

Study on applying the current principle for the place of supply of B2B services to B2B supplies of goods

Place of establishment of the customer

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TAXUD/2011/DE/304

Appendix 9: Qualitative impact assessment supplies by exempt taxable persons and non-taxable legal persons and exempt supplies

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1. Purpose of the special regime¹

- 1 VAT is meant to be a general tax on consumption.
- 2 In this light, article 4 of the Second VAT Directive,² later also article 4 of the Sixth VAT Directive³ and article 9(1) of the VAT Directive, includes a very broad definition of the term “taxable person”. The very broad definition of economic activities in article 9(1) implies that a priori classification as a “taxable person” is independent from the nature, under private or public law, of the legal person carrying out the relevant economic activities.
- 3 This explains also why, apart from the restrictions in the VAT Directive itself, States, regional and local government authorities and other bodies governed by public law fall under the scope of the VAT Directive. The exclusion of public legal persons with respect to activities or transactions in which they engage as public authorities is reversed “where treatment as non-taxable persons would lead to significant distortions of competition” (article 13(1) of the VAT Directive).
- 4 Under article 131 of the VAT Directive, the exemptions provided for in the VAT Directive shall apply without prejudice to other provisions and in accordance with conditions which the EU Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.
- 5 There are two lists of VAT exemptions without input VAT deduction: one concerning exemptions for certain activities in the public interest and one concerning exemptions for other activities.
- 6 The first list includes postal, medical, social, welfare, educational, physical recreation and cultural services (articles 132 to 134 of the VAT Directive). These exemptions already existed in the majority of the Member States prior to the introduction of the Sixth VAT Directive.
- 7 The other exemptions include insurance and reinsurance transactions, banking and financial transactions, betting, lotteries and other forms of gambling, the leasing or letting of immovable property and the supply of goods used for an exempt activity, if those goods have not given rise to deductibility (articles 135 and 136 of the VAT Directive).
- 8 The latter exemptions were justified for reasons of general policy common to all the Member States because VAT was not considered to be the most appropriate way of taxing those transactions.
- 9 Member States may allow taxable persons an option to tax banking and financial transactions, the supply of land and the leasing or letting of immovable property (article 137 of the VAT Directive).

¹Terra, B., Kajus, J., Chapter 9 – Exemptions – A guide to the Recast VAT Directive, http://online.ibfd.org/collections/evdcom/html/evdcom_recast_chap09.html?WT.z_na;

Terra, B., Kajus, J., Chapter 3 – Taxable persons – A guide to the Recast VAT Directive, http://online.ibfd.org/collections/evdcom/html/evdcom_recast_chap03.html?WT.z_na.

² Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the Common system of value added tax.

³ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment.



2. Summary of the provisions

- 10 Article 9(1) of the VAT Directive defines a taxable person as “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”.
- 11 This definition should be read in conjunction with articles 10 to 13 of the VAT Directive, dealing with taxable persons.
- 12 The very broad definition of economic activities in article 9(1) of the VAT Directive means that, apart from the restrictions in the directive itself, States, regional and local government authorities and other bodies governed by public law fall under the scope of the VAT Directive. The basis for their inclusion can be found in the second sentence of article 13(1) of the VAT Directive, which refers to distortions of competition between the private and public sectors. The exclusion of public legal persons with respect to activities or transactions in which they engage as public authorities is reversed “where treatment as non-taxable persons would lead to significant distortions of competition” (article 13(1) of the VAT Directive).
- 13 In other words, two conditions must be fulfilled for entities to fall outside the scope of taxation: they must be classified as a public legal person and they must engage in transactions as a public authority. In any case, such bodies are considered to be taxable persons in relation to activities listed in Annex I to the VAT Directive provided the activities are not carried out on such a small scale as to be negligible⁴.
- 14 Under article 2(1)(a) of the VAT Directive, the supply of goods for consideration within the territory of a Member State by a non-taxable legal person acting as such will be outside the scope of VAT. In the case of an intra-Community supply of goods by a non-taxable legal person, according to article 2(1)(b)(i) of the VAT Directive, the intra-Community acquisition of goods for consideration within the territory of a Member State by a taxable person acting as such or a non-taxable legal person will not be subject to VAT as the vendor does not qualify as a taxable person.
- 15 Persons with transactions in scope of articles 132 to 136 of the VAT Directive qualify as exempt taxable persons having no right to deduct input VAT with respect to those transactions (article 168 of the VAT Directive).
- 16 According to article 2(1)(a) of the VAT Directive, the supply of goods for consideration within the territory of a Member State by exempt taxable persons will thus be in scope of VAT.

