

# COMMISSION OF THE EUROPEAN COMMUNITIES

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## COMMISSION COMMUNICATION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

**Common system of value added tax:  
arrangements for taxing transactions carried out  
by non-established taxable persons**

## REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

**Common system of value added tax:  
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by non-established taxable persons**

## I. Introduction

1. The common system of value added tax, which has been in force since the adoption of the Sixth Directive<sup>(1)</sup>, was amended with effect from 1 January 1993 in order to abolish internal frontier checks in the Community. Following the introduction of the transitional arrangements for taxing trade between Member States<sup>(2)</sup>, intra-Community transactions are no longer treated as imports/exports. This fundamental change in the arrangements for taxing intra-Community trade has been incorporated into the general principles laid down by the Sixth Directive regarding the place of taxation of transactions.

2. The criteria for determining the location of taxable transactions and, consequently, the place where the declaration obligations must be met and the tax paid take account of the supplier's place of establishment only in a very few cases. Traders may therefore have to satisfy declaration obligations in Member States in which they are not established: they may, for example, have to be identified for VAT purposes there and submit periodic returns. In many cases, these obligations have to be met through a tax representative - a procedure which entails major difficulties and considerable cost for traders.

3. The diverse procedures used by Member States for taxing transactions carried out by non-established taxable persons existed and were recognised as being too complex for traders before the introduction of the transitional regime. The procedures laid down for taxing intra-Community acquisition of goods are affected by but are not the cause of these difficulties.

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(1) Directive 77/388/EEC of 17 May 1977 (OJ No L 145 of 13 June 1977, p. 1) as last amended by Directive 94/5/EC of 14 February 1994 (OJ No L 60 of 3 March 1994, p. 16).

(2) Directive 91/680/EEC of 16 December 1991 (OJ No L 376 of 31 December 1991, p. 1).

4. With a view to resolving these difficulties, the Commission undertook, when Directive 92/111/EEC<sup>(1)</sup> was adopted, to present to the Council, on the basis of information transmitted to it by the Member States, a report on the arrangements adopted for giving effect to the tax representative concept and, if necessary, proposals for harmonizing legislation in this area. The Member States for their part were required, pending presentation of the report and any proposals, to take all necessary steps to ensure that the existing provisions relating to the designation of a tax representative were correctly and simply applied.

5. The preparatory work on this report rapidly confirmed the fact that the use of tax representatives was only one facet of the more general problem of determining the person liable for payment of the tax and that only a detailed study of that concept could lead to solutions which took proper account of traders' concerns.

6. In the light of the Community provisions in force (Sixth VAT Directive: Articles 21 and 22 on the person liable for payment of tax and his obligations), the analysis focused on the tax arrangements laid down in Member States' legislation with a view to identifying more closely the origin and scale of the difficulties mentioned by traders and thus to devising the most suitable remedies.

7. The results of this work are set out in detail in the report annexed to this communication. In addition, a summary of the factual analysis of national legislation - a prerequisite for drawing up that report - is available in the form of a Commission working paper (XXI/1803/94).

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(1) Directive 92/111/EEC of 14 December 1992 (OJ No L 384 of 30 December 1992, p. 47).

## **II. Difficulties facing non-established traders**

8. The main difficulties encountered by taxable persons in carrying out transactions in a Member State in which they are not established involve the following:

- determination of the person liable for payment of the tax. Any one category of transactions is governed by provisions which differ between Member States; moreover, even for transactions carried out within the same Member State, the person liable for payment varies according to the nature of the transaction;
- the nature and extent of the obligations imposed on the person liable for payment. For any one person liable for payment, these obligations differ from one Member State to another or, where only one Member State is concerned, according to the nature of the taxable transaction;
- the considerable differences in the interpretation of the concept of tax representative, whose role and obligations vary significantly from one Member State to another;
- the burden and cost of these obligations, particularly for small and medium-sized firms.

9. These difficulties stem from the wide use of options available to Member States, in the Sixth Directive, for determining the person liable for payment of tax. These have been exercised without due regard to the need for simple and consistent treatment of transactions carried out by non-established taxable person.

## **III. Community legal framework**

10. The provisions of the Sixth Directive are based on the following mechanisms:

- one person only ranks as the person liable for payment of the tax due on a given taxable transaction;
- the declaration obligations associated with the carrying-out of that taxable transaction have to be met by the single person regarded as the person liable for payment;

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- the payment obligation has, in principle, to be met by the person liable for payment. However, Member States have the option of stipulating that another person may be held jointly and severally liable - with the person liable for payment - for payment of the tax due: the obligation on that co-debtor held jointly and severally liable is then limited solely to payment of the tax due, the other obligations having to be met by the person liable for payment alone.

11. As a general rule, the person liable for payment of the tax is the taxable person who carries out the taxable transaction, whether or not that person is established within the country. The only exceptions to this general principle involve transactions carried out by non-established persons: instead of the non-established taxable person, a tax representative or the person for whom the transaction is carried out (recipient of a supply of goods or services) may be the person liable for payment of the tax.

