]. It should be noted that Taxable Person B would in principle be obliged to register for VAT purposes in MS 3 to charge VAT.

Box 4. The Seminar Case

The case is impressive because of the full range of stakeholders involved at various levels:

- Council with specific VAT legislation;
- VAT Committee with Guidelines (meeting 10-12 May 2010);
- Two EU Cross-Border Ruling requests, one leading to an agreement published in the CBR list[31], the other involving more Member States and without agreement;
- The Court of Justice of the European Union[32].

For the moment, the issue is not settled. One could argue that for these mundane but high economic value activities, the available tools and procedure to reach an agreement between Member States have not worked optimally.

Subgroup comments

Exchanges of views took place about the efficiency of the different tools and the procedure used to find a common implementation of the specific provisions of the VAT Directive. It must be underlined that the positive result of the CBR request had been achieved through a comprehensive dialogue and a true willingness of the stakeholders to find a practical bilateral agreement.

The Judgment of the EUCJ and the conclusions of the Advocate-General in case C-647/17 can be seen as a strong call for the tax administrations to find a solution between themselves, avoiding legal uncertainty for the taxpayer as well as for the public revenue collection, which tax administrations are responsible for.

As long as the notion of seminars will be subject to various criteria to be defined by Member States, different implementations will occur. This is the case for some other provisions of the EU legislation as well. It is paramount to explore

[30] Article 170-171 paragraph 1 of the VAT Directive.
[31] https://circabc.europa.eu/w/browse/e41853b6-0396-453b-a503-bfb41fa8bcc2
[32] EUCJ 13 March 2019, C-647/17, *Konsulterna AB*

new mechanisms or to improve the existing ones to prevent and avoid such situations.

On a positive note, currently there are discussions within the VAT Committee[33], which could possibly lead to further guidelines.

6. Inventory of existing tools for prevention / solution of VAT disputes

6.1. Foreword

In the EU legal framework, the most important VAT dispute resolution mechanism is the *European Court of Justice.* This supranational court is responsible for the interpretation of EU primary and secondary law. It gives binding interpretations of the applicable EU law which must be then applied by the national courts of the EU Member States to resolve the specific VAT disputes. Two procedural mechanisms allow a case to be brought before the Court of Justice: preliminary rulings (Art. 267 of the TFEU) and infringement proceedings (Art. 258 of the TFEU). Both proceedings lack a subjective right for individuals and corporations, meaning an individual or a corporation has no right to initiate proceedings in the EUCJ, but is dependent on the willingness of domestic courts and the Commission[34]. In a preliminary ruling procedure, only the domestic law of one Member State and its conformity with the VAT Directive is discussed. Furthermore, in an infringement action, only the failure of one Member State is alleged by the Commission. The Commission can launch parallel infringement procedures against different Member States presenting the same problem, but they remain separate. There is no procedure where two (or more) Member States can get involved on an equal level and, hence, where a judgment of the EUCJ may bind two (or more) States. This limitation makes it very difficult to tackle cases of VAT double (non-)taxation in an efficient way.

Box 5. Court case law on non-taxation

Case C-277/09, RBS Deutschland. The lease transactions involved were not taxed in any Member State. According to the interpretation applied in the UK, the transactions were viewed as supplies of services located at the place of supply, in

[33] No 982 dated 12/11/2019

[34] K. SPIES, « Dispute Resolution in VAT: status quo under the EU VAT Directive and Room for Improvement », *in* M. LANG et al. (Eds), *CJEU – Recent Developments in Value Added Tax 2016,* Linde Verlag, 2017, pp. 91-128.

this case, Germany. According to the interpretation applied in Germany, the transactions were viewed as supplies of goods taxable in the UK.

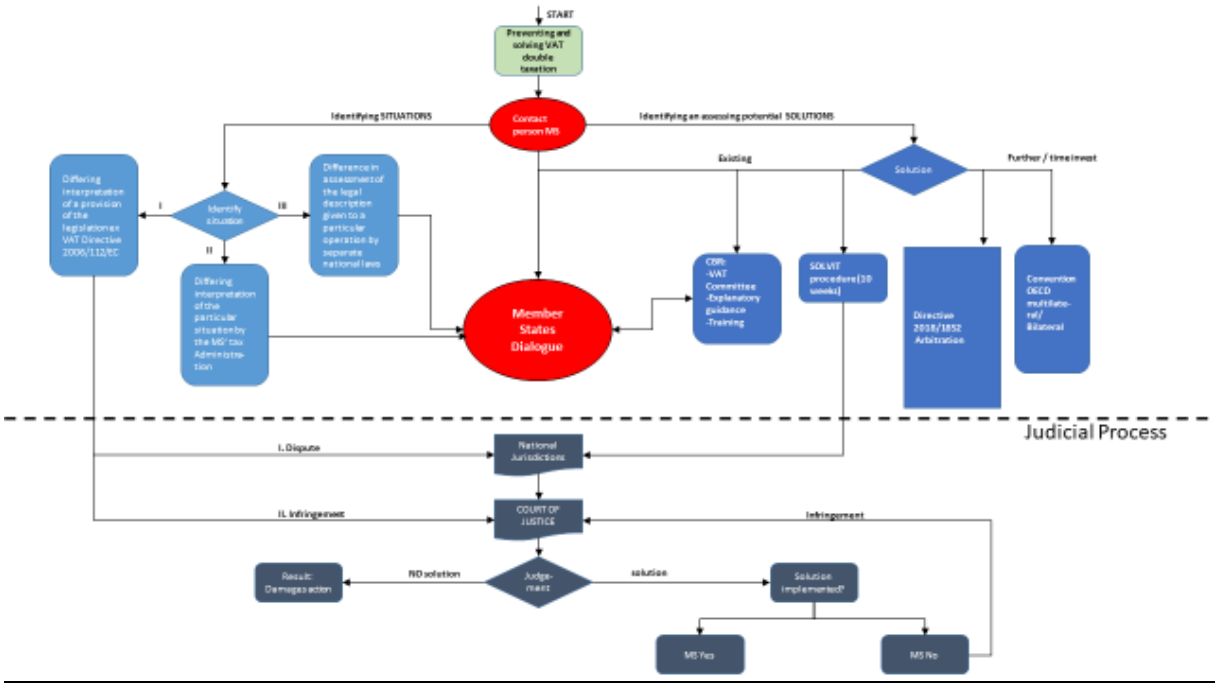
As pointed out by the Advocate General in the conclusions of the WebMindLicenses Kft. case (note 31) "*In that event, a Member State cannot waive the application of its law in order to impose VAT on a transaction that is not normally subject to VAT in its system 'solely on the ground that the output transactions have not given rise to the payment of VAT in the second Member State' (ibid., paragraph 46).*"

The question is whether this can be seen as a signal that the EUCJ does not apply principles regarding the prohibition of double taxation or double non-taxation. Since this judgment, the Court has not had the opportunity to clarify its position on double non-taxation.

However, even though the judicial mechanisms improve legal protection and efficiency of dispute resolution, they cannot resolve disputes leading to VAT double taxation in a cross-border situation in all cases. Although all domestic courts have to comply with EU law and decisions by the EUCJ, they are not obliged to mutually recognise decisions of domestic courts of other Member States. Moreover, the use of judicial means entails costs as well as long delays, which may not correspond to business working arrangements.

In addition to judicial remedies, the subgroup identified other instruments that exist at EU level either to prevent and/or to resolve disputes in the area of VAT, as the same tool can serve both purposes. The graph below presents the first mapping established by the subgroup on possible tools.

Graph 3. First inventory of possible tools to prevent and/or solve VAT double taxation disputes



6.2. Prevention tools

It was acknowledged that significant efforts had been made to improve the EU policymaking process for all stakeholders. This indeed paves the way to a better/homogeneous implementation of the EU legislation by the Member States

in cross-border situations. Thus, the subgroup agreed that, as a starting point and to prevent future VAT disputes, clear legislation is of essence[35].

The role of experts in different entities and places in the dialogue between the stakeholders was also mentioned as an efficient factor to prevent or/and solve a dispute on VAT double taxation.

6.2.1. Clear legislation

Clear legislation is a prerequisite to ensure smooth application of the VAT rules and to limit the existence of double and/or non-taxation. This prerequisite is already dealt with using a specific instrument. In particular, the European Commission's regulatory fitness and performance (REFIT) COM (2012) 746 programme aims to ensure that EU Legislation delivers results for citizens and businesses, effectively, efficiently and at minimum cost.

The Commission publishes every year the REFIT scoreboard, which provides a comprehensive overview of the REFIT results in each of the Commission's political priorities. The scoreboard also shows how the recommendations of the REFIT Platform (see box 6 below) have been taken into account by the Commission.

The better regulation agenda[36] is about designing and evaluating EU policies and laws transparently, with evidence, and backed up by the views of citizens and stakeholders. It covers all policy areas and aims for targeted regulation that goes no further than required in order to achieve objectives and bring benefits at minimum cost.[37]

The so-called quick-fixes package[38] adopted to clarify chain transactions and call-off stocks is an example of the complexity of the EU VAT system but also of the efforts to provide clear legislation. The quick fixes clarified a number of issues. However, new issues have arisen during the implementation process, underlining the ongoing need for communication between and with the relevant parties throughout the process.

35 The criteria of a "good" legislation have been characterised by OECD (see table Annex 5).
36 REFIT is part of the Commission's better regulation agenda.
37 https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en
38 https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat/single-vat-area_en#quick_fixes

Box 6. The REFIT platform

The REFIT Platform was set up by the May 2015 Better Regulation Communication[39] to advise the Commission on how to make EU regulation more efficient and effective while reducing burden and without undermining policy objectives. It consists of a Government Group, with one seat per Member State and a Stakeholder Group with 18 members and 2 representatives from the European Social and Economic Committee and the Committee of the Regions. Platform members' work includes reviewing suggestions received via the online 'Lighten the load - Have your say' form and making recommendations to the Commission taking into account suggestions made by citizens and interested parties.

Although this does not concern the situation of individual taxpayers, it creates conditions of better compliance for businesses as well as a more accurate view on tax authorities' available resources to tackle VAT fraud.

6.2.2. Expert groups in the VAT field

In the law-making process as well as in the monitoring requirement of the existing legislation, expert groups have an unneglectable role. One principle is to make sure that the envisaged EU legislation is elaborated with the contribution of the stakeholders. In the VAT field, this means that the recent proposals, including on the definitive regime, were subject either to public consultation and/or to dialogue with expert groups mentioned in the expert group register[40].

Within the constellation of expert groups and similar entities in the VAT field, special attention was given to the potential prevention and/or dispute solving role of the EU VAT Committee and the EU VAT Forum and its subgroups as both entities deal with issues of implementation of the existing legislation. The EU VAT Forum has currently no mandate to deal with individual cases of VAT double taxation dispute. However, as the present report illustrates, it can discuss broader issues.

6.2.2.1. Directive 2006/112/EC: guidance for common implementation of EU VAT legislation - The Advisory Committee on Value Added Tax (VAT Committee)

The VAT Directive does not contain any provision that can be used by taxpayers to directly lodge a complaint in case of VAT double taxation. The

[39] https://ec.europa.eu/commission/priorities/democratic-change/better-regulation_en

[40] See Annex 6

only reference to potential solution in case of different interpretation of the Directive itself can be found in the VAT Committee.

The VAT Committee was established in 1977 as an advisory committee for which the Commission provides the secretarial services. The scope of its work is set out in Article 398 of the VAT Directive. It deals with consultations by Member States wanting to take up an option under the VAT Directive and it examines questions raised by the Commission or by a Member State which concern the application of EU VAT provisions. The purpose of its work is thus to provide general guidance at EU level with a view to promoting uniform application of the VAT Directive. That is done through the guidelines it issues. Those guidelines have been published since 2012.

The VAT Committee does not solve concrete issues and has not been tasked with arbitrating in concrete cases where decisions taken by two or more Member States result in double taxation or non-taxation.

Some of the VAT guidelines issued by the VAT Committee served as basis for the VAT Implementing Regulation adopted by the Council on the basis of Article 397 of the VAT Directive. In contrast to the VAT Directive, the rules in the Implementing Regulation are directly applicable and do not need to be implemented into domestic law by the Member States.

Based on Article 397, introduced by Directive 2004/7/EC, the Council may - acting unanimously on a proposal from the Commission - adopt the measures necessary to implement the VAT Directive. Those measures fill the VAT Implementing Regulation. Guidelines of the VAT Committee will often be used to feed into this process.

6.2.2.2. VAT Explanatory Notes

The Commission services have produced various Explanatory Notes with a view to facilitating the common understanding of new rules. Those explanatory notes merely reflect the view of the Commission services, usually after discussion within the Group on the future of VAT and the VAT expert group. Explanatory Notes can therefore be seen as a guidance tool only. These Notes are not binding. Upon issuance, it is explicitly indicated that these are a work in progress.

Explanatory Notes may also facilitate the implementation of the EU VAT rules by the Member States. However, they do not address each circumstance in cross-border transactions or bring legal certainty given

their non-binding status. Moreover, with Member States not being bound by these notes, tax authorities could choose to have their own way to implement rules or interpretation of them. In some instances, it is nevertheless helpful to have the retroacts of the legislative process thus facilitating a common interpretation of the provision at stake. It also happens that the Court mentions them in some of its judgments, even though they have no legal value.

6.2.3. Dialogue: cooperation between tax authorities and EU Cross-Border Ruling pilot case

This section deals with the two pilot projects of the EU VAT Forum, which address tax certainty for business in cross-border transactions. These pilots are currently running. They have a common objective of preventing risks of double taxation.

6.2.3.1. EU VAT Cross-border Ruling (CBR) prevention tool

Since 2013, 18 EU Member States (Belgium, Denmark, Ireland, Estonia, Spain, France, Italy, Cyprus, Latvia, Lithuania, Malta, Hungary, Netherlands, Portugal, Slovenia, Finland, Sweden and the United Kingdom) have agreed to participate in a test case for advance VAT ruling in cross-border situations (CBR).

This pilot addresses practical situations where there is a risk of different interpretations of the transaction facts by the tax authorities involved. It could help prevent mistakes with consequences on the tax collection and/or risks of VAT double taxation and double non-taxation.

Businesses planning cross-border transactions in one or more of these participating Member States may wish to ask for such a ruling with regard to the transactions they envisage. In that case, they are invited to introduce their request for a cross-border ruling in the participating Member State where they are registered for VAT purposes.

Participating Member States and the business representatives have praised the CBR as an effective tool of tax administration cooperation and compliance. The EU VAT Forum members have urged all EU Member States to join the CBR pilot. Poland has manifested its interest in joining the participating Member States and attended one of the CBR meetings as observer.