⁴ Terra, B., Kajus, J., Chapter 9 – Exemptions – A guide to the Recast VAT Directive, http://online.ibfd.org/collections/evdcom/html/evdcom_recast_chap09.html?WT.z_na.



- 17 In the case of an intra-Community supply of goods by an exempt taxable person, according to article 2(1)(b)(i) of the VAT Directive, the intra-Community acquisition of goods for consideration within the territory of a Member State by a taxable person acting as such or a non-taxable legal person will be in scope of VAT. Nevertheless, the intra-Community acquisition of the goods will be VAT-exempt in accordance with article 140(a) of the VAT Directive. This article says that an intra-Community acquisition of goods is VAT-exempt if the supply of the goods is in all circumstances VAT-exempt.

3. Qualitative impact assessment of transactions for which the current VAT treatment does not change

- 18 We only explain the specific impact of the new B2B localisation and liability principle with respect to the application of the exemption pursuant to article 136 of the VAT Directive in the case of taxable persons supplying goods that have not given rise to input VAT deduction. In the case of non-taxable legal persons, although their supplies are outside the scope of VAT pursuant to article 2(1)(a) of the VAT Directive, we assess the impact of the new B2B localisation and liability principle on their supplies outside the scope of VAT.
- 19 We do not elaborate on more general conclusions that have already been dealt with in the qualitative impact assessment of the general scenarios.

3.1. Description of scenarios

- 20 The exempt taxable person/non-taxable legal person and the customer are established in the same EU Member State.
- 21 The goods are (at the time of dispatch or transport) located within that same EU Member State.
- 22 The transactions concerned are local supplies of goods, cross-border supplies of goods in the EU or exports.
- 23 The groups concerned are EL2, EEU2 and EEX2.

3.2. Comparison of VAT treatment

- 24 The VAT treatment “as is” is equal to the VAT treatment “to be”.
- 25 This can be visualised by the following examples (the reference to exempt supplier in the diagram means an exempt taxable person and non-taxable legal person):