12. The Sixth Directive contains an exhaustive list of the cases and circumstances in which the person liable for payment of the tax is always the recipient (triangular transactions, intangible services, intra-Community goods transport and ancillary transport services, services of intermediaries). These derogations obviate the need for traders to be identified for tax purposes and to satisfy declaration obligations in Member States in which they are not established. The main disadvantage of designating the recipient as the person liable for payment is that traders are obliged to use the refund procedures provided for in the Eighth<sup>(1)</sup> or Thirteenth<sup>(2)</sup> Directives. However, in carrying out such transactions, taxable persons do not generally make any purchase attracting tax in the Member State in which their transactions are taxed.

13. For all other transactions, the designation of a person other than the non-established taxable person as the person liable for payment, and in particular the obligation to designate a tax representative, stems solely from the exercise by Member States of an option provided for in the Sixth Directive.

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(1) Directive 79/1079/EEC of 6 December 1979 (OJ No L 331 of 27 December 1979, p. 11).

(2) Directive 86/560/EEC of 17 November 1986 (OJ No L 326 of 26 November 1986, p. 40).

#### **IV. Misunderstanding concerning the concept of person liable for payment**

14. Where the taxable person is himself the person liable for payment of the tax due on the taxable transactions he carries out, he is responsible for meeting the corresponding declaration and payment obligations. In this way, monitoring of the correct application of the tax focuses directly on the person possessing all the information relating to the carrying-out of the transaction. The option of designating a person other than the non-established taxable person as the person liable for payment (tax representative or person for whom the transaction is carried out) considerably alters not only the situation of traders regarding their declaration obligations but also the means of monitoring available to the authorities in Member States.

15. Designation of a person other than the taxable person as the person liable for payment of tax entails the following consequences for traders:

- the status of person liable for payment is transferred in its entirety from the taxable person to that other person;
- the declaration and payment obligations have to be met by that other person alone;
- where provision is made for joint and several liability for the tax due, that obligation may be imposed only on a person other than the taxable person who carried out the taxable transaction.

16. Furthermore, the use of a person other than the non-established taxable person as the person liable for payment of the tax due does not necessarily provide national administrations with the expected guarantees in terms of tax monitoring and collection. Designation of, say, a tax representative as the person liable for payment of the tax has the following limitations:

- The tax representative inevitably depends on the information supplied to him by the non-established taxable person. Any extension of his responsibility to all the transactions carried out by the non-established taxable person has very limited effect in monitoring terms and adds considerably to the cost borne by the non-established taxable person: the representative passes on to his client the financial cost of the risk that he may have to meet his responsibility;

- The accounts kept by a tax representative in respect of the transactions carried out by a non-established taxable person are only partial accounts which fail to provide all the information necessary for monitoring. The additional information is available only from the taxable person who carried out the transaction;
- Finally, as the use of a tax representative deprives the taxable person of his status of person liable for payment, the authorities are prevented from using administrative cooperation as a means of securing assistance in the collection of tax.

## V. Use of tax representatives: an inappropriate solution

17. The tax authorities justify the use of tax representatives on the grounds that it ensures effective monitoring and guarantees collection of tax. They argue that this procedure gives them legal and practical instruments which would not be available to them if they dealt with the non-established trader direct.

18. Community law provides legal instruments which can be used specifically to allay the concerns expressed by Member States:

- Directive 77/799/EEC on mutual assistance in the field of direct taxation and value added tax;<sup>(1)</sup>
- Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation;<sup>(2)</sup>
- Directive 76/308/EEC on mutual assistance for the recovery of claims<sup>(3)</sup>.

19. Given the importance which should be attached to tax collection, the Commission pays particular attention to the proper operation of those provisions in order to safeguard and indeed reinforce their effectiveness.

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(1) Directive of 19 December 1977 (OJ No L 336 of 27 December 1977, p. 15), as last amended by the documents concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities (OJ No L 302 of 15 November 1985, p. 1).

(2) Regulation of 27 January 1992 (OJ No L 24 of 1 February 1992, p. 1).

(3) Directive of 15 March 1976 (OJ No L 73 of 19 March 1976, p. 18), as last amended by Directive 92/108/EEC (OJ No L 390 of 31 December 1992, p. 124).

20. These Community instruments providing for administrative cooperation and mutual assistance between Member States offer a tailor-made answer to the special problems involved in monitoring and collecting the tax due from a non-established trader. The obligation on non-established taxable persons to designate a tax representative is not therefore automatically justified. Dispensing with this obligation would by no means undermine the opportunities for monitoring the transactions carried out by a non-established taxable person.