In practical terms, the costs are very limited for the participating Member States. The number of EU CBR cases is manageable. The legislation applied

to the advance rulings is national legislation. A list of the outcomes of the dialogue between tax authorities on the cases (EU VAT ruling list) can be consulted on the TAXUD Europa web site[41]. The EU VAT CBR strives to meet the criteria of transparency and tax fairness as the clarification provided after the dialogue between tax authorities could benefit all businesses involved in similar transactions.

Tax authorities who can rely on an EU CBR business compliance tool to prevent mistakes and to minimise the risks of adjustments and sanctions following an audit could concentrate the freed resources on fighting "real fraudsters".

The CBR pilot could be seen as a "good value for money" project for Member States to show their commitment and to fulfil their obligations of administrative cooperation in the framework of Regulation 904/2010[42]. Additionally, the CBR helps ensure fiscal neutrality, which is a fundamental principle of the common system of VAT.

This principle precludes treating similar supplies of services and goods, which are thus in competition with each other, differently for VAT purposes and, further, precludes economic operators who carry out the same activities from being treated differently as far as the levying of VAT is concerned (see, inter alia, Case C-29/08 SKF [2009] ECR I-10413, paragraph 67 and the case law cited). The CBR pilot can help preventing a potential breach of VAT rules.

Eventually, cooperation between tax administrations is not seen by the Court as optional. This duty for Member States has been recently recalled by the Court in the WebMindLicenses Kft case[43].

6.2.3.2. VAT Double Taxation – Dialogue between tax administrations – Pilot Case

Responding to the EU VAT Forum's request, some Member States[44] decided to support an "additional" dialogue tool, between tax authorities of the Member States concerned, to ascertain different factors that may wrongly lead to double taxation and create the conditions of solving VAT double taxation situations.

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41 https://ec.europa.eu/taxation_customs/sites/taxation/files/cross-border-rulings.pdf

42 See Annex 7

43 EUCJ 17 December 2015, C-419/14, *WebMindLicenses Kft*.

44 https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/key_documents/eu_vat_forum/dialogue_tax_administrations_ms_en.pdf

By contrast to the EU VAT Cross-Border Ruling Project (CBR)[45], the request is not only for envisaged/future transactions but also for performed transactions where VAT has been wrongly paid in one Member State due to "errors". At a later stage, a dispute could arise in another Member State, when the tax authorities of that State claim VAT on the same transaction.

For businesses as well as for tax authorities, the correct VAT treatment of taxable transactions depends on:

- a correct understanding of the facts and conditions relating to the transaction at stake;
- a correct interpretation of the VAT rules applying to that situation.

It is possible that VAT is paid in one Member State, based on the contracting parties' assumption that VAT is indeed due in that Member State. In addition, there may have been a tax audit in that Member State that did not question the VAT treatment applied to this transaction.

If, at a later stage, another Member State considers that, for VAT purposes, the transaction at stake has taken place on its territory and that VAT should be paid in that other Member State, this claim could lead to a situation of VAT double taxation, which is contrary to the principle that each transaction should only be taxed once.

This initiative of the EU VAT Forum is based on voluntary cooperation. It does not replace other specific legal arrangements or agreements imposing a clear legal obligation for the Member States concerned to enter into negotiations in such double taxation cases.

Furthermore, it is acknowledged that a certain number of Member States already practise a dialogue at the request of taxable persons. In no way is the EU VAT forum initiative meant to be a substitute for the existing dialogue channels and procedures between Member States. The EU VAT Forum dialogue comes as an additional but not binding support for more efficient VAT collection and allocation by tax authorities and fruitful cooperative compliance with taxpayers.

Until now, very little feedback has been given on the use of this pilot. However, this issue has been discussed in the EU VAT Forum subgroup[46]

[45] Further information on the CBR pilot project on Taxud website: https://ec.europa.eu/taxation_customs/business/vat/vat-cross-border-rulings-cbr_en
http://ec.europa.eu/taxation_customs/taxation/vat/traders/cross_border_rulings/index_en.htm

[46] EU VAT Forum meeting 20/11-2018

7.1. Some clarifications were given by the EU VAT Forum with regard to the scope and the designated contact point. It was decided that, for efficiency reasons, the contact person will be the same as the one dealing with the CBR pilot and that quarterly reminders for reporting would be sent to the Member States. As follow-up to this meeting, several members have shared situations where a dialogue took place. This could be seen as a promising compliance move.

6.3. Solutions

6.3.1. Dialogue/cooperation between tax authorities

The pilot case mentioned at point 6.2.3.2. above is not only a prevention tool but could also be considered as a concerted solution to avoid VAT double taxation (i.e. if it leads to an agreement that the other tax authorities involved to refrain from claiming VAT under their jurisdiction). The group agreed that more visibility for this pilot would be important.

Eventually, in case where there is no agreement, the dialogue is by no means a waste of time and money. It will contribute to clarifying the understanding of the facts and conditions relating to the transaction concerned, and the interpretation of the VAT rules applying to the situation by taxpayers as well as tax authorities. It will thus give a possibility for the taxpayer to decide on a sound basis about follow-up.

6.3.2. SOLVIT (Internal Market Problem solving Network)

SOLVIT is already dealing with some cases related to VAT refund issues[47]. SOLVIT is a useful tool in cases where a Member State does not respect the rights granted by the EU to citizens and companies, which can be used when the case has not yet been brought to the courts.

There is a SOLVIT centre in each Member State. Depending on the country, the SOLVIT centre is placed under different Ministries or Government Bodies. As SOLVIT solves different types of questions from different fields and is not only concentrated on tax issues, the national SOLVIT centres are not typically located at tax administrations. However, the national SOLVIT centres have contacts with the local tax administrations implying that the tax administrations are involved in solving the potential double taxation issues. The resolution of cases is achieved with the cooperation of two SOLVIT centres: the Home centre (MS with closer ties with the individual/business) and the Lead centre (MS where the problem occurred). The two SOLVIT centres cooperate to resolve cases in a transparent way through a database

[47] See Annex 8

(SOLVIT is a module of the Internal Market Information (IMI) system). Complaints are submitted by citizens and businesses through an online complaint form. The European Commission coordinates the network and provides legal trainings, mediation on case handling[48].

The SOLVIT centres can help businesses[49] to solve cross-border issues that are caused by incorrect application of EU law by a public authority in a cross-border situation. For VAT purposes, SOLVIT can be used when the problem has already occurred and when there are two or more Member States involved.

So far, SOLVIT has been used to handle 109 cases of VAT double taxation (2002-2018). It is safe to conclude that on an EU level businesses do not yet know the SOLVIT procedures very well. One potential task of the members of the EU VAT Forum is to consider how knowledge of SOLVIT as a tool to solve (rather than prevent) double taxation could be spread.

[48] For more information on the role of the Commission, see Chapter VI of the SOLVIT Recommendation C (2013) 5869 final.

[49] The SOLVIT centres help also individuals. The purpose of this document is to merely look at the functioning of the SOLVIT centres from the perspective of usage in solving double taxation issues and not to offer a full review of SOLVIT as a system. Therefore, these other functions of the SOLVIT centre and possibilities of SOLVIT are not discussed here.

7. Assessment of the available tools

7.1. Comparative table of the available tools

The table in Annex 9 shows the five most relevant available tools to prevent and/or solve VAT double taxation issues. In particular, the subgroup paid attention to the following attributes:

- Preventive vs. resolving (prior to or post transaction)
- Who are the stakeholders involved?
- Does a workflow including a timeline for making a decision exist?
- What are the eligibility criteria (conditions)?
- What are the deliveries?
- Whether the deliveries contribute to legal certainty, transparency and efficiency
- Whether a solution is guaranteed/binding
- Whether the result is made available to the public
- Consequence of no solution for the taxpayer in individual case

The table below gives an overview of the strengths and weaknesses of each one of the five identified tools.

Table 2. Strengths and weaknesses of the identified tools

TOOL	STRENGTHS	WEAKNESSES
DIALOGUE between tax administration	▪ Tax administrations informal dialogue ▪ Can deal with individual cases ▪ Deals with envisaged and/or transactions that already took place ▪ Clarifies facts of the transaction ▪ Better understanding on the national implementation of the VAT provisions ▪ Better understanding on the consequences of the EU applicable legislation in the specific situation	▪ Participation of the tax administrations pilot is on a voluntary basis ▪ Solution is not guaranteed ▪ Not widely known by the businesses ▪ No procedure and deadline for the dialogue between the tax administrations involved[50]

[50] The members of the CBR are currently working on an upgraded version of the project. One of the possible upgrades is to agree on a deadline for the dialogue between tax administrations.

	▪ Dialogue can occur at any stage of the dispute. ▪ No heavy procedure to organise the dialogue between the Member States involved.	
EU CBR pilot	▪ Businesses have direct access via the CBR contact person ▪ Legal certainty for future transactions ▪ Deals with individual cases ▪ Requested Member State (where the business request has been registered) coordinates the answers from the other Member States involved. ▪ Effective tool of cooperation between tax administrations ▪ No complicated rules of procedure ▪ Transparency and tax fairness is ensured with the publication on the Web of the list of CBR ▪ A pilot is a good tool for experimentation	▪ Participation of the tax administrations is on a voluntary basis. Only 18 Member States participate in this project ▪ Solution is not guaranteed ▪ Only for envisaged transactions ▪ Not widely known by the businesses ▪ No specific procedural provisions for the dialogue between the tax administrations involved i.e. timeline to examine and decide on the case ▪ Eligibility conditions can be interpreted strictly so almost no CBR pilot can be launched ▪ A "pilot" cannot last for ages ▪ Few cases in the list of EU CBR since 2015 (may not justify further action)
SOLVIT Internal market solving system	▪ Directly deals with complaints of the taxpayers ▪ Online complaint form available ▪ Addresses breach of EU law ▪ Is a solving system relying on a structured network of the Member States coordinated by the Commission ▪ A SOLVIT centre is established in each Member State ▪ Transparent handling case process through the IMI database (Internal Market	▪ Only for transactions that already took place ▪ Does not deal with the VAT treatment in advance of a transaction ▪ SOLVIT cannot deal with purely national cases or cases where legal proceedings are underway ▪ Lack of awareness amongst businesses

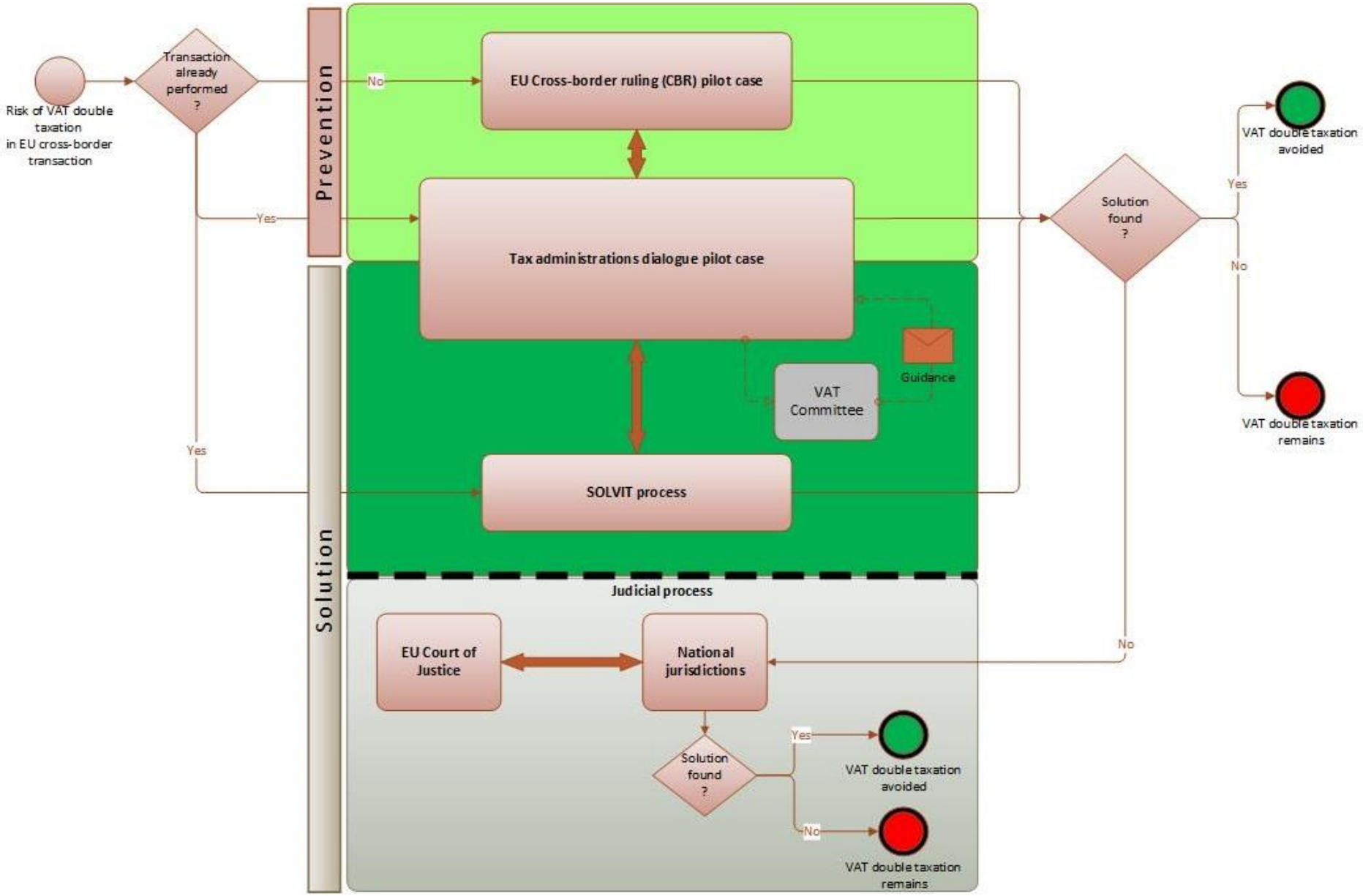
	Information System). ▪ Procedural rules for all stakeholders involved ▪ Deadline of 15 weeks (5 weeks for the preparation of the case and 10 weeks for the lead centre to try to solve the case). ▪ Starts to be widely known by the businesses ▪ VAT refund issues appear to be a successful category of cases solved within the network, good signal for citizens and businesses	
VAT COMMITTEE	▪ Guidance on the practical implementation of EU VAT rules for national tax administration ▪ Transparency, publication of the guidelines	▪ Does not deal with individual cases (just general questions) ▪ Unanimity, almost unanimity or large majority is needed to issue a guidance ▪ Solution is not guaranteed ▪ Only Member States and COM can send a question (not individuals/ businesses)
EUCJ	▪ Binding solution to a VAT double taxation situation	▪ Process takes long and does not finish with the ruling because it remains with national courts to implement the decision ▪ In some cases, national courts' way of implementing the decision may not meet the expectation of the applicant ▪ Individuals/businesses cannot launch a request directly ▪ Costs of procedure

7.2. Available mechanisms to prevent and/or solve VAT double taxation

The graph below illustrates the available mechanisms offered to taxable persons to prevent and/or solve VAT double taxation issues. The assumptions on which this graph is based are the following:

(i) The transaction at stake is subject to VAT and opens a right to deduct VAT;
(ii) The taxable person is entitled to fully deduct the input VAT amounts incurred;
(iii) Taxable persons are legitimate. Situations of tax fraud and evasion or gross negligence are not covered.