Figure 9.1: Local supply of goods

Diagram 157
GROUP EL – Scenario 2

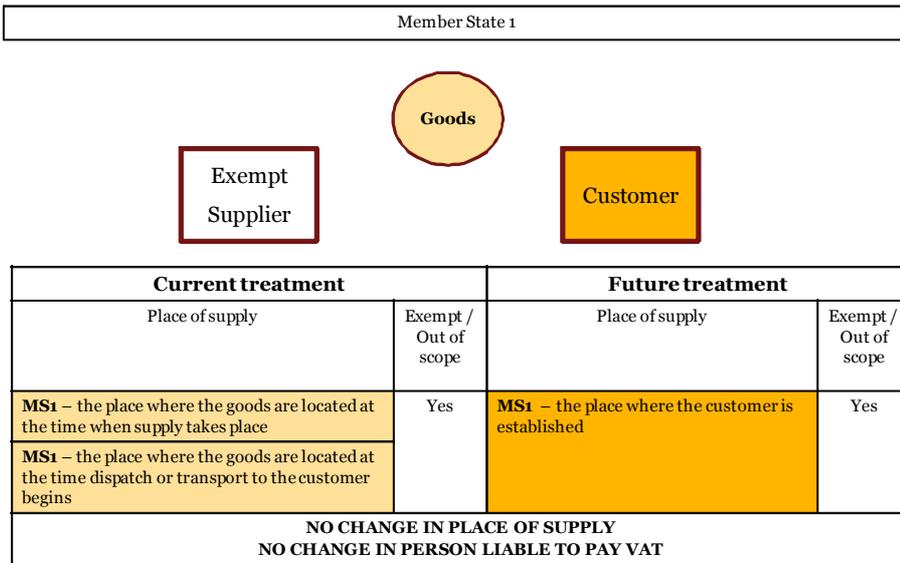


Figure 9.2: Cross-border supply of goods in the EU

Diagram 160
GROUP EEU – Scenario 2

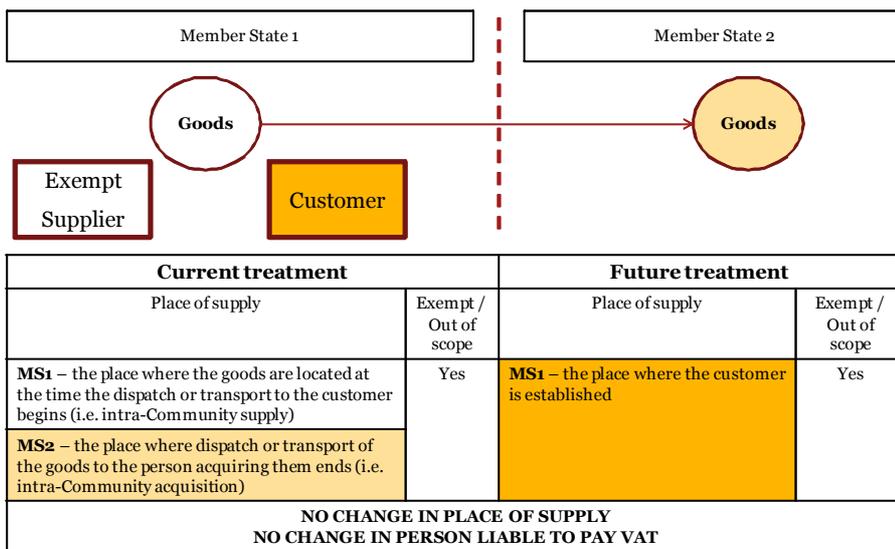
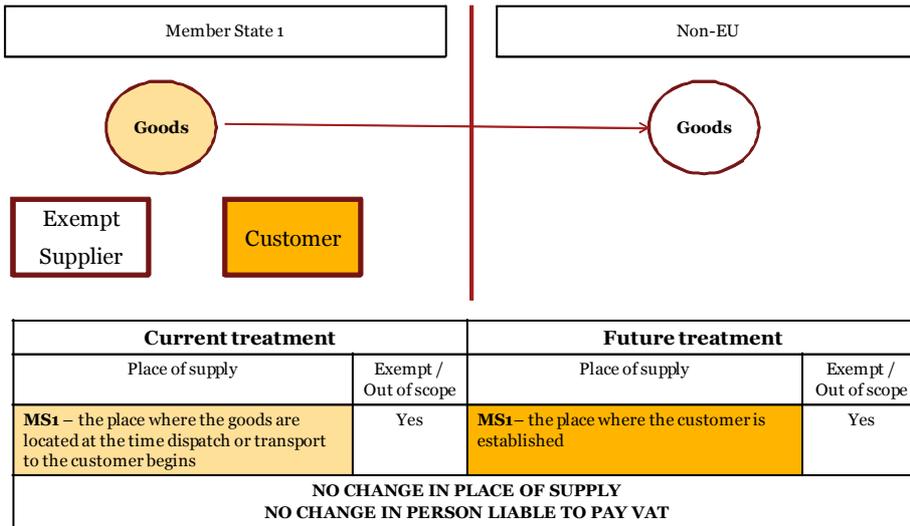


Figure 9.3: Export of goods outside the EU

Diagram 163
GROUP EEX– Scenario 2



3.3. Qualitative impact assessment

3.3.1. Impact in country of taxation

Figure 9.4: Impact in country of taxation

Impact in country of taxation (AS IS)					Impact in country of taxation (TO BE)				
Budgetary impact		Ease of administration and cost of collection		Prevention of fraud and abuse on EU level	Budgetary impact		Ease of administration and cost of collection		Prevention of fraud and abuse on EU level
Cash flow	Revenue	Ease of administration	Cost of collection		Cash flow	Revenue	Ease of administration	Cost of collection	
0	0	0	0	0					

Impact in country of taxation (“as is”)

26 No impact.

Impact in country of taxation (“to be”)

27 The country of taxation “as is” is equal to the country of taxation “to be”.

3.3.2. Impact on taxable person

Figure 9.5: Impact on taxable person

Impact on supplier (TO BE)				Impact on customer (TO BE)			
Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance	Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance
0	0	0	0	0	0	0	0
0	0	0	0	0	1	1	1

Impact on supplier (“to be”)

28 No impact.

Impact on customer (“to be”)

In the case of local supplies of goods and exports:

29 No impact.

In the case of cross-border supplies of goods in the EU:

Budgetary impact:

30 No impact.

Positive impact on legal certainty and simplicity:

31 It is easier for the customer to administer in day-to-day practice due to the absence of a burden of proof that any “VAT exemption” is applicable to the transaction. In the “as is” situation, the customer needs to prove that the intra-Community acquisition is exempt in the EU Member State of arrival of the goods where this is not his own EU Member State of establishment.

Shift in liability:

32 The customer is no longer liable for payment of the VAT.

Positive impact on cost of implementation and compliance:

33 There would be no need for changes to processes/systems/technologies or to train staff in order to comply with the new VAT treatment of the supply.



3.4. Conclusions

- 34 For local supplies of goods and exports, the new B2B localisation principle leads to the same treatment as the current place of supply rules with respect to the exemption.
- 35 For cross-border supplies of goods within the EU, there is a clear benefit for the customer as he no longer needs to produce proof that the intra-Community acquisition of the goods is exempt in the EU Member State of arrival of the goods.