21. For traders, dispensing with the obligation to designate a tax representative as the person liable for payment of the tax would reduce the cost of transactions carried out by them in Member States in which they are not established. Quite clearly, it would be without prejudice to the possible use of tax advisers, who could give non-established taxable persons the benefit of their experience of local administrative structures and procedures and enable them to overcome language problems but who acting as such are not responsible for declaring and paying any tax owed by his client to the authorities.

22. Member States permit taxable persons established on their territory to employ an agent for the purpose of meeting their tax obligations. This option should be made available under the same conditions to non-established taxable persons. Where he carried out taxable transactions in a Member State in which he was not established, a taxable person would thus be able to choose between the following solutions:

- either he would meet the declaration and tax payment obligations himself,
- or he would employ an agent to act on his behalf and to meet his obligations to the tax authorities.

## VI. Outlook

23. The difficulties encountered by non-established traders stem mainly from the diverse arrangements adopted by Member States for determining the person liable for payment of VAT. This diversity is due in particular to Member States' extensive use of the options available to them under the Sixth Directive. In this context, more systematic application of the principle that the taxable person is himself the person liable for payment of the tax would in itself simplify matters.

24. Any extension of the designation of the recipient as the person liable for payment beyond the restricted number of cases provided for in the Directive (triangular transactions, intangible services, intra-Community goods transport and ancillary transport services, services of intermediaries) should be ruled out since it would have the effect of:

- obliging taxable persons to use the refund procedures as a means of exercising their right to deduct input tax;
- undermining the principle of tax neutrality in that the tax would be applied differently according to whether or not the supplier was established in the Member State in which tax was due: the mechanisms by which tax is invoiced by the supplier and then deducted by the customer would apply only in the case of transactions carried out by an established taxable person.

25. The use of a tax representative as the person liable for payment in place of a non-established taxable person is likely to provide a solution only where the tax authorities have no other means of ensuring that checks are carried out and that VAT is collected. The Community legal framework for administrative cooperation and mutual assistance gives Member States the necessary instruments for monitoring and collecting tax. The Commission would draw Member States' attention to the fact that, by designating a person other than the non-established taxable person as the person liable for payment of the tax, they deprive themselves of the possibility of using those Community legal instruments.

26. The Commission concludes therefore that the implementation of the following principles by Member States would simplify matters greatly:

- ensuring that there is only one person liable for payment per taxable transaction;
- applying as widely as possible the principle that the tax is payable by the taxable person who carries out the taxable transaction;
- refraining, therefore, from using systematically the option - available under Article 21 of the Sixth Directive - of designating the tax representative or the recipient as the person liable for payment of the tax in place of the non-established taxable person;
- permitting non-established taxable persons to use the services of a tax agent under the same conditions as those laid down for established taxable persons
- finally, ensuring that Community legal instruments on administrative cooperation and mutual assistance are applied as effectively as possible.

If these guidelines were applied by all the Member States, it would be possible to reduce the very wide diversity of arrangements for taxing transactions carried out by non-established taxable persons and to resolve the principal difficulties they face. It would also give Member States the necessary guarantees regarding collection and monitoring.

27. The Commission would point out, however, that traders' expectations go beyond the simple question of the person liable for payment of the tax: their perception of the internal market - once completed - is that it should ensure uniform tax treatment for all their transactions in the Community. This expectation cannot be met, however, because of the principles currently laid down by the common VAT system regarding the location of taxable transactions. Only fundamental changes to those rules would be likely to provide a complete answer to the problems currently encountered by traders: this matter is central to the work to be carried out in preparing for the definitive VAT system.

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## INTRODUCTION

The single market overlaps with the implementation of the principle of the free movement of goods, services, persons and capital within the Community. Before it could be introduced on 1 January 1993, it was first necessary to abolish the administrative procedures applied until then, primarily for tax reasons, each time an internal border was crossed. As far as VAT was concerned, the adoption of the transitional arrangements for taxing trade between the Member States meant that these checks and procedures could be definitively abolished, while rules for taxing these transactions at the rate and under the conditions of the Member State of destination could be retained for a transitional period

For traders, the purpose of completing this frontier-free area is seen as ensuring not only that intra-Community trade receives equivalent tax treatment to that governing any transaction within the same Member State, but also that the differences in the tax treatment of the transactions they effect at different points of Community territory are narrowed.

While traders have availed themselves of the opportunities offered by the abolition of checks at internal borders for their intra-Community purchases and sales, they nevertheless still face difficulties in respect of transactions subject to VAT which they carry out in a Member State within whose territory they are not established. While these difficulties vary, their common origin is the diversity of the provisions adopted by the Member States: the system of taxation applicable (rate of tax, exemption conditions and cases, special schemes, etc.); nature and extent of statement obligations; persons on whom these obligations devolve, etc.

These difficulties are not new: they do not stem from the principle of taxing intra-Community acquisitions of goods, but are the direct consequence of the effecting of sales transactions taxable in a Member State in which the supplier is not established. The question of declaration and payment of the tax due by virtue of transactions effected by non-established taxable persons did exist prior to 1 January 1993. Traders nevertheless feel, more and more acutely, the burdensome nature of the obligations and procedures associated with carrying out taxable transactions in a Member State in which they are not established: their expectations in this area are on a par with the hopes which they had placed in the completion of the single market.