Graph 4. Available mechanisms to prevent and/or solve VAT double taxation


Risk of VAT double taxation in EU cross-border transaction
Transaction already performed ?
Yes
No
Prevention
EU Cross-border ruling (CBR) pilot case
Tax administrations dialogue pilot case
Solution
SOLVIT process
VAT Committee
Guidance
Judicial process
EU Court of Justice
National jurisdictions
Solution found ?
Yes
No
VAT double taxation avoided
VAT double taxation remains
Solution found ?
Yes
No
VAT double taxation avoided
VAT double taxation remains

7.2.1. Prevention

When the cross-border transaction subject to a VAT double taxation risk has not taken place, the available mechanisms taxable persons can use are the EU cross-border ruling (CBR) and the tax administrations dialogue. The tax administrations dialogue can also be of help where a transaction has already occurred. The common features of these mechanisms are that they lead to more legal certainty for taxable persons.

7.2.1.1. EU Cross-Border Ruling (CBR)

In all Member States, taxable persons have a possibility to get a national ruling / opinion / decision on their transactions. However, the difference is that the EU cross-border rulings address business transactions that have to do with more than one Member State. With regard to this situation, taxable persons have the possibility to request an advance ruling from tax administrations to secure the VAT treatment of their envisaged EU cross-border transactions and/or to evaluate the related VAT double taxation risk. Tax administrations of 18 EU Member States participate in this Pilot project, on a voluntary basis.

Dialogue between tax administrations from the participating Member States is the backbone of this mechanism. Indeed, dialogue helps discuss the background facts of the CBR requests and limits the risk of different interpretations that could lead to different VAT treatments. It also allows tax administrations to share their analysis of the case and to find a common solution, where possible.

A solution is found between the tax administrations when a cross-border ruling is issued. The taxable person requesting the ruling is duly informed and the ruling is published on the TAXUD Europa website.

In case an agreement cannot be reached between the tax administrations involved in the case, no solution is found. Under this scenario, no further alternatives are offered to taxable persons facing risks of VAT double taxation. Currently, there is no obligation for the tax administrations to find an agreement. In theory, tax administrations could put the case before the national courts, which have the authority to bring the cases to the Court of Justice of the European Union.

7.2.1.2. Tax administrations dialogue

Tax administrations dialogue is also a pilot project that can be used to prevent situations of VAT double taxation in cases where transactions have not been performed yet. Tax administrations participate in this pilot

project on a voluntary basis. As for the CBR, there is no obligation for the tax administrations to find a solution to prevent VAT double taxation.

A solution is found when an agreement is reached between the tax administrations on the VAT treatment of the envisaged transactions. Under this scenario, the notice is communicated to the taxable persons.

In cases where the dialogue between tax administrations cannot prevent the risk of VAT double taxation, no solution is found. Under this scenario, the taxable persons face a risk of VAT double taxation and do not have any further alternative mechanisms at their disposal to avoid this situation.

In theory, tax administrations could put the case before the national courts, which could then put the case before the Court of Justice of the European Union. An alternative could be that national tax authorities raise the question to the VAT Committee, provided that it is a general question on the practical implementation of the VAT Directive and not a question related to an individual case (see point 7.2.3 below).

7.2.2. Solutions

In cases where the transactions have already been performed, some mechanisms can be used to solve a situation of VAT double taxation, in particular the dialogue between tax administrations and the SOLVIT network.

7.2.2.1. Tax administrations dialogue

As described under point 7.2.1.2. above, the tax administrations dialogue can also be used in cases where the transactions have already been performed. A typical example would be when there is an audit.

7.2.2.2. SOLVIT

SOLVIT is a mechanism that taxable persons can use in cases where the following criteria are met:

- The cross-border transactions at stake have already taken place and involve a cross-border element;
- The issue faced by the taxable person is caused by the incorrect application of EU rules, i.e. the VAT Directive by a public authority;
- The complainant has not yet started formal legal proceedings.

A case is closed as solved once the two SOLVIT centres have found a solution for the VAT double taxation problem.

In cases where a solution is not found, the case is closed as unresolved. Alternatives for taxable persons are to submit an administrative appeal, go to national courts or submit a formal complaint to the European Commission.

7.2.3. Other means to solve VAT disputes

7.2.3.1. VAT Committee

Tax authorities can address a question to the VAT Committee, provided that the question is general (i.e. not related to an individual case) and that it is related to the practical application of the EU rules (i.e. the VAT Directive).

In cases where at least a large majority is reached among the members of the VAT Committee on the question raised, a general guidance may be issued.

7.2.3.2. Judicial process

In cases where the mechanisms of prevention and solution of VAT double taxation detailed above fail, there may still be a possibility to go to national courts and to the Court of Justice of the European Union.

The Court of Justice can only be involved via a request for a preliminary ruling by a national court and is possible only when the problems of double taxation arise from differing interpretations of a provision of the VAT Directive. The Court is competent to interpret Union law (Article 234 of the Treaty), particularly by giving preliminary rulings to national courts. However, it leaves to those national courts the task of applying its rulings to specific cases by making the national judge responsible for applying the principles it sets out (see, for example, Case C-77/01). Even though it is theoretically possible to pursue an action before the courts of two separate Member States, such proceedings are costly and, what is more, the litigant risks getting two totally different decisions. Hence, from the business perspective, it is possible that having two different rulings is the end of the story (and neither of the courts takes it to the EUCJ).

Intermediary Conclusion

From the analysis above it appears that none of these tools, alone or combined, are able to guarantee to businesses but also to tax administrations a solution to all cases of VAT

double taxation and, more widely, to VAT disputes. So the principles of VAT neutrality and fair competition have, to an extent, not been appropriately addressed so far.

8. Dispute resolution mechanisms in other fields and context

8.1. Foreword

Since none of the instruments can guarantee to solve VAT disputes in all cases, the subgroup looked for inspiration in other fields.

EU legislation in other domains embeds right from the start provisions on dispute resolution. For instance, the Directive (EU) 2019/515 of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (OJ L 91, 29.3.2019) contains a provision referring to the SOLVIT system. No such choice has been made in the VAT Directive but this option could be further examined, among other legal options.

Firstly, the members of the subgroup analysed some of the existing tools and legal vehicles in order to determine whether issues of double and non-taxation in the field of VAT (indirect taxation) can be dealt with in a similar way as the existing tax dispute settlement mechanisms laid down in Directive 2017/1852 on tax dispute Resolution Mechanism in the European Union.

Secondly, as far as VAT is concerned, the EU VAT Forum not only investigated situations of double taxation involving transactions within the EU VAT territory but also situations of double taxation involving transactions performed with third countries. In this specific case, the proper legal framework / competent jurisdictions should be a matter of concern to solve VAT disputes.

8.2. Analysis of the existing tools of dispute resolution mechanisms in other fields

While the demand for transparency is gradually increasing today and anti-abuse measures are multiplying and strengthening over time, it seemed desirable to ensure that mechanisms for dispute resolution are comprehensive, effective and sustainable. Effective and efficient dispute resolution mechanisms are also necessary to respond to the risk that the number of double or multiple taxation disputes will increase, with potentially high amounts at stake, because tax administrations have established more regular and focused audit practices and because the (general and specific) anti-abuse measures are always more subject to divergent or questionable interpretations, giving rise to uncertainty.

Specific attention has first been given to the EU level dispute resolution mechanisms for disputes arising out of interpretation and application of a convention or an agreement that provide for elimination of double taxation (e.g.

tax treaty)[51]: Directive 2017/1852**.** The group discussed the potential use of this directive to address procedures for resolving VAT disputes at EU level.

The scope of Council Directive (EU) No 2017/1852 of 10 October 2017 is limited to taxes on income and capital covered by bilateral tax treaties and the Arbitration Convention and the Nordic Tax Treaty (with respect to cases between contracting parties that are EU Member States). VAT is outside of the scope of this Directive.

It relates to situations where Member States differently interpret or apply the provisions of tax agreements and conventions that provide for elimination of double taxation in connection with the income, or capital when applicable. Such divergences create serious tax obstacles for businesses operating across borders. They generate an excessive tax burden for businesses and are likely to cause economic distortions and inefficiencies and have a negative impact on cross-border investment and growth. The purpose of the Directive is to ensure the effective resolution of disputes concerning the interpretation and application of such tax treaties, in particular disputes leading to double taxation.

The directive lays down the procedural rights and obligations of the affected persons when such disputes arise. Moreover, it provides for specific and enforceable time limits for the duration of the procedures to resolve double taxation disputes and establishes the terms and conditions of the dispute resolution procedure for the taxpayers. However, the procedure is more flexible for individuals, micro, small and medium-sized enterprises.

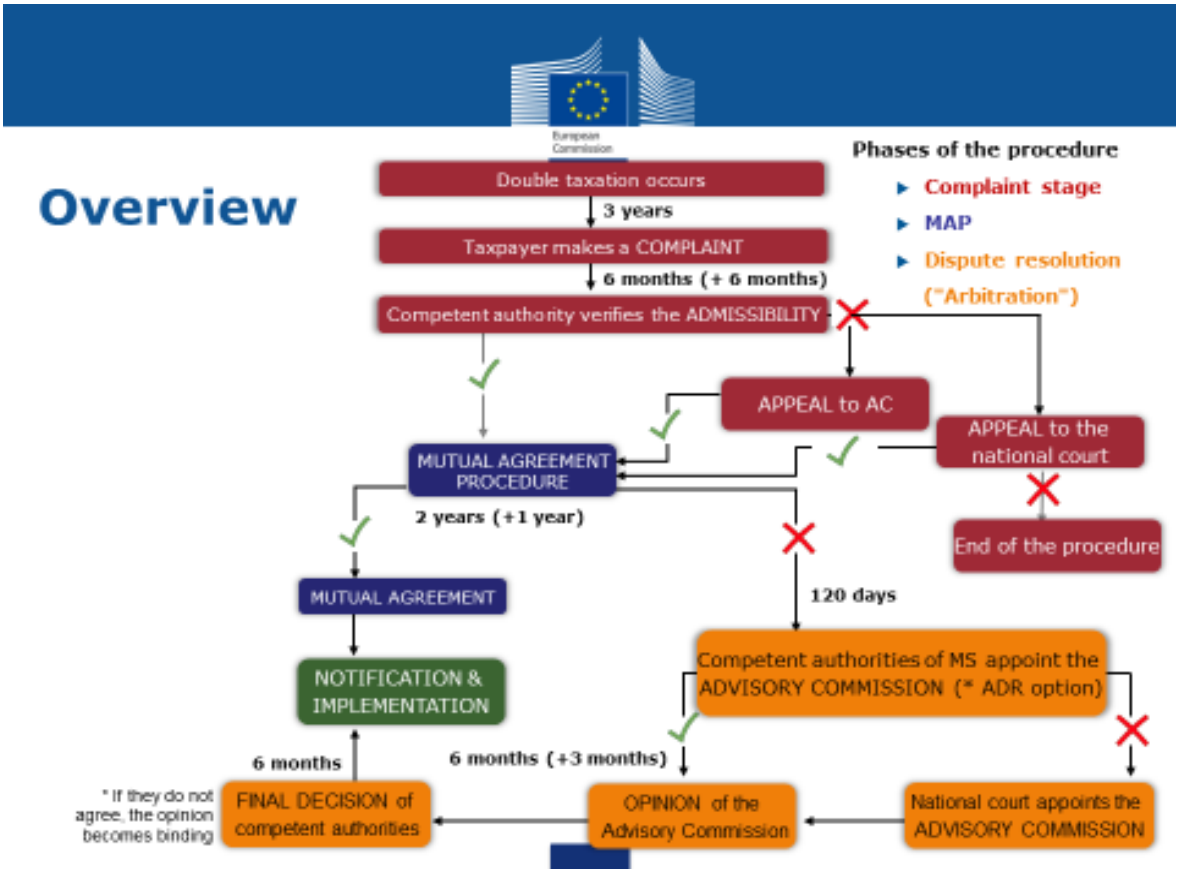
The notion of 'double taxation' is characterised as the imposition by two or more Member States of taxes covered by an agreement or convention in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits.

Prior to the directive, the Arbitration Convention constituted the legal instrument that EU Member States could use for resolving tax treaty disputes related to transfer pricing. Differently from the Convention, the directive is subject to the review of the EUCJ, as it is part of the *acquis communautaire*. Therefore, the Commission can initiate its infringement procedure against a Member State's failure to comply with the Directive.

The graph below describes the workflow of the Directive 2017/1852 in a detailed way. The comments of the different steps of the procedure are in Annex 10.

[51] This part is a contribution from the academic member of the subgroup.

Graph 5. Overview of the workflow



Box 7. Value of the Directive 2017/1852 for dispute resolution with regard to VAT

Although the concept of having a dedicated VAT dispute resolution legal instrument was valued by the EU VAT Forum members during the 3rd meeting of the EU VAT Forum subgroup 7.1, the vast majority of the participants stated that the directive shaped for direct taxation cannot be a copy-paste for VAT disputes for the following reasons:

- The structure of VAT is too different from the characteristics of taxes covered by the directive. While VAT is harmonised at the EU level, the majority of direct tax substantive law is governed by the domestic laws of Member States and tax treaties concluded amongst them.
- Even if we consider adapting the provisions to VAT, the results may be overly burdensome as many adaptations would be needed to improve the provisions.
- It is not guaranteed that a solution applicable to all Member States can be found.
- The directive process is too complex.
- It takes too long for a business that needs a quick answer and legal certainty for its activities.
- The disputes within the scope of the Directive 2017/1852 are related to yearly income, while VAT disputes arise on a transactional basis.

- Some Member States do not want to submit decisions on public revenue to a third party.

The point of view of the academics on a possible use of the framework of the Directive to VAT disputes is expressed in a discussion paper in Annex 11.