4. Qualitative impact assessment of transactions with change in place of supply and person liable for payment in the EU

- 36 We only explain the specific impact of the new B2B localisation and liability principle with respect to application of the exemption pursuant to article 136 of the VAT Directive in the case of taxable persons supplying goods that have not given rise to input VAT deduction. In the case of non-taxable legal persons, although their supplies are outside the scope of VAT pursuant to article 2(1)(a) of the VAT Directive, we assess the impact of the new B2B localisation and liability principle on their supplies outside the scope of VAT.
- 37 We do not elaborate on more general conclusions that have already been dealt with in the qualitative impact assessment of the general scenarios.

4.1. Description of scenarios

- 38 The exempt taxable person/non-taxable legal person and the customer are not established in the same EU Member State.
- 39 The goods are located within the EU Member State of the exempt taxable person/non-taxable legal person.
- 40 The transactions concerned are local supplies of goods, cross-border supplies of goods in the EU, and exports.
- 41 The groups concerned are EL1, EEU1 and EEX1.

4.2. Comparison of VAT treatment

- 42 The VAT treatment “as is” differs from the VAT treatment “to be”.
- 43 The place of supply (“as is”) differs from the place of establishment of the customer (“to be”) and the exempt taxable person/non-taxable legal person and the customer are not established in the same EU Member State.
- 44 This can be visualised by the following examples (the reference to exempt supplier in the diagram means an exempt taxable person and non-taxable legal person):