However, it was not until 1992 that the diversity of the methods of taxing transactions effected by non-established taxable persons was criticized for making traders' lives so complicated. In particular, the arrangements for implementing the concept of tax representative were on that occasion described as extremely burdensome and particularly difficult to apply, because for certain traders, or for certain transactions, it was impossible to find a person agreeing to act as tax representative.

Since its proposals for amending the provisions of the Sixth Directive<sup>(1)</sup> relating to the person liable for payment of the tax were not adopted by the Council, the Commission undertook, at the time of the adoption of Council Directive 92/111/EEC of 14 December 1992<sup>(2)</sup>, to study the tax representative concept and its implementation by the Member States. It was quickly confirmed that tax representation was only one facet of the broader problem of determining the person liable for payment of the tax, and that only a detailed study of this general question could lead to traders' concerns being genuinely taken into account.

In order to comply with its undertaking the Commission has prepared this report which is a two-stage analysis of the provisions relating to the taxation of transactions effected by non-established taxable persons:

- study of the Community provisions on the determination of the person liable for payment of the tax and the obligations incumbent on him (Title I);

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(1) Directive 77/388/EEC of 17 May 1977, OJ L 145 of 13.6.1977 as amended by Council Directive 94/5/EC of 14 February 1994, OJ L 60 of 3.3.1994.

(2) OJ L 384 of 30.12.1992

- identification of the difficulties reported by traders and presentation of ways of simplifying the treatment of transactions effected by non-established taxable persons (Title II).

It was clear that it was necessary to analyse the legislation of the Member States in order to prepare the report. The result of this work is set out in a Commission working paper.

Lastly, it should be noted that some questions are not tackled in this report: it does not discuss the VAT concept of place of establishment of a taxable person, since the developments which follow concern only the person liable for payment of the tax due under the internal system (Articles 21(1) and 22 of the Sixth Directive), and not the person liable for payment of the tax on importation (Articles 21(2) and 23).

## **TITLE I. THE COMMUNITY LEGAL FRAMEWORK**

(1) When they effect supplies of goods or services taxable in a Member State within the territory of which they are not established, traders are faced with the general question of who will have to pay VAT and complete the declaration obligations in respect of these transactions.

(2) In the Sixth VAT Directive, this question is not tackled as such: it is dealt with in the general context of the provisions relating to the place of taxation of transactions, the person liable for payment of the tax and the obligations relating to declaration. This Title is devoted to examining these provisions, as they apply to the case of taxable persons who carry out taxable transactions in Member States within whose territory they are not established.

(3) This "survey" of the Community legal framework in which the question of the person liable for payment of tax is situated is the necessary preliminary to identifying the nature and origin of the difficulties encountered by traders and by the administrations of the Member States.

(4) The taxable person who effects taxable transactions in a Member State within whose territory he is not established must, in that Member State, comply with the same obligations, whether he is established within the territory of one other Member State, whether he has establishments in several other Member States or whether he has no establishment in the Community. For the sake of simplicity, some of the examples set out below mention only the first of these three cases. This presentational choice does not, however, limit the scope of the conclusions reached to this situation alone.

(5) Also, and whether or not he is established within the territory of the Community, every taxable person within the meaning of the Sixth Directive may have to deal with the provisions in force in territories outside the common system of VAT, in all cases where he carries out taxable transactions within the meaning of the laws of these third territories. The only reference made here to such transactions effected outside the Community<sup>(1)</sup> arises in respect of the extent of the right of deduction to which every taxable person who bears VAT within the territory of the Community is entitled.

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(1) The concept of transactions is here understood in the sense given by the Sixth Directive, namely supplies of goods or services effected for consideration by a taxable person acting as such.

## CHAPTER 1

### TAXABLE TRANSACTIONS, PERSON LIABLE FOR PAYMENT OF THE TAX AND OBLIGATIONS RELATING TO DECLARATION

(6) In order to grasp the problem of the person liable for payment of the tax when taxable transactions are effected by a taxable person not established in the Member State where these taxable transactions have to be taxed, it is necessary to start by determining:

- the cases in which transactions effected by a taxable person are taxable transactions in a Member State within whose territory that taxable person is not established (Section 1),
- whether all taxable persons who carry out transactions in a Member State within whose territory they are not established are necessarily liable for payment of tax by virtue of these transactions, which are the consequences, in terms of obligations relating to declaration, of a taxable person carrying out taxable transactions in a Member State within whose territory he is not established, and, where appropriate, how these various obligations are apportioned between the taxable person carrying out the transaction and the person liable for payment of the tax (Section 2),
- the extent to which the status of person liable for payment of the tax has an effect on the procedures for the exercise, by the taxable person, of his right to deduct (Section 3).