8.3. International mechanisms for eliminating double taxation in VAT matters

VAT double taxation and double non-taxation are issues that go beyond the internal market's borders. In this sense, they affect both EU businesses trading with each other and EU businesses trading with businesses from third countries. A distinction must indeed be made on the basis of the countries involved in the transactions: some cross-border double (non) taxation arises among countries some of which are not Member States of the EU; other cross-border double (non) taxation arises exclusively among countries being bound by a common legal framework for their consumption tax systems.

As regards countries that have neither a common legal framework for their consumption tax systems, nor a treaty or any other agreement providing for legally binding procedures for resolving disputes, dispute resolution in VAT can only be based on informal mechanisms. In this respect, the OECD guidelines constitute a point of reference. These guidelines are specifically designed for countries that are not bound by a common legal framework for their consumption tax systems. They provide guidance on measures such countries may take to prevent disputes. Dispute prevention or resolution involve discussion between tax authorities concerned.

Some countries may not have a common legal consumption tax framework but may have an instrument for administrative cooperation.

The instruments potentially existing at international level essentially concern prevention and cooperation/dialogue between administrations of different States, and not dispute resolution. The main exception relates to the so-called mutual agreement procedure in the OECD Model Tax Convention (Article 25 of the OECD Model Tax Convention on Income and on Capital ("OECD Model Tax Convention"), which provides a mechanism – the mutual agreement procedure ("MAP") - that allows the resolution of such difficulties or disputes. The mutual agreement procedure (MAP) article of a tax treaty accordingly provides a mechanism to resolve these cross-border tax disputes. Although in the framework of the Action 14 minimum standard of the BEPS the effectiveness and efficiency have been strengthened, this mechanism still does not guarantee a solution to the dispute that guarantees the taxpayers' defense in this

process[52]. Under these circumstances, the MAP could only be a source of inspiration when dealing with VAT double taxation disputes within the European Union.

Indeed, EU VAT cross-border double taxation cannot be properly addressed by the OECD tools taking into account the common VAT system and the common framework for administrative cooperation. Initiatives to solve dispute resolution should respect this EU framework.

With regard to VAT double taxation between Member States and third countries, EU Member States cannot give up their right to levy VAT, which at the same time constitutes an obligation under the EU VAT Directive. Member States should respect this EU law.[53] However, the development of EU agreements with third countries may be considered. In this regard, the EU agreement on administrative cooperation in the field of VAT concluded with Norway constitutes a first step in the actions to promote discussions for prevention and resolution of VAT double taxation situations with third countries. It was agreed that the specific tools such as OECD guidelines, multilateral conventions, Mutual Administrative Assistance in Tax Matters, bilateral tax treaty provisions equivalent to Art. 26 of the OECD Model Tax Convention ("MTC") and the OECD's model Agreement on Exchange of Information on Tax Matters ("TIEA") should not be dealt with more extensively.

Intermediary conclusion

None of the current dispute resolution mechanisms in other fields can solve cross-border VAT disputes, neither in cases where VAT disputes arise between Member States nor in cases where VAT disputes arise with third countries.

[52] In addition to mutual cooperation in tax matters, the OECD also suggests that taxpayer services may play a role in preventing dispute in VAT matters. The concept of "Taxpayer services" notably implies the provision of accessible and easily understood local guidance on the domestic VAT rules, the creation of points of contact with taxing authorities (where businesses and consumers can make inquiries regarding the domestic VAT rules or where businesses can identify perceived disparities in the interpretation or implementation of VAT rules. As a consequence, the OECD (and also the IMF) encourages the development of advance ruling procedures.

[53] EUCJ, 6 March 2018, C-284/16, *Achmea BV*

9. Possible solutions: prevention and solution of VAT double taxation disputes

The subgroup concluded in sections 7 and 8 that tools are available but do not effectively prevent and solve VAT double taxation. The subgroup elaborated in brainstorming sessions on the possible way forward to overcome the identified loopholes, in particular:

i. the need for better communication and dialogue between Member States and between businesses and Member States;
ii. the need of a better articulation between the existing tools and processes to solve the different VAT double taxation cases; and
iii. the need of a comprehensive legal framework to prevent and/or solve VAT dispute.

The subgroup investigated potential solutions that may be implemented in the short, medium and long term. This section is the result of these fruitful discussions.

1. Enhance communication and dialogue among tax authorities and between taxable person and tax authorities

The subgroup stressed that communication and dialogue are a prerequisite to prevent and/or solve cases of VAT double taxation. This came as an overarching finding that concerns all situations where there is a risk of VAT dispute.
The following suggestions were made:

a. Complete, updated and accessible information to all stakeholders

- The available information on the topic of prevention and solution of VAT double taxation should be regrouped in a single place on the EUROPA website. An overview of the available tools should be presented in a comprehensive format of one single page, written in plain language. It must be easy to find on the website very practical information about the process (what to do and how to do it, in each situation).
- This page will be translated in all EU languages. EU tax authorities should add a link to this central webpage in their respective national websites.
- Use of Artificial Intelligence tools should be integrated: for instance, the creation of a Chatbot or virtual assistant on the EUROPA web page for EU VAT provisions with the aim to guide users in finding information on prevention and solution of VAT double taxation and to

answer simple questions on available tools and processes. It could also be envisaged that the Chatbot could answer simple questions on the VAT treatment of transactions.

- An EU-VAT information portal could be envisaged as a tool to facilitate the access to information in multiple languages.

b. Rules governing dialogue between tax authorities should be better applied

- Dialogue between tax authorities should be mandatory in all cases where there is a cross-border element and when businesses need assistance.
- A possible way to achieve this could be to look into the scope of the EU Regulation 904/2010[54] on administrative cooperation and combatting fraud in the field of VAT in order to better understand the interlinkage to VAT double taxation issues.
- An additional step to foster dialogue between tax authorities would be to support it with a network. This network would be composed by representatives of the tax authorities and would be a platform where they can exchange their views on cases, interpretations of the background facts and administrative practices. The EU VAT Forum and the CBR subgroup in particular are already spaces where tax authorities can dialogue. The subgroup proposes to extend the function of the EU VAT Forum to use it as a dialogue space and network for tax authorities.

c. Enhance dialogue between tax authorities and businesses

- Some VAT double taxation issues are the result of errors also due to the complexity of the VAT rules. In such cases, dialogue between tax authorities and businesses is necessary to guide businesses through the correction of errors in cross-border transactions.
- Dialogue must also take place in cases where practical assistance from the tax authorities is needed to help the taxable person to comply with his obligations. In this respect, the main concern is about invoicing (what to do and how to do it, in each situation) while businesses are waiting for the tax authorities' opinion on the proper VAT treatment for instance, through a CBR process.
- Dialogue is also an important aspect for clear legislation, which paves the way to correct implementation and compliance.

[54] Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax

2. Upgrade the existing tools and mechanisms and link them to form a complete process

Currently, the existing tools and mechanisms to prevent and to solve VAT double taxation issues have not deployed their full potential. Some tools need to be upgraded to be more effective. In addition, there is no articulation between the available tools and mechanisms which could guarantee that a solution can be found at the end of the process, as the seminar case demonstrated.

a. Upgrade the existing tools

- To make the CBR more efficient, all Member States should participate in the project. The CBR should have a formal process[55] and should be used as both a "prevention tool" and "solution tool" in cases of VAT double taxation issues. Ultimately, giving a legal framework to this tool is an option to consider.
- For homogeneous practical implementation of VAT rules, businesses could draw the attention of their Member State to questions of a general nature, which it could decide to bring to the VAT Committee to deal with in a timely manner. In addition, when drafting guidelines, Member States should be encouraged to consult businesses on matters of practical application.

b. Articulate the tools and mechanisms to guarantee a solution to all cases

- The existing tools and mechanisms should be part of a larger process to ensure that a solution is guaranteed in all cases. For this, an articulation between the tools is necessary. When a tool does not give a solution to a case, there should be a possibility to use another tool. Having a complete process will decrease the work for the tax authorities and will provide straightforward procedures for businesses, leading to more tax certainty.
- In the same vein, the use of SOLVIT should be integrated in this overall process.

3. Create a legal framework to solve disputes in the field of VAT

[55] The CBR subgroup of the EU VAT FORUM is currently working on upgrading the tool. Two main actions have been agreed: to work on a common timeframe to solve the CBR requests and to establish a formal process / business flow.

Today, in cases where there is a VAT dispute between tax authorities related to cross-border transactions, there is no guarantee that tax authorities will agree on a solution to the benefit of the taxable person. For these situations, mechanisms to solve disputes concerning the implementation of the VAT directive are needed at every stage of the VAT business lifecycle to address the VAT principles of legal certainty, neutrality and fairness.

a. Possible mechanisms to solve disputes in the area of VAT

- The Commission could create and support a conciliation process in a dispute between two or more VAT tax authorities.
- A VAT Ombudsman /mediator was mentioned as the rights of taxpayers must be protected while there is no agreement between tax authorities.
- Creation of a VAT dispute resolution mechanism in the field of VAT. This dispute resolution mechanism would not be limited to cases of VAT double taxation but would be applicable to all VAT issues in general.

b. Designing and disseminate clear and practical rules / legislation

- Involving Member States and businesses in the designing process of the VAT dispute resolution mechanism is necessary to ensure that the rules are clear and applicable by all stakeholders in practice. This would optimise the probability of creating business proof and -friendly rules and procedures.

10. Key messages to the EU VAT Forum

Since 1993, the enlargement of the EU, the elimination of borders and the concomitant multiplication of sub-processing flows have triggered an exponential increase of potential double taxation issues. Modern commerce, sharing economy and servitisation[56] will still amplify the phenomenon. VAT legislation shortcomings (whether legally transposed or in implementation rules) impact the neutrality of the tax by triggering inconsistent business behaviours and additional costs and risks. This is a drag on the correct functioning of the internal market.

The subgroup recommends to the EU VAT Forum to adopt the analysis and findings of the subgroup in terms of identifying and evaluating the existing tools available. From the analysis, it is concluded that:

- Information about the existing tools is not readily available in one place or sufficiently known to businesses and tax administrations.
- Dialogue between Member States and between Member States and businesses is essential.
- None of the identified tools – alone or combined – match the need to guarantee a solution to all cases of VAT double taxation and, more widely, to VAT disputes.

The key actions recommended by the subgroup are the following:

Short-term actions:

- To provide easy accessible and updated information inspired by the solutions outlined in 1a) of section 9.
- To organise systematic dialogue between Member States and between Member States and businesses in double taxation instances.
- To ensure better voluntary communication between Member States and between Member States and taxpayers where there is VAT double taxation or VAT dispute.
- To promote and potentially institutionalise a trilogue between Member States, taxpayers and the EU Commission covering all the relevant aspects of the VAT rules and process.

Mid-term actions:

- To upgrade the existing tools, e.g. EU cross-border rulings, EU cross-border dialogue and SOLVIT, to make them more effective in regard of double taxation.
- To elaborate solutions to protect the rights of the taxpayer acting in good faith until a solution is found to define the VAT treatment, e.g. invoicing.

[56] More and more transactions are services.

Longer-term actions:

- To explore an EU fully-fledged mechanism for taxpayers to provide a solution to prevent and/or solve VAT double taxation situations in cases where existing tools are not efficient.

Final recommendation

The subgroup requests the EU VAT Forum to acknowledge the need to take actions to prevent and solve VAT double taxation disputes and to commit itself to supporting and facilitating the implementation of these recommendations.

Annex 1. List of the meetings

Date	Meetings/documents
2018 02 19	Agenda 11th plenary meeting
	Prevention and solution of double taxation (discussion paper)
	Minutes of meeting mandate to launch the subgroup
2018 03 02	Call for interest 02/03/2018
2018 05 28	1st meeting *subgroup on Prevention and solution of double taxation*
2018 09 06	2nd meeting Forum sub group (Copenhagen)
2018 11 20	Progress report to the 12th meeting of EU VAT Forum plenary session
2019 01 31	3rd meeting 31/01-01/02/2019 Draft agenda – EU VAT FORUM Subgroup 7.1
	Solution tree double taxation VAT (Doc Taxud C4 - PPT)
	VAT committee and explanatory notes (Doc Taxud C1 –)
	Updated Seminar Case description C/647-17 (Doc BE Min Fin –)
	VAT Committee – Working paper No 668 final – Guidelines (Doc Taxud C1)
	CBR Breakout session I (Doc Taxud C4 –)
	The Future of CBR: food for thoughts
	Directive on Dispute Resolution Mechanisms (DRM) – Taxud D2
	Presentation Global Tax Dispute Resolution
	Presentation EU-CH Framework agreement
	Risk Double Taxation – Document
	Minutes of the 3rd meeting held on 31/01-01/02/2019
2019 05 29	4th meeting held on 29/05/2019– EU VAT FORUM Subgroup 7.1
	Minutes of the 4th meeting
2019 07 02	Plenary meeting: Presentation structure report subgroup 7.1
	Report of the 13th EU VAT Forum plenary Meeting
2019 09 08	5th meeting subgroup 7.1 Completed version with the contributions version 03
2019 11 15	6th meeting subgroup 7.1
2020 01 16	14th Plenary meeting: Presentation of the report

Annex 2. Tables from the 2018 annual report of the judicial activity of the EUCJ

III. New cases — Subject matter of the action (2014-2018)

	2014	2015	2016	2017	2018
Access to documents	1	7	6	1	10
Accession of new States				1	
Agriculture	12	17	27	14	26
Approximation of laws	21	22	34	42	53
Arbitration clause				5	2
Area of freedom, security and justice	53	53	76	98	82
Association of the Overseas Countries and Territories		1			
Citizenship of the Union	9	6	7	8	6
Commercial policy	11	15	20	8	5
Common fisheries policy	2	1	3	1	1
Common foreign and security policy	7	12	7	6	7
Company law		1	7	1	2
Competition	23	40	35	7	25
Consumer protection	34	40	23	36	41
Customs union and Common Customs Tariff	24	29	13	14	13
Economic and monetary policy	3	11	1	7	3
Economic, social and territorial cohesion	1	3		2	1
Education, vocational training, youth and sport	1			2	
Employment	1				
Energy	4	1	3	2	12
Environment	41	47	30	40	50
External action by the European Union	2	3	4	3	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	4	6	3	6	6
Free movement of capital	7	6	4	12	9
Free movement of goods	11	8	3	6	4
Freedom of establishment	26	12	16	8	7
Freedom of movement for persons	11	15	28	16	19
Freedom to provide services	19	24	15	18	38
Industrial policy	9	11	3	6	3
Intellectual and industrial property	47	88	66	73	92
Law governing the institutions	28	24	22	26	34
Principles of EU law	23	13	11	12	29
Public health	2	10	1	1	4
Public procurement	21	26	19	23	28
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	5	2	2	1
Research and technological development and space	2	1	3	3	1
Social policy	25	32	33	43	46
Social security for migrant workers	6	7	10	7	14
State aid	32	29	39	21	26
Taxation	57	49	70	55	71
Trans-European networks	1				
Transport	29	27	32	83	39
TFEU	**612**	**702**	**676**	**719**	**814**
Protection of the general public	1				1
Safety control					1
Euratom Treaty	**1**				**2**
Principles of EU law					1
EU Treaty					**1**
Law governing the institutions					4
Privileges and immunities	2	2	2		
Procedure	6	9	13	12	12
Staff Regulations	1		1	8	16
Others	**9**	**11**	**16**	**20**	**32**
OVERALL TOTAL	**622**	**713**	**692**	**739**	**849**