Figure 9.6: Local supply of goods

Diagram 156
GROUP EL – Scenario 1

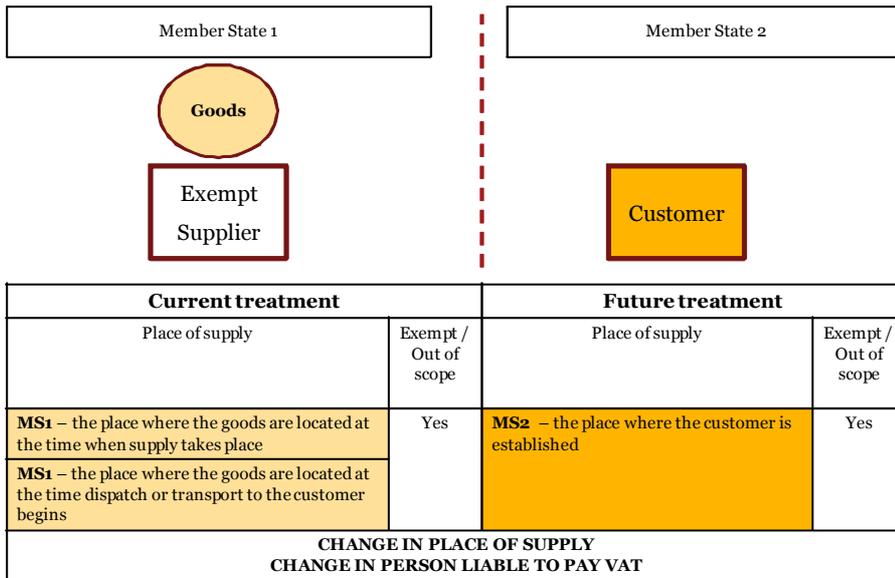


Figure 9.7: Cross-border supply of goods in the EU

Diagram 159
GROUP EEU – Scenario 1

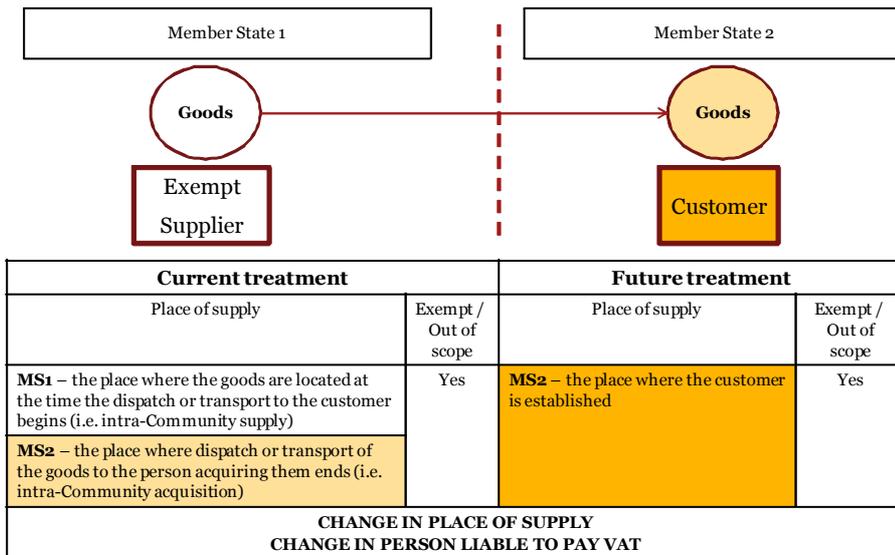
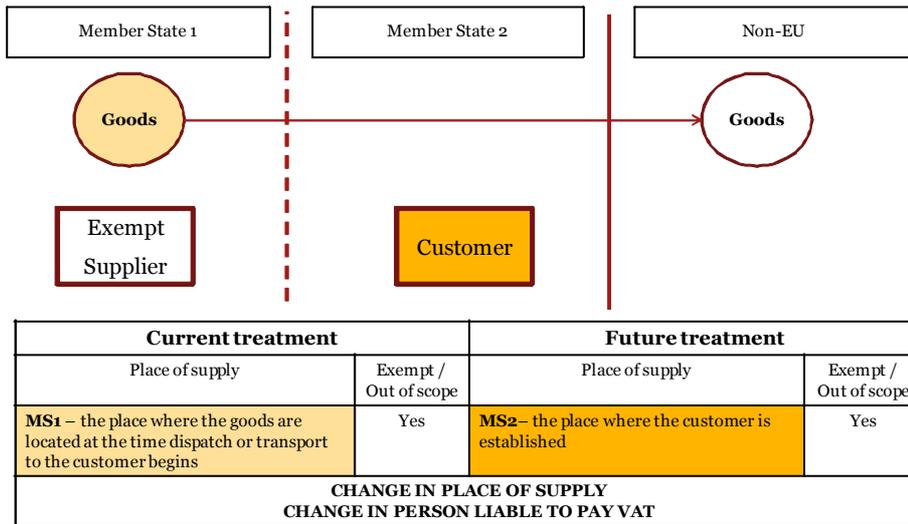


Figure 9.8: Export of goods outside the EU

Diagram 162
GROUP EEX – Scenario 1



4.3. Issues

- 45 Following the new B2B localisation and liability principles, it will be the customer who will be liable for payment of the VAT in its EU Member State of establishment.
- 46 This means that it will be the customers’ responsibility to interpret whether the exemption under article 136 of the VAT Directive is applicable or whether the supply is outside the scope of VAT pursuant to article 2(1)(a) of the VAT Directive. It will be the customer that has to provide necessary proof supporting how the transaction has been treated in accordance with the status of the supplier, i.e. exempt taxable or non-taxable legal person or the nature of the goods. Note that, in the “as is” situation the customer already has the burden of proving that the intra-Community acquisition is exempt in the EU Member State of arrival of the goods.
- 47 If a customer with no or only a limited right to deduct VAT failed to apply the exemption or did not consider the purchase of the goods as outside the scope of VAT, he would incur an additional VAT cost. Furthermore, he also bears the risk that the input VAT deduction will be rejected due to the VAT being unduly paid. This leads to a “tax on tax” situation (double taxation) owing to the supplier’s failure to deduct input VAT on the goods.
- 48 As the VAT treatment relates to the status of the supplier and/or the nature of the goods, it will be the supplier who has to provide the customer with the necessary proof in this respect.
- 49 Owing to the new burden of proof on customers, it will be easier to purchase goods from an exempt taxable person or non-taxable legal person established within the same EU Member State. This is distortive and contrary to the Single Market.

4.4. Qualitative impact assessment

4.4.1. Impact in country of taxation

Figure 9.9: Impact in country of taxation

Impact in country of taxation (AS IS)					Impact in country of taxation (TO BE)				
Budgetary impact		Ease of administration and cost of collection		Prevention of fraud and abuse on EU level	Budgetary impact		Ease of administration and collection		Prevention of fraud and abuse on EU level
Cash flow	Revenue	Ease of administration	Cost of collection		Cash flow	Revenue	Ease of administration	Cost of collection	
0	0	1	1	0	0	0	-1	-1	0

Impact in country of taxation (“as is”)

Budgetary impact:

50 No impact.

Positive impact on ease of administration and cost of collection:

51 It would always be clear that the place of supply is where the customer is established, which should reduce the potential for disputes.

52 There would be a decrease in work in terms of supervision and inspection due to the shift in the place of supply.

Impact in country of taxation (“to be”)

Budgetary impact:

53 No impact.

Negative impact on ease of administration and cost of collection:

54 There would be an increase in work in terms of supervision and inspection due to shift in place of supply and applied exemption.