#### Section 1. Taxable transactions and place of taxable transactions

##### Taxable transactions

(7) The scope of VAT is defined in Article 2 of the Sixth Directive: as well as the importation of goods, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to the tax.

(8) Article 4 gives a very broad definition of the concept of taxable person. 'Taxable person' is taken to mean any person who independently carries out in any place any economic activity, whatever the purpose or results of that activity. The same Article also states that "all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions" are to be regarded as economic activities.

(9) The question of the location of the transactions is raised in the actual definition of the basic concepts of VAT. Merely by reading Articles 2 and 4, it is possible to identify the three conditions necessary for the application of the tax:

- the activity engaged in, within or outside the Community, must constitute an economic activity conferring the status of taxable person on the trader concerned;
- only the supply of goods or services effected for consideration, within the framework of the economic activity conferring the status of taxable person, falls within the "substantive" scope of the tax;
- only transactions effected within the territory of one of the Member States are transactions which fall within the "territorial" scope of the tax.

(10) Thus, whether a taxable person is liable for payment of a tax on the transactions he effects is governed by the location of these transactions

(11) It is Articles 8 and 9 of the Directive which lay down the rules governing the location of transactions. The idea common to supplies of goods or services is the origin of the goods or services supplied. This concept of origin is, however, defined differently for each of the two categories of taxable transaction.

#### Place of taxation of the supply of goods

(12) With regard to the supply of goods, the criterion applied by Article 8 to determine the origin of the transaction is that of the place where the goods are located: the criterion for the VAT location of the supply of goods in no case involves the place of the supplier's establishment.

#### Place of taxation of the supply of services

(13) For the supply of services, the origin of the service is the same as the place in which the service is performed. Hence the location principle set out in Article 9(1) uses the criterion of the place where the supplier is established, defined as "the place where the supplier has established his business or has a fixed establishment from which the service is supplied". Consequently, if the principle is adhered to, the cases in which a taxable supplier of services had to apply VAT in a Member State in which he was not established would have to be exceptional.

(14) However, the principle set out in Article 9(1) is subject to a number of exceptions: the place where a property is situated (Article 9(2)(a)), the place of departure of transport (Article 9(2)(b)), the place where services are physically carried out (Article 9(2)(c)) or the place where the customer is established (Article 9(2)(e)).

(15) The consequence of all these exceptions is to reduce the scope of the principle of taxation in the place where the supplier is established to the point where its application is marginal, and as a result to increase the number of cases in which a taxable person has to have his supplies of services taxed in a Member State within whose territory he is not established.

#### Place of taxation and place of establishment

(16) Thus, the present structure of the Sixth Directive is based on the principle of the location of the supply of goods or of services in the place of origin of the goods or services supplied. However, the meaning today given to the concept of place of origin is largely dissimilar from the place of establishment of this taxable person. Quite apart from the other reasons for which they have been adopted by the Council (taxation in the place of actual consumption/use to avoid recourse to the procedures for refunding the tax, need to monitor transactions, principle adopted for allocating the tax yield, etc.), the main purpose of these provisions is to ensure that two transactions, carried out under identical conditions, will be subject to the conditions and the rate of tax of one and the same Member State, whether or not the supplier is established in that Member State: this neutralizes the risks of distortion of competition, between Member States and between traders, which are due either to differences between the VAT rates applied or to differences in the assessment of transactions and of expenses giving rise to the right of deduction.

(17) The taxation mechanisms adopted by the transitional arrangements for taxing trade between Member States are only an extension of these rules aiming at the neutrality of taxation conditions:

- the concept of intra-Community acquisition of goods mirrors the concept of the supply of goods within the territory of a Member State;
- the place of taxation of intra-Community acquisitions of goods confers the power of taxation on the Member State who would be responsible for taxing the same "purchase" effected under the internal system;
- these two provisions are only means, designed to ensure taxation at the rates and under the conditions of the Member State of consumption/use of the goods, in accordance with the choices made by the Council. By this token their effects are fully felt in the case of acquisitions by purchasers who have no, or only a partial, right to deduct, and in the case of acquisitions of capital goods or investment goods;
- lastly, the taxation of intra-Community acquisitions of goods at the place of arrival of the transport of goods is not an additional place of taxation. In the case of acquisitions of goods intended for resale, the place of arrival of the transport of the goods acquired is necessarily the same as the place of taxation of the supply-resale of the goods (see paragraph (12)). In the case of acquisitions of capital goods, the place of taxation of the acquisition is the same as the place in which they are used.

(18) While the place of taxation of transactions does not depend on the place of establishment of the taxable supplier who carries out these transactions, the carrying-out of taxable transactions in a Member State in which the taxable person is not established does not automatically confer on him the status of person liable for payment of the tax: the links between the nature of the transaction carried out, the person liable for payment of the tax and the obligations associated with carrying out taxable transactions are examined in the following Section.