IV. New cases — Subject matter of the action (2018)

	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Total	Special forms of procedure
Access to documents	1		9		10	
Agriculture	19		7		26	
Approximation of laws	49	3	1		53	
Arbitration clause			2		2	
Area of freedom, security and justice	80	2			82	
Citizenship of the Union	6				6	
Commercial policy	1		4		5	
Common fisheries policy	1				1	
Common foreign and security policy			7		7	
Company law	2				2	
Competition	4		20	1	25	
Consumer protection	41				41	
Customs union and Common Customs Tariff	12		1		13	
Economic and monetary policy	1		2		3	
Economic, social and territorial cohesion	1				1	
Energy	7	1	4		12	
Environment	32	15	3		50	
External action by the European Union	4				4	
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	1	4	1		6	
Free movement of capital	8	1			9	
Free movement of goods	4				4	
Freedom of establishment	6	1			7	
Freedom of movement for persons	16	2	1		19	
Freedom to provide services	31	7			38	
Industrial policy	3				3	
Intellectual and industrial property	20	5	67		92	
Law governing the institutions	2	4	22		34	6
Principles of EU law	23	3	3		29	
Public health	2	1	1		4	
Public procurement	20	6	1	1	28	
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			1		1	
Research and technological development and space			1		1	
Social policy	45		1		46	
Social security for migrant workers	14				14	
State aid	4	1	18	3	26	
Taxation	69	2			71	
Transport	39				39	
TFEU	**568**	**58**	**177**	**5**	**814**	**6**
Safety control		1			1	
Protection of the general public		1			1	
Euratom Treaty		**2**			**2**	
Principles of EU law		1			1	
EU Treaty		**1**			**1**	
Law governing the institutions		2	2		4	
Procedure					12	12
Staff Regulations			14	1	16	1
Others		**2**	**16**	**1**	**32**	**13**
OVERALL TOTAL	**568**	**63**	**193**	**6**	**849**	**19**

Annex 3. The role and activity of the EUCJ in cases of VAT double taxation

1. The role and the activity of the ECJ in the resolution of cross-border disputes

From an examination of the judgments and orders issued by the Court of Justice concerning VAT from 1970 to the present, it was found that in about 60 cases the dispute concerned two or more Member States, with a possibility of double taxation or double non-taxation.

In all these judgments, that do not relate to double taxation within a single Member State, the Court was asked to resolve issues of particular importance for the proper functioning of VAT. In fact, the provisions contained in Directive 2006/112 aim to establish a rational subdivision of the respective spheres of application of the national VAT regulations, uniformly determining the point of reference for tax purposes of supplies of goods and services avoiding conflicts of jurisdiction between Member States which may result in double taxation or non-taxation (judgment in Case C- 97/14 - SMK, point 32 and the case law cited therein).

However, despite the effects resulting from the application of these provisions, in none of these cases the Court sat in plenary session or as a Grand Chamber according to Article 16 of its Statute. This shows that cross-border cases have not, to date, been considered as issues of primary importance.

It should also be noted that in:

- 18 cases, the opinion of the Advocate General was not deemed necessary, thereby depriving the Court of an important instrument for in-depth research, analysis and synthesis of legal problems. Moreover, the figure of Advocate General is central to the proceedings before the Court of Justice, since, in cases where his intervention is required, he delivers to the Court the reasoned opinion to the preliminary ruling request with absolute impartiality and independence (Art. 252, para 2, TFEU) in the interest of the correct application of EU law. The opinion of the Advocate General, although not binding on the Court, is of considerable importance in determining the orientation of the European judge;

- 46 cases, the Member State, potentially involved in the dispute, did not participate in the proceedings without, therefore, presenting its position to the Court.

Probably, the Court's negligible focus on cross-border issues is due to the fact that the reference for a preliminary ruling is made exclusively by the judge of one Member State. The case C-37/08 RCI Europe is the only one in which both Member States involved (UK and ES) participated in the proceedings. Each of the two countries claimed that the

service should be taxed, according to two different provisions of the directive (UK for the supplier's registered office and ES as services relating to an immovable property), in their own country and the Court held that the taxing power felt within the competence of Spain.

2. Origin of cross-border disputes

The cross-border cases of double taxation or non-taxation derive from differences between the Member States in the application of VAT provisions.

Differences, as shown in the table attached to this report, may derive from:

a) Wrong implementation of the Directive (8 cases)

The national legislature erroneously transposes Directive 2006/122/EC by introducing conditions that do not exist in it. For example, in Dresser-Rand SA case (joined cases C 606/12 and C 607/12) the Court, providing a restrictive interpretation of the VAT provision, specified that the introduction into the territory of the State of goods from another Member State, and destined for internal work, is admitted under the sole condition that, at the end of the suspension procedure, the goods must be returned to the taxable person in the Member State of origin. Consequently, the corresponding Italian provision, which allows the application of the suspension procedure regardless of the transfer of the goods worked to the State, is incompatible with the Directive provision. Therefore, the internal provision, unlike the European rule, allows that goods to be returned to the taxable person in any other EU or non-EU State, and then, other than the one from which they were initially dispatched or transported.

b) Different interpretations and application of EU Directive (59 cases)

The national provision is incompatible with the corresponding provision of the Directive, according to the meaning given to it by the Court of Justice on the basis of its wording, the rationale behind it and, moreover, the fundamental principles of the VAT system, such as that of neutrality. It is on the basis of this principle that in the Rusedespred case (case C 138/12) the Court established that the supplier of an exempt transaction must be refunded of the VAT invoiced in error to a customer, by declaring, therefore, the interpretation of the national law - intended to transpose Art. 203 of the Directive - which refuses the supplier the refund of value added tax even when there is no risk of damage to the treasury - where that authority had definitively refused the customer the right to deduct that value added tax with a final decision.

c) Options and Standstill clause (4 cases)

The Directive contains various provisions that allow Member States to exercise options, in derogation from the general rules of VAT, regarding the:

- Taxable person (Articles 12 and 13, par. 2);

- Supply of good and service (Art. 14, par. 3 and 15, par. 2 and 19, par. 1);

- Place of supply of goods (Art. 34, par. 4);

- Place of supply of services (Article 59 bis);

- Exemptions (Articles 156 et seq);

While some of these options are aimed to prevent double taxation or non-taxation (such as Article 59a), most of the optional measures, if exercised by the Member States, do not favour the harmonisation, as far as possible, of national systems within the European Union, with the obvious risk of leading, in cross-border cases, to the duplication of taxation.

With reference, instead, to the so-called "standstill clause" provided for by Art. 145, par. 2 of the Directive, it should be noted that this clause temporarily regulates the possibility for Member States to continue to tax the transactions listed in Articles 143 and 144 of the Directive.

Its exercise by some Member States can create, similarly to options, double taxation or non-taxation phenomena due to a misalignment between national laws.

For example, in the Eurodental case (C-240/05) - in which the national court asked whether transactions like the making and repair of dental prostheses which, when they take place within the territory of a Member State, are exempt from VAT as activities in the public interest may give rise to a deduction of input VAT when they are intra-Community transactions - the Court rejected the argument put forward by the German Government (point 48) that: "the Federal Republic of Germany applies the transitional arrangements (...) which permit it to continue to tax the transactions in question (...)". Therefore, "those transactions could be subject to double taxation as they could be taxed again in that Member (...) whereas the input VAT in Luxembourg could not be deducted. On the other hand, the same transactions, although taxable where they are carried out within the territory of that Member State, give rise to a deduction. It follows from this that taxable persons based in Germany would be treated more favourably than their competitors based in Luxembourg".

So, the Court rejected such argument, theoretically admitting the possibility of a duplication of the VAT levy, since the "taxation" provided by the German VAT law is "authorised only for a transitional period (...). Clearly, therefore, the particular situation relied on by the German Government in the present case in support of the deduction of input VAT in Luxembourg, a situation which, moreover, has not led the national court to vary its questions according to the system of VAT used in the Member State of destination, results both from the fact that the option, granted by the transitional

arrangements, to continue to tax the transactions at issue has not yet been abolished and from the Federal Republic of Germany's decision to opt for such derogating and transitional arrangements, so that that situation is entailed by the fact that VAT has not yet, at this stage, been subject to complete harmonisation by the Community legislature" (points 52 and 53 of the judgment).

3. The principle of tax neutrality and the prohibition on double taxation

1) The legal references

Directive 2006/112, as well as the previous directives, did not set up a perfectly harmonised common VAT system between Member States. For this reason, the functioning of VAT can generate possible cases of double taxation or, conversely, non-taxation of the tax.

In the Directive there is no provision prohibiting cross-border double taxation; however, this principle derives from the mechanism of functioning of the tax. In fact, in the recitals 61 and 62 to the Directive it is stated that "It is essential to ensure uniform application of the VAT system. Implementing measures are appropriate to realise that aim. Those measures should, in particular, address the problem of double taxation of cross-border transactions which can occur as the result of divergences between Member States in the application of the rules governing the place where taxable transactions are carried out".

In this regard, Article 397 provides that "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive". Such measures are contained in EU Regulation 282/2011.

2) The ECJ judgments where express reference is made to the prohibition of double taxation

In most of the cases examined, the Court refers to the general principles governing the application of the tax, including the VAT neutrality principle. However, only in a few cases the decision was based on the actual application of this principle. As a rule, the Court restricts itself to interpreting the law (for example, a specific provision concerning the territoriality principle), acknowledging that these provisions have been approved in order "to establish a general criterion for determining the place of supply of services so as to avoid conflicts of jurisdiction between Member States and cases of double taxation or non-taxation to VAT" (see opinion of Advocate General in Case C 210/04, point 49).

A rare exception is the WebMindLicenses case (C-19/14), which, however, concerns the particular subject of abuse of rights characterised not by the violation of individual provisions, but by their circumvention so as to infringe the objective of the provisions pursued by European legislature through tax provisions.

In this case, the Court dealt with the double taxation issue that, as pointed out by the Commission in the proceedings, can be avoided only if EU law imposes on the tax authorities of the Member States an obligation of mutual recognition of their respective decisions. Neither the VAT Directive nor Regulation No 904/2010 lay down such an obligation.

However, as stated by the Advocate General in point 92 of his opinion, in terms of abuse of rights the duplication of the levy can be solved by applying the principle expressed by the Court's case-law - starting from the Halifax case - according to which "where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice". Based on this principle, the Court concludes by stating that EU law must be interpreted as meaning that, if an abusive practice is found which has resulted in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed in the absence of that abusive practice, the fact that VAT has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located (see point 54 of the judgment)

It should also be noted that the Court, in a national case, stated that economic double taxation, even within the individual Member State, is contrary to tax neutrality.

In detail, in the Kühne case (C-50/88), concerning the purchase by an economic operator of a car used by a private customer (i.e. the supplier), the European judges have established that (points 17 and 18):

"the imposition of VAT on the private use of business goods on which the VAT was not wholly or partly deductible gives rise to double taxation contrary to the principle of fiscal neutrality inherent in the common system of value-added tax. Consequently, the Member States' power to derogate from the rule requiring the taxation of the private use of business goods cannot in any event allow them to impose VAT on such use where the VAT on the goods was not wholly or partly deductible".

Furthermore, in the "Eurodental" case (C-240/05), the European Commission, intervening in the proceeding, raised the spectre of double taxation, or of non-taxation, depending on the misalignment of the legislation, due to the transitional rule of Article 370 of the directive. On the basis of this rule, Germany, which on 1 January 1978 did not apply the exemption to dental prostheses, could maintain this regime, and this circumstance may have significance where it is a cross-border transaction, that is, a supply from a Member State which recognises the exemption to another Member State which does not recognise it, or vice versa.

The same scenario showed up in case C-154/13, "X BV", where the question is if "the exemption from the provision of dental prostheses originates from a Member State which has implemented the derogating and transitional arrangements provided for in Article 370 of the VAT Directive" (see point 59 of the judgment). Taking up the observations made in the "Eurodental" case, the Court specifies that "the Community system of VAT is the result of a gradual harmonisation of national legislation pursuant to Articles 113 TFEU and 115 TFEU. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial" (see point 60 of the judgment) so there is no reason to subordinate the exemption of the purchase to the regime (i.e. exemption, or tax liability in the case of application of the transitional rule of Article 370 of the directive) applied in the Member State of dispatch of the goods subject of the ICS .

3) The Court's position in cases of non-imposition

In Case C-277/09, RBS Deutschland, the CJEU was confronted with an obvious case of double non- taxation. The lease transactions involved were not taxed in any Member State. According to the interpretation applied in the UK, the transactions were viewed as supplies of services where the place of supply was in Germany. According to the interpretation applied in Germany, the transactions were viewed as supplies of goods where the place of supply was in the UK.

This case seemed to be an obvious possibility for the ECJ to solve a situation where double non-taxation occurred. The obvious solution was to establish whether the transactions involved were supplies of goods or services.

As pointed out by the Advocate General in the conclusions of the WebMindLicenses Kft. case (note 31) “I would point out that, while there may be double taxation, there may also be no taxation, as in the case that gave rise to the judgment in RBS Deutschland Holdings (C-277/09, EU:C:2010:810). In that event, a Member State cannot waive the application of its law in order to impose VAT on a transaction that is not normally subject to VAT in its system ‘solely on the ground that the output transactions have not given rise to the payment of VAT in the second Member State’ (ibid., paragraph 46).”

The question is whether this can be seen as a signal that the ECJ does not apply principles regarding the prohibition of double taxation or double non-taxation.

4. The limits of the CJEU in resolving cross-border double taxation problems

The judgments of the Court of Justice have, in theory, erga omnes effect, applying not only to the dispute pending before the national court which has requested, by way of preliminary ruling, the intervention of the Community court, but also to all other disputes concerning the same question of law resolved by the Court of Justice.

However, in practice, the questions submitted to the Court for examination - except in the case of infringement proceedings - are formulated by the referring court, which has the task of explaining the facts of the case, according to the evidence provided by the parties in the course of the national proceedings, which is necessary for the examination of the reference for a preliminary ruling.