4.4.2. Impact on taxable person

Figure 9.10: Impact on taxable person

Impact on supplier (TO BE)				Impact on customer (TO BE)			
Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance	Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance
0	-1	1	-1	0	-1	-1	-1
0	-1	1	-1	0	-1	0	-1

Impact on supplier (“to be”)

Budgetary impact:

55 No impact.

Negative impact on legal certainty and simplicity:

56 The administration was easier in day-to-day practice as exemption was applicable irrespective of the place of establishment of the customer.

57 The supplier would need to provide the customer with the necessary proof with respect to the treatment of the supply of the goods.

Shift in liability:

58 The customer would become liable for paying VAT. In the case of cross-border supplies of goods in the EU, the customer was already liable for paying VAT in the EU Member State of arrival of the goods.

Negative impact on cost of implementation and compliance:

59 There would be need for changes to processes/systems/technologies and to train staff in order to comply with the new VAT treatment of the supply.

Impact on customer (“to be”)

Budgetary impact:

60 No impact.



Negative impact on legal certainty and simplicity:

- 61 The customer has the burden of proof with respect to the applied treatment of the purchase of the goods and the supplier needs to provide the customer with the necessary proof with respect to its VAT status or the nature of the goods.

Shift in liability:

- 62 The customer would become liable for paying VAT. In the case of cross-border supplies of goods in the EU, the customer was already liable for paying VAT in the EU Member State of arrival of the goods.

Negative impact on cost of implementation and compliance:

- 63 The customer has the burden of proof with respect to the applied treatment of the purchase of the goods.
- 64 There would be a need for changes to processes/systems/technologies and to train staff in order to comply with the new treatment of the supply.

4.5. Conclusions

- 65 The new B2B localisation and liability principles will lead to a negative impact both for the exempt taxable person or non-taxable legal person and the customer.
- 66 If the supplier and the customer are not established in the same EU Member State, there is an increased risk for “tax on tax” situations (double taxation).
- 67 As the customer has the burden of proof with respect to the applied treatment of the purchase of the goods, he will have the tendency to purchase goods from an exempt taxable person or non-taxable legal person established within the same EU Member State. This is distortive and contrary to the Single Market.



5. Qualitative impact assessment of transactions with change in place of supply from EU to non-EU

5.1. Description of scenarios

- 68 The exempt taxable person/non-taxable legal person is established in the EU. The customer is established outside the EU.
- 69 The goods are located within the EU Member State of the exempt taxable person/non-taxable legal person.
- 70 The transactions concerned are local supplies of goods, cross-border supplies of goods in the EU, and exports.
- 71 The groups concerned are EL3, EEU3 and EEX3.

5.2. Comparison of VAT treatment

- 72 The VAT treatment “as is” differs from the VAT treatment “to be”.
- 73 The place of supply (“as is”) differs from the place of establishment of the customer (“to be”), and the customer is established outside the EU.
- 74 This can be visualised by the following examples (the reference to exempt supplier in the diagram means exempt taxable person and non-taxable legal person):