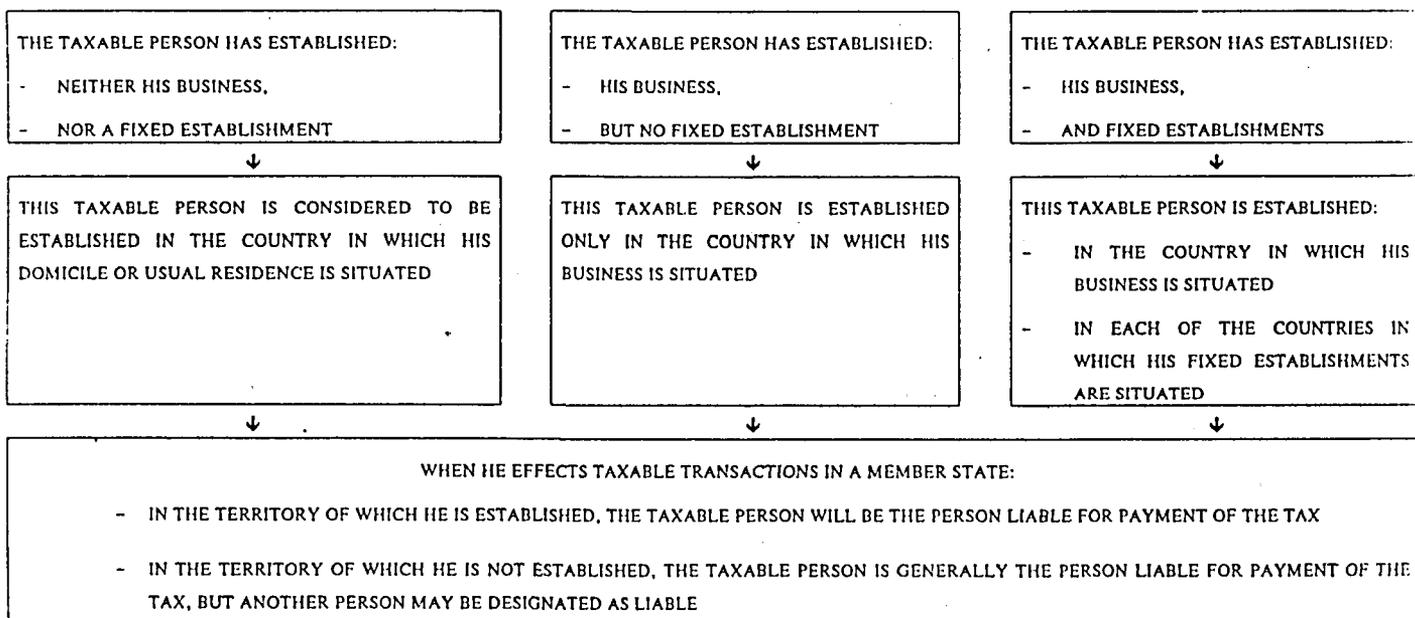
## **Section 2. Taxable transactions, tax payable and obligations relating to declaration**

### **Taxable transactions and persons liable for payment of the tax**

(19) The extent to which a taxable person is liable for payment of a tax on the transactions he effects is limited by the location of his transactions: only on the basis of the place of taxation does the question arise of

- whether or not the taxable person is established in the Member State of taxation;
- and, when the taxable person is not established in the Member State of taxation, who is the person liable for the tax due in respect of these transactions.

(20) Thus, the person liable for payment of the tax will be determined differently depending on whether or not the trader who effects the transaction is established in the Member State in which his transaction is taxed. This relationship, between the place of establishment and the taxable trader's possible status as person liable for payment of the tax, is presented in the Table below.



(21) The status of person liable for payment of the tax is determined by Article 21. However, this Article of the Sixth Directive gives Member States a number of options, depending on the nature of the transaction carried out by the non-established taxable person: the result of making use of these options is that a taxable person who carries out transactions in a Member State within whose territory he is not established is not necessarily the person liable for payment of the tax due in that Member State. The persons who may be designated as liable to pay the tax are listed, by categories of transactions carried out by a non-established taxable person, in the Table below:

PERSON LIABLE TO PAY THE TAX	TRANSACTIONS
NON-ESTABLISHED TAXABLE PERSON	<ul style="list-style-type: none"> <li>- supplies of goods<sup>(1)</sup></li> <li>- supplies of services other than those referred to in Article 21(1)(b)</li> <li>- intra-Community acquisitions of goods</li> </ul>
TAX REPRESENTATIVE OF THE NON-ESTABLISHED TAXABLE PERSON	<ul style="list-style-type: none"> <li>- supplies of goods</li> <li>- supplies of services other than those referred to in Article 21(1)(b)</li> <li>- intra-Community acquisition of goods</li> </ul>
PERSON FOR WHOM THE TRANSACTION IS CARRIED OUT	<ul style="list-style-type: none"> <li>- supplies of services referred to in Article 21(1)(b)</li> <li>- supplies of goods carried out as part of triangular transactions<sup>(1)</sup></li> <li>- other supplies of goods</li> <li>- supplies of services other than those referred to in Article 21(1)(b)</li> </ul>