While it is true that the decisions of the Court bind the referring court of the Member States, so that their authority is close to the Anglo-Saxon principle of stare decisis, it is also true that the concrete application of the basic rule, as indicated by the Court, is the exclusive responsibility of the national court which, in its free judgment, resolves the dispute by also assessing all the factual elements contained in the procedural file.

The Welmory case is representative of the difficulties encountered in applying the judgments to the specific case. In this case, the European court provided an interpretation of the EU rule (Article 44 of Directive 2006/112), but referred to the national court the assessment of whether or not the parameters necessary to determine whether Welmory had a permanent establishment in Poland existed. It is clear that although the EU principle is legally binding on both Member States, the decision could be applied differently by national courts.

5. List of the EUCJ case law

Case	Party	Classification	Double taxation	Neutrality principle	Nature of dispute	1 Country	2 Country	3 Country	Other country
388/11	Crédit Lyonnais	Deduction/Refund	No	Yes	A/B	FR	UE		FR/CY/UK
507/16	Entertainment Balgaria System	Deduction/Refund	No	Yes	A	BG	UE		
375/16	Igor Butin	Deduction/Refund	No	No	B	DE	ES		AT
136/99	Monte Dei Paschi Di Siena	Deduction/Refund	No	No	B	FR	IT		EL
73/06	Planzer Luxembourg	Deduction/Refund	Yes	No	B	DE	LU		FR/IT/LU
323/12	E.ON Global Commodities SE	Deduction/Refund	No	Yes	B	RO	DE		
210/04	FCE Bank	Deduction/Refund	Yes	No	B	IT	UK		PT/UK
235/18	Vega International	Deduction/Refund	No	No	B	PL	AU		
245/04	EMAG Handel Eder	Exemption UE sales	No	No	B	AT	NL	IT	IT / UK
240/05	Eurodental	Exemption UE sales	Yes	Yes	B	LU	DE		DE
84/09	X	Exemption UE	Yes	Yes	B	SE	UK		DE

		sales							
587/10	Vogtländische Straßen, Tief- und Rohrleitungsbau GmbH Rodewisch (VSTR)	Exemption UE sales	Yes	Yes	B	DE	(USA)	FI	DE/IT
273/11	Mecsek- Gabona	Exemption UE sales	No	No	A/B	HU	IT		DE
154/13	X	Exemption UE sales	No	No	B	NL	DE		EE
21/16	Euro Tyre	Exemption UE sales	No	Yes	B	PT	ES		PL
26/16	Santogal M-Comércio e Reparação de Automóveis	Exemption UE sales	No	Yes	A/B	PT	ES		
386/16	Toridas	Exemption UE sales	Yes	Yes	B	LT	EE	DK/DE	
580/16	Firma Hans Bühler	Exemption UE sales	Yes	Yes	B	AT	DE	CZ	
628/16	Kreuzmayr	Exemption UE sales	No	Yes	B	DE	AT		
414/17	Arex CZ	Exemption UE sales	No	No	B	CZ	AT		
401/18	Herst	Exemption UE sales	Yes	Yes	B	CZ	AT	DE	
277/09	RBSD	Exemption UE sales	No	Yes	B	DE	UK		DK/IT/IE
492/13	Traum	Exemption UE sales	No	No	B	BG	EL		
168/84	Gunter Berkholz	Place of establishment	Yes	No	B	DE	DK		
421/10	Markus Stoppelkamp	Place of establishment	No	No	B	DE	AT		EL
319/11	Daimler/Widex A/S	Place of establishment	Yes	No	B	SE	DE	DK	
605/12	Welmory	Place of establishment	Yes	No	B	PL	CY		CY/UK
165/11	Profitube	Place of importation	No	No	C	SK	PT		CZ
108/17	Enteco Baltic	Place of importation	No	Yes	A/B	LT	SK	PL	
528/17	Božičevič Ježovnik	Place of importation	No	No	B	YES	RO		EL/ES
26/18	Federal Express Corporation Deutsche Niederlassung	Place of importation	Yes	No	B	DE	GR		
531/17	Vetsch Int. Transporte	Place of importation	No	No	B	AT	BG		EL
371/99	Liberexim BV	Place of importation	Yes	No	B	NL	DE	PT/LT	IT/NL/UK

536/08	X	Place of supply of goods	Yes	No	B	NL	ES		NL/BE
606/12	Dresser Rand	Place of supply of goods	No	No	A	IT	FR	ES	
526/13	Fast Bunkering Klaipėda	Place of supply of goods	No	No	B	LT	UE		IT
446/13	Fonderie 2A	Place of supply of goods	Yes	No	B	FR	IT		EL
430/09	Euro Tyre Holding BV	Place of supply of goods	No	No	B	NL	BE		EL
155/01	Cookies World	Place of supply services	Yes	No	A	AT	DE		
377/08	EGN	Place of supply services	Yes	Yes	B	IT	IE	NL/BE	
231/94	Faaborg-Gelting Linien	Place of supply services	Yes	No	B	DK	DE		IT/NL
167/95	Linthorst, Pouwels en Scheres /Ondernemingen Roermond	Place of supply services	Yes	No	B	NL	BE		DE/IT
190/95	ARO Lease	Place of supply services	No	No	B	NL	BE		BE/DK/FR
260/95	DFDS	Place of supply services	No	No	C	UK	DK		IT
438/01	Design Concept	Place of supply services	No	No	B	BL	LU		FR
8/03	BBL	Place of supply services	No	No	B	BL	LU		EL
68/03	D. Lipjes	Place of supply services	No	No	B	NL	FR		PT
452/03	RAL (Channel Islands) e a.	Place of supply services	No	No	B	UK			PT/IE
41/04	Levob Verzekeringen e OV Bank	Place of supply services	No	No	B	NL			NL
114/05	Gillan Beach	Place of supply services	No	No	B	FR	UK		EL/UK
166/05	Heger	Place of supply services	No	No	B/C	DE	AT		IT
1/08	Athesia Druck	Place of supply services	Yes	No	B/C	IT			IT
37/08	RCI Europe	Place of supply services	Yes	No	B	UK	ES		UK/EL/ES
218/10	ADV Allround Vermittlungs AG	Place of supply services	Yes	No	B	DE	IT		
97/14	SMK	Place of supply services	No	No	B	HU	UK		EL
453/15	A e B	Place of supply services	No	No	B	DE	LU		EL

647/17	Srf konsulterna	Place of supply services	No	No	B	SE	UE		FR/UK
68/03	D. Lipjes	Place of supply services	No	No	B	NL	FR		PT
552/17	Alpenchalets Resorts	Special schemes	No	No	B	DE	AT	IT	NL
299/86	Rainer Drexl	Taxable amount	Yes	Yes	A/B	DE	IT		
47/84	Gaston Schul	Taxable amount	Yes	No	B	NL			
24/15	Plöckl	Taxable persons	No	Yes	B	DE	ES		EL/PT
419/14	WebMindLicences	Taxable persons	Yes	Yes	B	HU	PT		
544/16	Marcandi	Taxable persons	Yes	Yes	B	GB	DE		

Description of the content of column	
Double taxation	This column indicates whether there is any evidence that double taxation is taking place
Neutrality principle	This column indicates whether the courts explicitly refer to the principle of tax neutrality
Nature of the dispute	A = Wrong implementation of the Directive
	B = Different interpretation and application of the Directive
	C = Options and Stand still clause
1 Country	Country of the referral case
2 Country	Country indirectly involved in the case
3 Country	Other country indirectly involved in the case
Other country	Country which has submitted written observations to the Court (art. 23 of the statute of the Court of Justice)

Annex 4. Seminar Case

EU legislation for seminars

According to Article 44 of the VAT Directive, the place of supply of services to a taxable person acting as such shall be the place where that person has established his business.

By derogation, Article 53 of the VAT Directive provides that the place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, such as fairs and exhibitions, and of ancillary services related to the admission, supplied to a taxable person, shall be the place where those events actually take place.

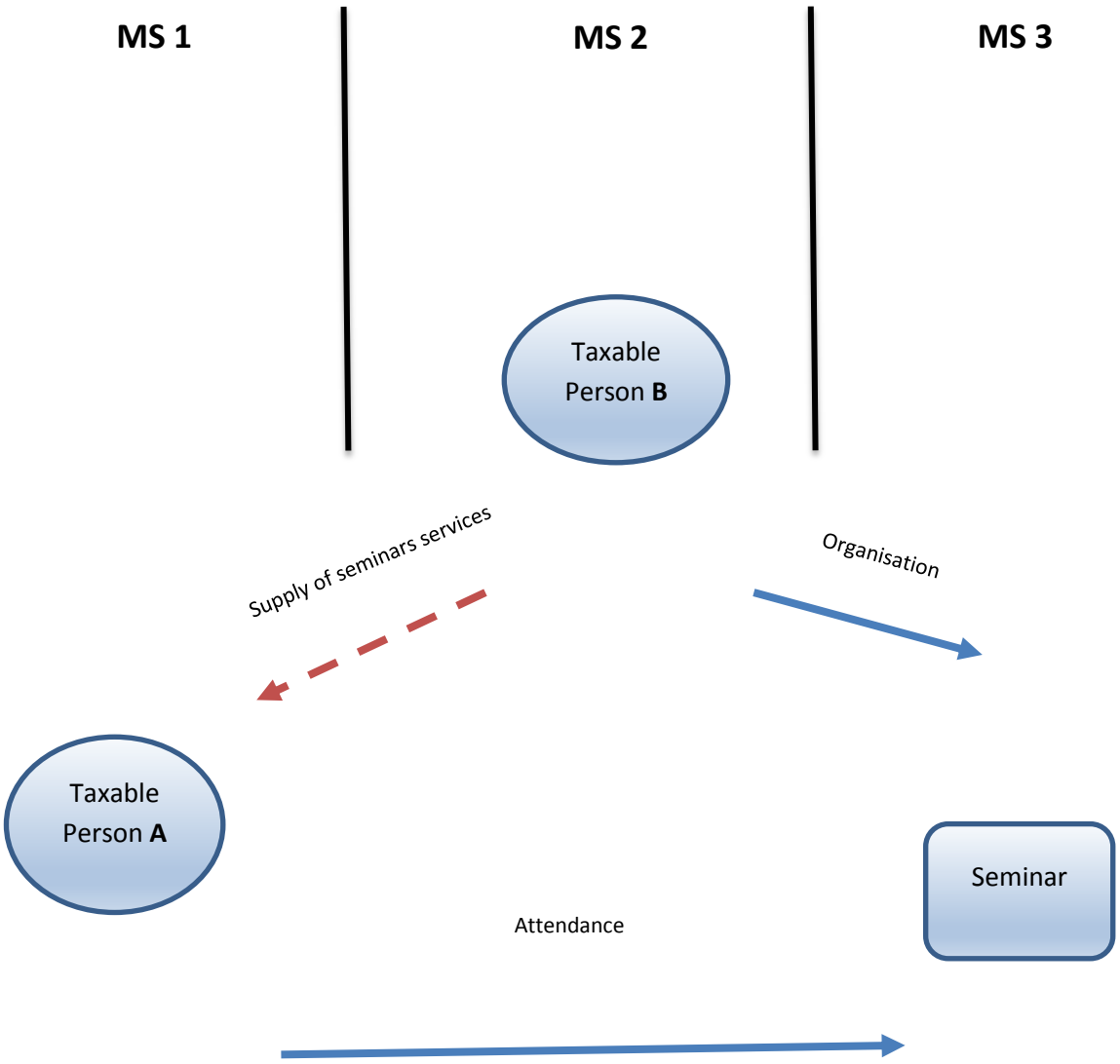
Article 32 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 states that services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events as referred to in Article 53 of the VAT Directive shall include the supply of services of which the essential characteristics are the granting of the right of admission to an event in exchange for a ticket or payment, including payment in the form of a subscription, a season ticket or a periodic fee. This shall apply in particular to the right of admission to educational and scientific events such as conferences and seminars.

The notion of "educational or scientific events" (such as seminars) referred to in Article 53 of the VAT Directive is not clearly and autonomously defined on a European level. Member States can then have different implementations of this specific provisions which could lead to double (or double non-) taxation issues. The different criteria that can be considered by Member States to define what a seminar is are the following:

- Duration of the event;
- Status of the attending persons;
- Technical or practical aspects in relation to registration and payment.

Description of the case

The diagram below illustrates the facts[57].



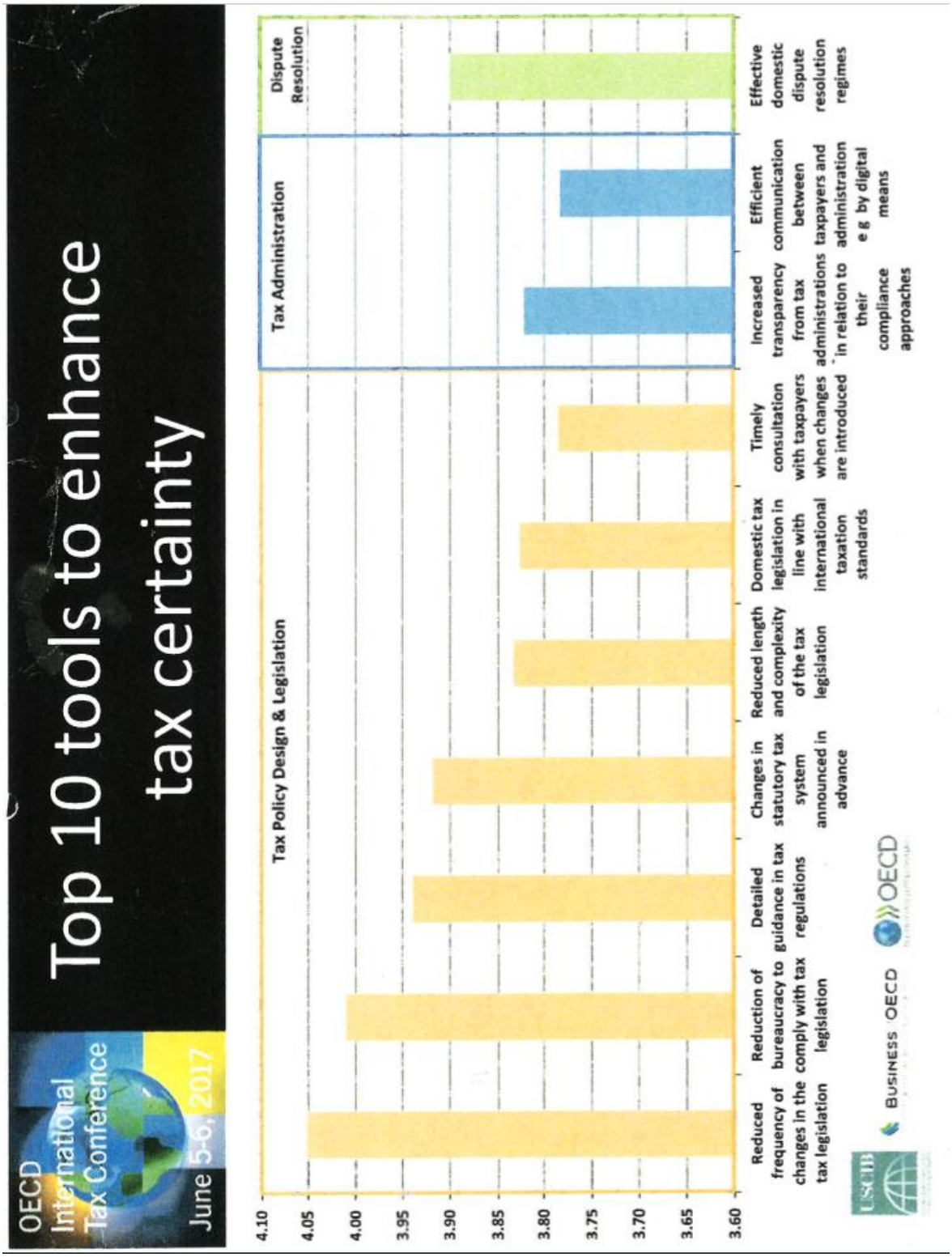
Analysis of the case

The difference of interpretation leads to a VAT double taxation issue for Taxable Person A. This is financially harmful considering that (i) Taxable Person A could have a partial input VAT deduction right and (ii) the recovering of VAT due in MS 3 through the VAT refund process implies a pre-financing. It should also be noted that a difference of interpretation of provisions of the directive for the same supply could have led to a lack of taxation which is harmful for a Member State's tax revenues.