Figure 9.11: Local supply of goods

Diagram 158
GROUP EL – Scenario 3

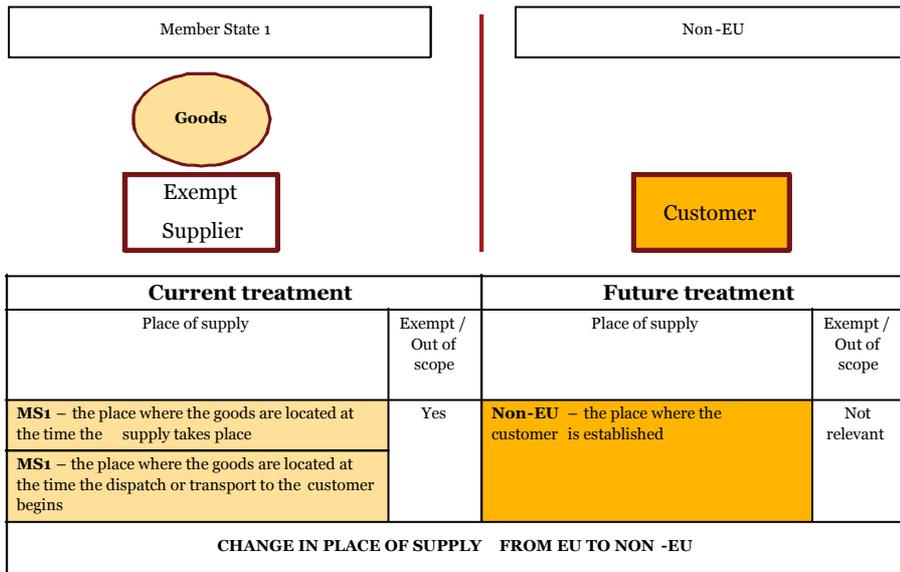


Figure 9.12: Cross-border supply of goods in the EU

Diagram 161
GROUP EEU – Scenario 3

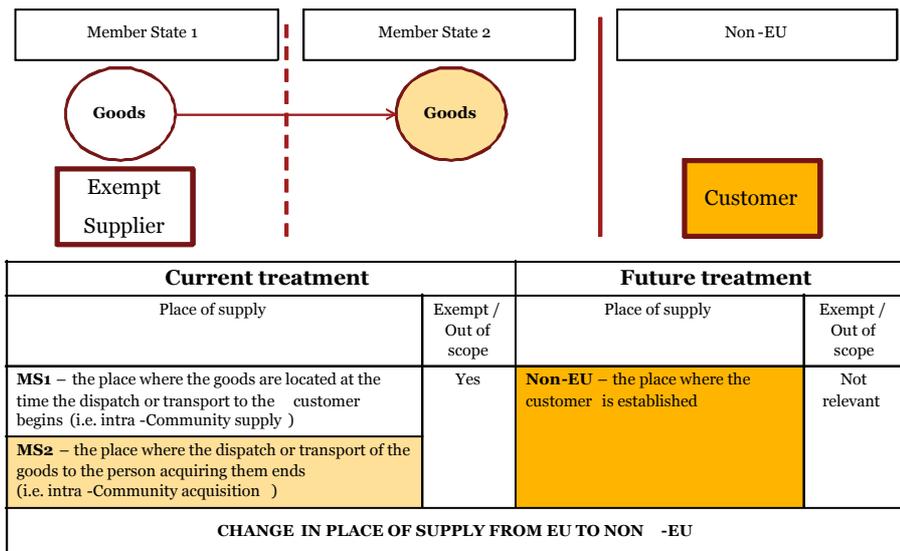
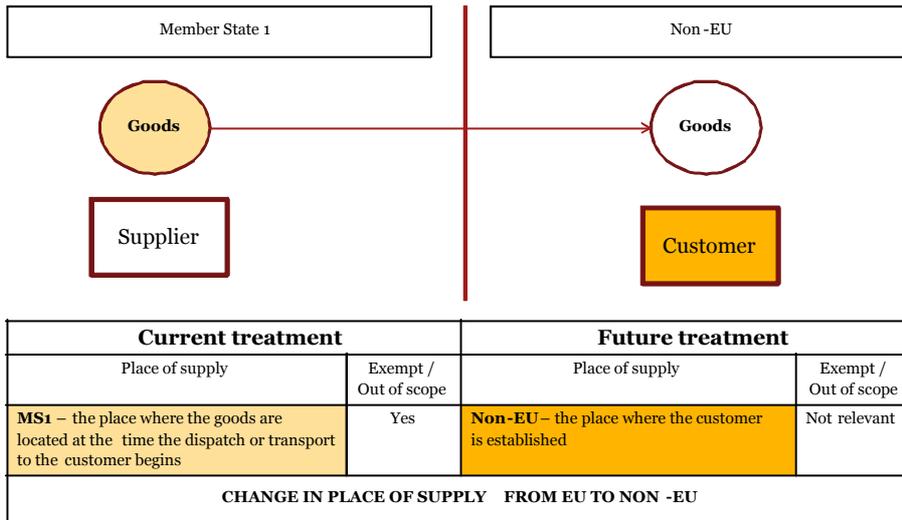


Figure 9.13: Export of goods outside the EU

Diagram 164
GROUP EEX– Scenario 4



5.3. Issues

- 75 In the “as is”-situation, the place of supply of the goods is linked to the EU Member State where the goods are located (with or without transport). In the “to be”-situation, the place of supply of the goods will be outside the EU as the customer is established outside the EU.
- 76 De facto this will lead to a situation that also no taxation will occur (similarly as for the “exemption” or “out of scope” treatment) although, in some scenarios, the goods remain in the EU, if they are not exported.