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<sup>(1)</sup> subject to the last subparagraph of Article 21(1)(a)

## Taxed transactions, exempt transactions and status of person liable for payment of the tax

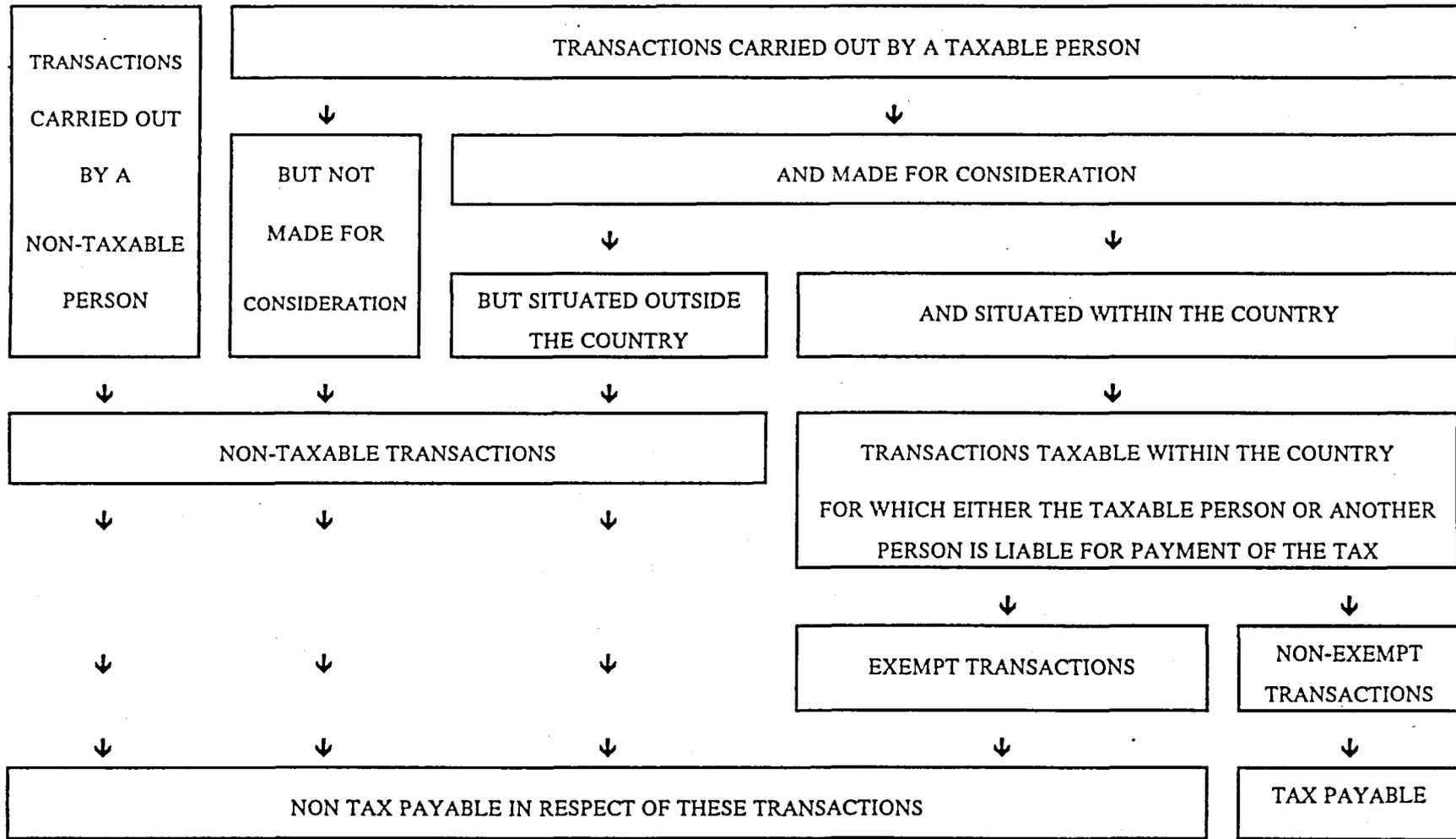
(22) While Article 2 of the Sixth Directive provides a very broad definition of transactions falling within the scope of the tax, only some of them are actually taxed, with the others enjoying exemptions laid down in particular in Articles 13 to 16 and Article 28c:

- for non-exempt transactions, there is a tax which is payable, payment of which will be sought;
- for exempt transactions, no tax is payable and therefore no payment will be sought, in so far as the exemption is rightly applied.

(23) Nevertheless, whether it is taxed or exempt, every taxable transaction necessarily involves a person liable for payment of the tax in carrying them out; this person is responsible:

- either for payment of the tax payable in respect of non-exempt transactions;
- or for justifying the conditions in which exemption may be applied.