[57] Facts taken from a Cross-Border Ruling.

Furthermore, double (or double non-) taxation should be avoided on principle. Indeed, according to the European Court of Justice (e.g. paragraph 28 of its judgment of 13 March 2019 in case C-647/17), "*It should be noted that the purpose of the provisions of the VAT Directive which determine the place where services are deemed to be supplied is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation.*"

Annex 5. Top 10 tools to enhance tax certainty



Annex 6. Inventory of VAT groups at EU level

- **Group on the future of VAT:** To provide a forum for discussion with **VAT** experts from Member States on the Commission's pre-legislative initiatives, exchange of opinions on the preparation of future VAT legislation.

- **SCAC expert group:** Expert group in the field of VAT Coordination between Member States, to exchange views, discuss and agree on the practical implementation of provisions, the procedures and the organisational and other aspects of the administrative cooperation and the fight against fraud in the field of VAT.

- **EU VAT Forum:** To discuss practical insights provided by tax authorities, as well as organisations, and to elaborate on possible ways to manage the current VAT system more efficiently including by combating fraud.

- **VAT Expert Group:** Advise the Commission on the preparation of legislative acts and other policy initiatives in the field of VAT. Provide insight concerning the practical implementation of legislative acts and other EU policy initiatives in the field of VAT.

- **Expert Group on anti-tax fraud-strategy**: Assistance and co-operation with the Commission in the preparation of an anti-tax fraud-strategy on EU level; Exchange of views and opinions on the subjects raised in the Communication.

- **The Advisory Committee on Value Added Tax (VAT Committee):** It is tasked with examining questions, raised by the Chair or Member State representatives, concerning the application of EU VAT provisions. The Committee, set up under the Council VAT Directive with secretarial services provided by the Commission, aims at assuring a more uniform application of EU VAT provisions.

Annex 7. Administrative cooperation – Regulation 904/2010

Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of VAT lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange information. The principle is that Member States exchange with each other any information that may help to effect a correct assessment of VAT, to monitor the correct application of VAT, particularly on intra-Community transactions, and to combat VAT fraud. They are required to request information on the basis of this Regulation if that is useful or even essential for determining where the transaction is to be taxed (as confirmed in WebMindLicenses point 59). In particular, this Regulation already fixes rules and procedures for Member States to collect and exchange such information by electronic means. An efficient dispute resolution mechanism would, however, require that the financial authorities are obliged to find a solution if they have different views with regard to the VAT regime that should be applied. The cooperation between the tax authorities to find a solution needs to respect the right of defence of the taxable persons involved in the dispute (see Glencore ECJ C-189/18). Furthermore, even if Member States' tax administrations are under an obligation to cooperate with each other in cases of potential double taxation or double non-taxation, the Regulation still does not oblige the Member States to agree on a common assessment of facts or a common interpretation of the legal norms. Thus, the Regulation can improve dispute resolution and help in preventing double (non-)taxation, but it cannot be considered now as a very effective means of doing so.

Annex 8. SOLVIT

1º) CRITERIA FOR USING SOLVIT IN VAT DOUBLE TAXATION

- Taxpayers must have carried out an operation with a cross-border element;

- A problem with VAT double taxation is caused by a misapplication of EU law by a public authority;

- No legal proceedings ongoing.

2) HANDLING OF A CASE IN SOLVIT

A business or an individual faces a problem of double VAT taxation in a cross-border situation. To redress the problem, the applicant can submit a case through the SOLVIT online complain form (www.solvit.eu). The case can be submitted in all EU official languages. Supporting documents can be attached.

The case is then recorded automatically in the IMI database and the applicant receives an automatic email with a unique reference number. Then the case is first handled by the SOLVIT centre with closer ties to the applicant (e.g. MS of residence, establishment). This is known as the Home SOLVIT centre. In principle, the Home centre has 7 days to initially assess if a case meets the SOLVIT criteria (see above). If the case is accepted, the Home SOLVIT centre has in principle a benchmark deadline of 30 days to legally prepare the case. The applicant is consulted regularly. During this stage, the Home SOLVIT centre can also consult internally experts in the tax administration for expertise in VAT.

After the case is legally prepared, it is submitted to the Lead SOLVIT centre, which is in the MS where the problem occurred. In principle, the Lead SOLVIT centre has a benchmark deadline of 10 weeks to approach the authority that has caused the problem (probably the tax administration) and try to persuade the authority to redress the situation (e.g. change the decision that wrongly imposes VAT double taxation).

To persuade the authority involved, the SOLVIT centres have the possibility to request informal legal advice from a Commission expert to clarify the application of the VAT Directive. The applicants have the possibility to request that their personal data are not disclosed to the authorities of the MS that has caused the problem. In practice, if this option is used, it is impossible to provide a redress decision for the applicant by the authority.

The case submitted in SOLVIT must be closed either as solved or unresolved. If it is closed as unresolved, the Commission services analyse the evidence detected through SOLVIT cases with a view to feeding into the EU law enforcement procedure and new policy formulation.

GRAPH

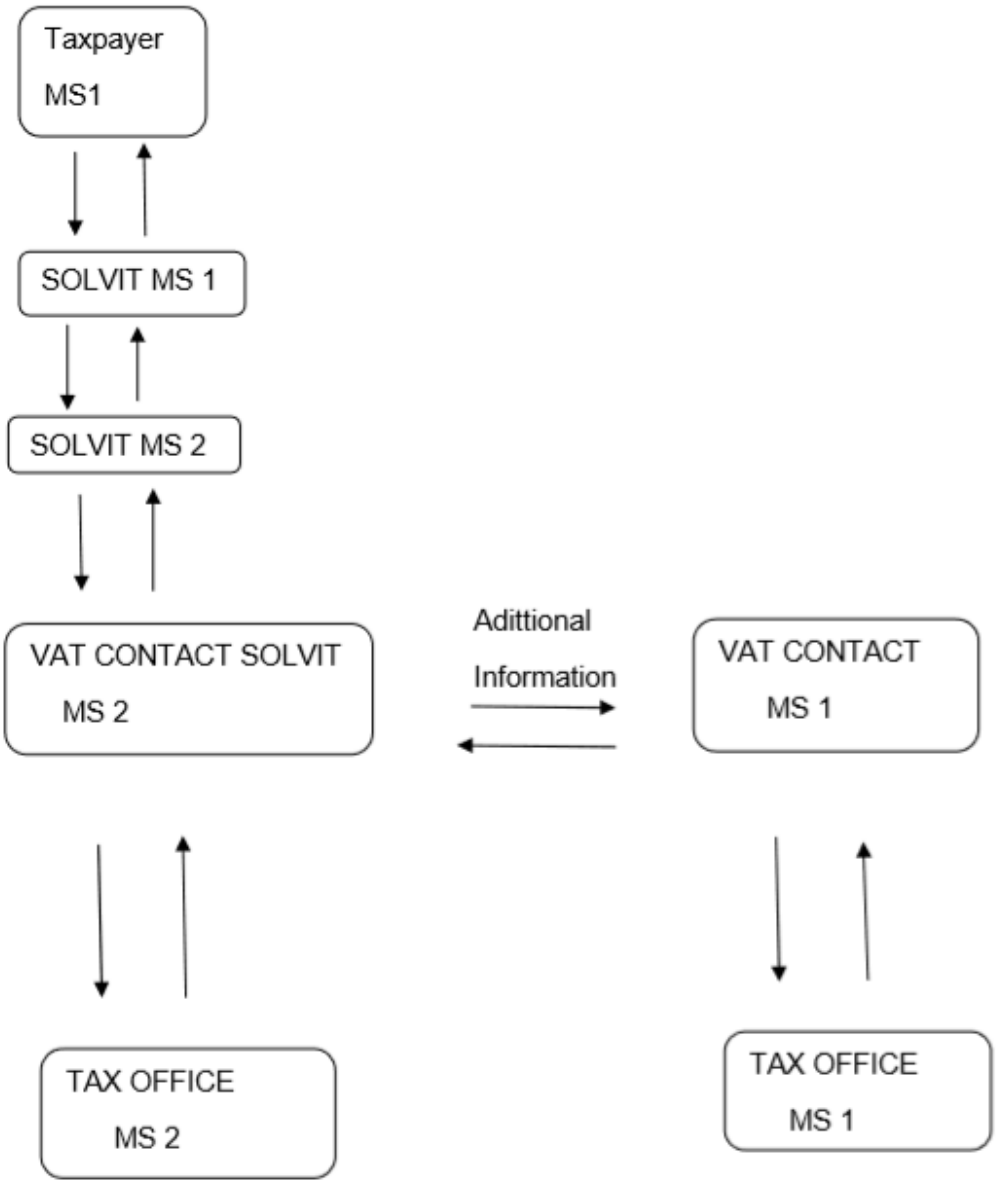
1.- Taxpayer in MS 1 presents a case of double taxation with MS 2 to SOLVIT in MS1.

2.- SOLVIT in MS 1 forwards the case to SOLVIT in MS 2

3.- SOLVIT in MS 2 forwards the case to VAT Contact SOLVIT in MS 2 Tax Administration

4.- Contact SOLVIT in MS 2 Tax Administration requires information from both Tax Office in MS 2 and VAT contact SOLVIT in MS 1.

5.- VAT contact SOLVIT in MS 1 requires information from Tax Office in MS 1 and returns this information to VAT Contact SOLVIT in MS 2



Annex 9. Comparative table of the existing tools

Tool	Legal Basis
Dialogue	▪ Practical implementation of the ECJ Case-law WebMindLicenses C-419/14 about administrative cooperation. ▪ Dialogue between tax authorities also encouraged by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.
CBR	▪ EU VAT Forum subgroup renewed by European Commission Decision C(2018)4422 of 16 July 2018; ▪ Court case-law on tax compliance provision (ECJ Case-law WebMindLicenses C-419/14 about administrative cooperation); ▪ Tax neutrality case law.
SOLVIT	▪ On-line problem-solving network: COMMISSION RECOMMENDATION C(2013) 5869 final of 17.9.2013 on the principles governing SOLVIT
VAT Committee	▪ 1977 advisory committee – not a Commission expert group Article 398 of the VAT Directive 2006/112/EC
EUCJ	▪ Article 19 of the Treaty on European Union (TEU); ▪ Articles 251 to 281 of the Treaty on the Functioning of the European Union (TFEU);

Tool	Role
Dialogue	▪ Dialogue between tax authorities can solve cross-border issues of (potential) risk of double taxation.
CBR	▪ Taxable persons request from tax authorities an EU cross-border ruling (CBR) to comply in practice with VAT rules in specific cross-border situations.
SOLVIT	▪ SOLVIT is a network of national administrations working together with a view to solving problems individuals and businesses encounter when there is a complaint from taxable persons that public authorities breach their rights in the Single Market. The network is coordinated by the Commission.
VAT Committee	▪ VAT Committee - amongst other - examines the questions raised by the European Commission (COM) or by Member States regarding the application of EU VAT provisions.
EUCJ	▪ ECJ ensures EU law is interpreted and applied the same in every EU Member State; ▪ ECJ ensures Member States and EU institutions abide by EU law.

Tool	Stakeholder who can initiate a request
Dialogue	▪ Taxable persons with their local tax authority contact person, or ▪ Local tax authorities
CBR	▪ Taxable persons
SOLVIT	▪ Taxable persons / citizens and businesses
VAT Committee	▪ Representative of a Member State or European Commission
EUCJ	▪ National Courts and Tribunals ▪ European Commission ▪ Member States, the Council or (under certain conditions) the European Parliament

Tool	Participants
Dialogue	▪ Tax authorities' contact persons ▪ and/or CBR contact persons (voluntary basis)
CBR	▪ National Contact persons for the CBR pilot (voluntary basis)
SOLVIT	▪ Members of the SOLVIT network- employees in the national administration ▪ European Commission
VAT Committee	▪ Member States' representatives ▪ European Commission
EUCJ	▪ European Court of Justice

Tool	Topics
Dialogue	▪ Individual case asking tax authorities about the VAT treatment of a cross-border transaction.
CBR	▪ Individual case asking tax authorities about the VAT treatment of a cross-border transaction that has not already taken place.
SOLVIT	▪ Problem-solving in cases of VAT double taxation caused by a public authority in a cross-border context when no legal proceedings are ongoing.
VAT Committee	▪ No business or individual cases; Interpretation of VAT rules in regard to general questions.
EUCJ	▪ Individual cases ▪ General questions regarding the interpretation and application of EU rules

Tool	Stage of cross-border transactions at stake
Dialogue	▪ Envisaged transactions ▪ Transactions performed
CBR	▪ Envisaged transactions
SOLVIT	▪ Transactions that have already taken place
VAT Committee	▪ Envisaged transactions ▪ Transactions performed
EUCJ	▪ Transactions performed

Tool	Rules of procedure
Dialogue	▪ Informal rules of procedure defined by the tax authorities.
CBR	▪ EU basic case-handling in the information notice and national procedural rules used for internal rulings.
SOLVIT	▪ Established rules of procedures based on SOLVIT Recommendation and SOLVIT case-handling manual ▪ Transparent case handling through the IMI database
VAT Committee	▪ Rules of Procedure adopted by the VAT Committee itself
EUCJ	▪ Rules of procedure established in Protocol No 3 on the statute of the Court of Justice of the European Union.