5.4. Qualitative impact assessment

5.4.1. Impact in country of taxation

Figure 9.14: Impact in country of taxation

Impact in country of taxation (AS IS)					Impact in country of taxation (TO BE)				
Budgetary impact		Ease of administration and cost of collection		Prevention of fraud and abuse on EU level	Budgetary impact		Ease of administration and collection		Prevention of fraud and abuse on EU level
Cash flow	Revenue	Ease of administration	Cost of collection		Cash flow	Revenue	Ease of administration	Cost of collection	
0	0	1	1	-1					

Impact in country of taxation (“as is”)

Budgetary impact:

77 No impact as exemption was applicable in the “as is” situation.

Positive impact on ease of administration and cost of collection:

78 The administration would be easier in day-to-day practice than under the current localisation rule.

79 It would always be clear that the place of supply is where the customer is established, which should reduce the potential for disputes.

80 A check is no longer required with respect to the VAT status of the supplier of goods.

Negative impact on prevention of fraud and abuse on an EU level:

81 The new B2B localisation principle provides for less auditability of the transactions.

Impact in country of taxation (“to be”)

82 The country of taxation “to be” is situated outside the EU, the impact has not been considered.

5.4.2. Impact on taxable person

Figure 9.15: Impact on taxable person

Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance	Budgetary impact	Legal certainty and simplicity	Shift of liability	Cost of implementation and compliance
0	1	1	1	0	1	0	1
0	1	1	1	0	1	1	1

Impact on supplier (“to be”)

Budgetary impact:

83 No impact as exemption was applicable in the “as is” situation.

Positive impact on legal certainty and simplicity:

84 The administration would be easier in day-to-day practice than under the current localisation rule.

85 It would always be clear that the place of supply is where the customer is established, i.e. outside the EU.

Shift in liability:

86 The supplier would no longer be liable for paying VAT as the place of supply of the goods would be outside the EU.

Positive impact on cost of implementation and compliance:

87 The administration would be easier in day-to-day practice than under the current localisation rule.

88 There would be a possibility for full automation, leading to a decrease in time spent (the VAT determination logic is based on the place of establishment of the customer).

89 There would only be need for limited changes to processes/systems/technologies to comply with the new VAT treatment of the supply.

Impact on supplier (“to be”)

Budgetary impact:

90 No impact as exemption was applicable in the “as is” situation.



Positive impact on legal certainty and simplicity:

- 91 The administration would be easier in day-to-day practice than under the current localisation rule.
- 92 It would always be clear for the customer that no VAT is due in the EU.

No shift in liability:

- 93 The customer would not become liable for paying EU VAT as the place of supply of the goods is outside the EU. In the case of cross-border supplies of goods, the customer would no longer be liable for paying EU VAT as the place of supply of the goods is outside the EU.

Positive impact on cost of implementation and compliance:

- 94 There would be possibility for full automation, leading to a decrease in time spent (the VAT determination logic is based on the place of establishment of the customer).
- 95 Because only limited changes to processes/systems/technologies would be required for compliance with the new VAT treatment of the supply.

5.5. Conclusions

- 96 In contrast with the general concept of the Study, we feel that no correction mechanism is required in the case that the customer is established outside the EU and the goods would be located in the EU.
- 97 The supply of the goods would take place outside the territorial scope of EU VAT but would lead to the same result as the application of the “exemption” or “out of scope” treatment. There will be no EU taxation, which is in line with the general objective of the “exemption” or “out of scope” treatment. Consequently, no “tax on tax” from an EU perspective will occur.



6. Overall conclusions and lessons learned

- 98 From an overall perspective, we derive that there are no specific obstacles to the application of the new B2B localisation principle. However, in practice, it will be the customer liable for paying VAT who will have the burden of proof with respect to the applied “exemption” or “out of scope” treatment. There is also a risk of distortion and double taxation.
- 99 The main lessons learned from the qualitative impact assessment are:
- 100 If the EU customer becomes liable for paying VAT under the new B2B localisation and liability rules (as the exempt taxable person/non-taxable legal person and the customer are not established in the same EU Member State), the customer will have the burden of proof regarding the “exemption” or “out of scope” treatment. There is an increased risk of a “tax on tax” situation (double taxation).
- 101 If the exempt taxable person or non-taxable legal person becomes or remains liable for paying VAT (as the exempt taxable person/non-taxable legal person and the customer are established in the same EU Member State), there is no particular difficulty applying the new B2B localisation principle. If the principle of exemption is maintained, it is for customers having no or only a limited right to deduct VAT beneficial to buy goods from such suppliers established in the same EU Member State. This is distortive in the Single Market.
- 102 If the customer is established outside the EU and the goods would be located in the EU, the supply of the goods would be outside the territorial scope of EU VAT but would lead to the same result as the application of the “exemption” or “out of scope” treatment. In this case, no EU taxation would occur, which is in line with the general objective of the “exemption” or “out of scope” treatment. Therefore, there is as such no need for changing the current treatment.