Tool	Conditions of eligibility
Dialogue	▪ Cross-border transactions; ▪ Risk of double taxation or existing double taxation;
CBR	▪ Complex cross-border transactions; ▪ Accurate information from the business about the transactions; ▪ Identification of the applicable legislation or measure and fact that may present a risk of double taxation or non-compliance with obligations stemming from the EU VAT legislation;
SOLVIT	▪ Cross-border transactions; ▪ Problem caused by the incorrect application of EU rules; ▪ Involving a public authority at national, regional or local level; ▪ No formal legal proceedings ongoing
VAT Committee	▪ General questions on how EU legislation is to be applied / implemented
EUCJ	▪ Questions related to the interpretation and application of EU legislation. ▪ Preliminary rulings (Article 267 TFEU)

Tool	Delivery
Tool	Consequence in cases where no solution is found
Dialogue	▪ In case there is an agreement between the tax authorities involved, a solution is found and the taxable person is informed.
CBR	▪ Upon agreement between the tax authorities involved, a cross-border ruling is issued to prevent double taxation.
SOLVIT	▪ For cases where no solution can be agreed they are closed as unresolved.
VAT Committee	▪ Can agree guidelines unanimously, almost unanimously or by large majority ▪ Explanatory notes are drafted by Commission services
EUCJ	▪ Judgments

Tool	Publication
Dialogue	▪ No publication (dialogue between tax authorities). However, good practice is shared on CIRCABC.
CBR	▪ List of the agreed CBR published on the TAXUD website.
SOLVIT	▪ Success stories can be found on the SOLVIT website.
VAT Committee	▪ Publication on the website of TAXUD
EUCJ	▪ Publication on Curia

Tool	Is the solution binding?
Dialogue	▪ No
CBR	▪ No
SOLVIT	▪ No
VAT Committee	▪ No
EUCJ	▪ Yes

Tool	Is there an obligation to find a solution to double taxation situations?
Dialogue	▪ No (Yes, according to Case-law WebMindLicenses C-419/14)
CBR	▪ No (Yes, according to Case-law WebMindLicenses C-419/14)
SOLVIT	▪ No (Yes, according to Case-law WebMindLicenses C-419/14)
VAT Committee	▪ No (Yes, according to Case-law WebMindLicenses C-419/14)
EUCJ	▪ Yes…but (see below)

Dialogue	▪ In case no solution has been found, the business can start a more formal procedure (courts)
CBR	▪ Double taxation remains
SOLVIT	▪ In case no solution has been found, in line with Communication COM(2017)255 final, the Commission services are analysing evidence from SOLVIT cases with a view to feeding into the EU law enforcement procedure and new policy formulation. From the applicant's perspective, the business can start a more formal procedure (courts)
VAT Committee	▪ In case sufficient majority is not reached, no guidelines are issued.
EUCJ	▪ Yes…but (see below)
All tools	▪ financial cost in case where double taxation is effective; ▪ lack of tax certainty; ▪ risk of extra audit; ▪ loss of competitiveness; ▪ loss of potential commercial partners and revenue; ▪ loss of revenue for tax administrations;

Tool	Time limit
Dialogue	▪ No time limit defined
CBR	▪ No time limit defined. That being said, the CBR subgroup is currently working on a time limit.
SOLVIT	▪ Total average of 15 weeks
VAT Committee	▪ No time limit defined
EUCJ	▪ Average of 18 months https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf

Annex 10. Directive 2017/1852

As a first step, upon complaint by the taxpayer a mutual agreement procedure is initiated. The case is submitted to the tax authorities of the Member States concerned, with a view to settling the dispute by using a mutual agreement procedure. This procedure is concretely regulated by Article 4 of the Directive No 2017/1852. The preamble to the Directive encourages the Member States to use non-binding alternative dispute resolution forms, such as mediation or conciliation, during the final stages of the mutual agreement procedure period[58].

If the mutual agreement procedure does lead to an agreement between the countries concerned, the competent authority of each of the Member States concerned shall, without delay, notify this agreement to the affected person, as a decision that is binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable. Where proceedings regarding such other remedies have already commenced, the decision shall only become binding and enforceable once the affected person has provided evidence to the competent authorities of the Member States concerned that action has been taken to terminate those proceedings. The decision shall then be implemented without delay, irrespective of any time limits prescribed by the national law of the Member States concerned.

If the mutual agreement procedure does not lead to an agreement between the Member States within two years (which can be extended by up to 1 year), the case can be submitted to a dispute resolution procedure.

Upon a request made by the affected person to the competent authorities of the Member States concerned, an advisory commission can be set up by such competent authorities. This commission is composed of representatives of the Member States and independent persons and delivers an opinion on how to resolve the question in dispute. This is a binding opinion.

As an alternative, Member States can agree to set up an alternative dispute resolution commission (instead of an advisory commission) to deliver an opinion on how to resolve the question in dispute (which may differ in composition and form) to provide a binding opinion. It can take the form of a committee that is of a permanent nature. Except for the rules regarding the independence of its members, the alternative dispute resolution

58 Within the period of 6 months from the receipt of a complaint, or within 6 months from the receipt of the information referred to in point (f) of paragraph 3, whichever is later, a competent authority may decide to resolve the question in dispute on a unilateral basis, without involving the other competent authorities of the Member States concerned. In such case, the relevant competent authority shall notify the affected person and the other competent authorities of the Member States concerned without delay, following which the proceedings under this Directive shall be terminated (Art. 3 of the Directive No 2017/1852).

commission may differ regarding its composition and form from the advisory commission. The option for the alternative dispute resolution commission would provide for flexibility in the choice of dispute resolution methods: it may apply any dispute resolution processes or technique to solve the question in dispute in a binding manner (including the 'final offer' arbitration process).

Finally, the tax authorities should take a final binding decision by reference to the opinion of an Advisory Commission or the Alternative Dispute Resolution Commission. More specifically, after the (advisory *or* alternative dispute resolution) commission has adopted its opinion, the competent authorities concerned shall agree on how to resolve the question in dispute within a certain time limit. The competent authorities may nevertheless take a decision which deviates from the opinion of the advisory commission or alternative dispute resolution commission. However, if they fail to reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion.

The directive thus lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. Moreover, it provides for a time limit for the duration of the procedures to resolve double taxation disputes and establishes the terms and conditions of the dispute resolution procedure for the taxpayers. However, the procedure is more flexible for individuals, micro, small and medium-sized enterprises.

Annex 11. Discussion paper - Extension of the Tax Dispute resolution directive to VAT - a contribution from the academic members of the Forum

The mechanism provided for in the Directive No 2017/1852 does not apply to VAT disputes. Nevertheless, since EU VAT law does not at present provide any legal basis for a remedy where two (or more) Member States have to agree on a common solution, it is sometimes suggested that such a dispute resolution scheme might also be useful in the area of VAT[59].

In direct tax law, the allocation of taxing rights is essentially governed by bilateral treaties (double tax conventions) outside the EU legal framework[60]. Except for certain particular points, direct taxes are not harmonised at the level of the EU. In contrast, the allocation of taxing rights in the area of VAT is substantially harmonised within the European Union. The essential responsibility for interpreting the harmonised VAT law (VAT Directive) rests with the EUCJ. Hence, one might question whether Member States should be allowed to agree on a specific interpretation of the VAT Directive in a mutual agreement procedure[61]. The same question arises as regards interpretations issued by any Advisory Commission or Alternative Dispute Resolution Commission and then in the framework of an arbitration procedure.

Such an approach might potentially be in conflict with the supranational court system established in the European Union and the concept of uniform interpretation of the VAT Directive[62]. The question would be how can the two procedures be combined when they lead to divergent interpretations. Such a question also arises with respect to direct taxation: conflicting interpretations of bilateral treaties may also derive from the mutual agreement or arbitration procedures, on the one hand, and the judicial procedure (domestic courts), on the other hand. The problem of conflicting jurisdictions interpreting the same legal basis is thus not limited to VAT; rather it is inherent in any mutual agreement and arbitration mechanism. It is to be expected that coordinated solution in a mutual agreement procedure between competent authorities of two States or a decision by an arbitration tribunal could not be in line with the case law of domestic courts[63]. As regards the arbitration procedure, it is, however, explicitly confirmed (Article 14.2) that the arbitration commissions must base their opinion "on the

[59] K. SPIES, « Dispute Resolution in VAT: status quo under the EU VAT Directive and Room for Improvement », *in* M. LANG et al. (Eds), *CJEU – Recent Developments in Value Added Tax 2016,* Linde Verlag, 2017, pp. 91-128.

[60] The exercise of tax prerogatives by Members States, including the implementation of double taxation agreements, should nevertheless be in line with the EU primary and secondary law (f.i. the fundamental freedoms in the EU Treaties).

[61] K. SPIES, o.c., pp. 91-128.

[62] K. SPIES, o.cpp. 91-128.

[63] K. SPIES,o.c. « , pp. 91-128.

provisions of the applicable agreement or convention referred to in Article 1 as well as on any applicable national rules". In other words, the principle of legality must be respected. In VAT matters, it would suppose that the text of the VAT Directive and the case law of the EUCJ should be in any case complied with.

In the end, this is a question of legitimacy: what can be the real value of legal interpretations or assessment of facts by commissions other than courts and how can these interpretations and opinions be combined (and reconciled?) with those provided by the Courts (and especially the EUCJ in the VAT area).

As a matter of principle, interpretation outputs which derive from mutual agreement procedures or arbitration procedures should not be binding on the domestic courts of EU Member States. This is the reason why specific provisions should systematically organise the coexistence of the opinions taken in the course of mutual agreement and/or arbitration procedures, on the one hand, and the judicial remedies, on the other hand. For instance, as regards the mutual agreement procedure, Article 4.3. of the Directive No 2017/1852 provides that the decision resulting from the agreement reached by the competent authorities must be "*binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable. Where proceedings regarding such other remedies have already commenced, the decision shall only become binding and enforceable once the affected person has provided evidence to the competent authorities of the Member States concerned that action has been taken to terminate those proceedings*". Then, the final decision resulting from the arbitration procedure is to be binding on the Members, although it cannot constitute a precedent. The final decision must be implemented subject to the affected person(s) accepting the final decision and renouncing the right to any domestic remedy within 60 days from the date when the final decision was notified.

It is also worth noting that Article 16 organises the so-called "interaction with national proceedings and derogations". It is clearly indicated that the fact that the action of a Member State that gave rise to a question in dispute has become final under national law shall not prevent the affected persons from having recourse to the procedures provided for in the Directive No 2017/1852. Moreover, the submission of the question in dispute to the mutual agreement procedure or to the dispute resolution procedure does not prevent a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal penalties in relation to the same matters. Then, the taxpayers concerned may always have recourse to the remedies available to them under the national law of the Member States concerned. However, where a taxpayer has commenced proceedings to seek such a remedy, the time limits to initiate procedures under the Directive start from the date on which a judgement delivered in those proceedings has become final or on which those proceedings have otherwise been definitively concluded or where the proceedings have been suspended. Finally, where a decision on a question in dispute has been rendered by the relevant court or other judicial body of a Member State, and the national law of that Member State does not

allow it to derogate from the decision, specific rules do apply in order to guarantee to ensure a certain balance between the procedures laid down in the Directive and the effects of national judicial proceedings.

Tensions between arbitration and judicial are unavoidable. As already mentioned, this is an inherent side effect of any mutual agreement procedure or arbitration. The only difference with respect to EU VAT is that the solutions reached in a specific dispute resolution mechanism would not undermine the domestic courts' jurisdiction, but the EUCJ's jurisdiction[64]. It is questionable whether this difference should indeed be relevant. In legal doctrine, authors underline the fact that "*the problem of undermining the EUCJ's jurisdiction could also be mitigated by assigning the EUCJ itself as the arbitration court (instead of an advisory or ADR commission), by permitting an appeal against the arbitration decision to the EUCJ or by implementing special provisions on the interaction of mutual agreements and arbitration decisions with EUCJ proceedings and judgments*"[65].

Moreover, a more precise definition of the requirement of "double taxation" would be necessary, since the concept of double taxation in VAT differs from the same notion in direct tax law. The directive, on the one hand, provides an instrument aimed at eliminating the cases of double taxation of income and capital and, on the other, recognises the rights and obligations of the subjects involved. In VAT matters, the regulatory framework is different.

In particular, VAT disputes have as their object: Directive 112/2006, the implementing rules, for example, Regulation 282/2011 and other related regulations, in addition to rulings by the Court of Justice. Therefore, the main objective of alternative dispute prevention and resolution mechanisms for VAT purposes is to avoid conflicts of jurisdiction and double taxation, in compliance with the principles of neutrality, distortion, etc. In the case of VAT, double taxation occurs not only in the case of double application (of the tax) but also in the case of application of the tax in one State and denial of the right of deduction in the other. From this, it follows that the concept of double taxation in the VAT field is very broad and includes various cases. It is also worth noting that in VAT matters double taxation is just a defect or a failure (shortcoming) in the harmonised common system. It means that something is incorrect. In the area of direct taxation, double taxation is the consequence of the normal implementation of the traditional tax sovereignty principles. It becomes incorrect if it infringes the double tax conventions in force, which are precisely designed to prevent or eliminate double taxation coming from the normal design of domestic income tax systems.

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64 K. SPIES, « Dispute Resolution in VAT: status quo under the EU VAT Directive and Room for Improvement », *in* M. LANG et al. (Eds), *CJEU – Recent Developments in Value Added Tax 2016,* Linde Verlag, 2017, pp. 91-128.

65 K. SPIES,o.c.pp. 91-128.

Furthermore, the VAT ratio is of the three-sided type (tax office, supplier and customer) while in direct sales it is simply bilateral.

With a view to potentially extending the proceedings provided for in the Directive No 2017/1852 to VAT, inclusion of the EU VAT Committee should also be considered.

Finally, a distinction should be made between two types of transactions in VAT matters: some cross-border transactions arise among countries some of which are not Member States of the EU ('soft law' context); other transactions arise exclusively among countries being bound by a common legal framework for their consumption tax systems ('hard law' context)[66]. The consequences of this distinction should be considered.

[66] This distinction is characterised and deeply commented by W. HELLERSTEIN, « Dispute Resolution and Dispute Prevention under the EU VAT : A Global Perspective », *in* M. LANG et al. (Eds), *CJEU – Recent Developments in Value Added Tax 2016,* Linde Verlag, 2017, pp. 65-80.

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