(24) This relationship is presented in the Table below.



#### **Taxable transactions, person liable for payment of the tax and right to deduct**

(25) Every taxable person who effects taxable transactions is entitled to deduct the tax on the expenditure he incurs in carrying them out, but only in so far as these transactions are taxed or exempt pursuant to Articles 15, 16 or 28c. This right of deduction arises whatever the taxable person's place of establishment, whatever the location of his transactions and whoever the person liable for payment of the tax (the taxable person himself, the taxable person's tax representative or the person for whom the transaction is carried out).

(26) However, the procedures whereby the taxable person will exercise his right of deduction depend on whether this taxable person is established or liable for payment of a tax in the Member State in which the deduction has to be made:

- the taxable person who is established or liable for payment of the tax in the Member State in which he is invoiced for VAT may recover this amount of VAT by means of direct imputation against his regular VAT returns;
- the taxable person who is neither established nor liable for payment of the tax in the Member State in which he is invoiced for VAT can recover this amount of VAT only by means of an application for refund.

#### **Taxable transactions and obligations relating to declaration**

(27) While a taxable person has no obligations relating to declaration in a Member State in which he is not established unless he is the person liable for payment of the tax in that State, that taxable person is in any event still subject to obligations relating to declaration in his Member State of establishment, in respect of all his taxable transactions wherever they take place, and no matter who is the person liable for payment of the tax: these obligations enable him to exercise his right of deduction in the place where he is established.

(28) For a better idea of the place of obligations relating to declaration, let us take the following example:

- taxable person A is established in Member State 1 (MS 1) and not established in Member State 2 (MS 2)
- taxable person B is established in MS 2
- taxable person A effects a taxable supply of services in MS 2 for which B is the customer.

#### **SITUATION 1**

A is the person liable for payment of the tax in MS 2 and the supply is not exempt

A, as person liable for payment of the tax, will have to declare the transaction and pay the VAT in MS 2. He will also have to declare in MS 1 that he is effecting taxable transactions in MS 2.

#### **SITUATION 2**

A is the person liable for payment of the tax in MS 2 and the supply is exempt

A will have to declare in MS 2 that he is effecting an exempt transaction unless he is excused any declaration as a taxable person effecting only exempt transactions.

Equally he will have to declare in MS 1 that he is effecting a taxable transaction in MS 2.

#### **SITUATION 3**

B is the person liable for payment of the tax in MS 2 and the supply is not exempt

B will have to declare the transaction in respect of which he is liable for payment, pay the VAT and remit the amount to the authorities. In order to do this, he will indicate this transaction in his regular return and comply with any other obligation laid down by his legislation in order to calculate the amount of the tax that has become chargeable and the deductions to be made. He is thus subject to a payment obligation and to statement obligations.

A is subject to no statement obligation in MS 2. He will, however, have to declare in MS 1 that he is effecting taxable transactions in MS 2.

#### **SITUATION 4**

B is the person liable for payment of the tax in MS 2 and the supply is exempt

While B is still obliged to declare the transaction, he does not have to pay VAT since, as the transaction is exempt, there is no person liable for payment (this would not apply if he is dispensed from declaration because he effects only exempt transactions).

A has to declare, in MS 1, that he is effecting taxable but exempt transactions in MS 2.

(29) This example illustrates the need to apportion the obligations laid down in Article 22. This apportionment takes place:

- in the Member State of taxation on the basis of the person liable for payment;
- and where applicable between the Member State in which the taxable person is established and the Member State in which he is not established but is liable to pay the tax.

### **Section 3. Taxable transactions and the right to deduction or refund**

(30) The carrying out of taxable transactions by a non-established taxable person justifies the imposition of statement obligations on:

- taxable persons established in a Member State, by reason of the transactions they effect in that State;
- taxable persons established in a Member State, by reason of the transactions they effect outside that Member State, whether or not they are themselves liable for payment of the tax by virtue of these other transactions.
- persons liable for payment of the tax in a Member State, by reason of transactions effected by a taxable person who is not established in that State, whether the person liable for payment is the non-established taxable person or another person;

(31) It should be noted that the statement obligations still have to be fulfilled by both the taxable person who carries out a transaction for which another person has been designated as liable for payment of the tax and the taxable person who carries out an exempt transaction on which no tax is due. They are imposed so that the amount of the deductions to be made by the taxable person can be checked.

(32) The sole purpose of the statement obligations is not to enable the tax due to be paid, but also to calculate the amount of tax to be deducted: the size of the deduction and the procedures for making it have to be specified, in particular where they relate to deduction of the tax by taxable persons effecting transactions in Member States where they are not established.

#### **Origin of the right of deduction and obligations relating to declaration**

(33) The extent of the right of deduction is determined by Article 17(2)(a) and (3)(a) of the Sixth Directive.

(34) In the wording used by the proposal for a Directive contained in COM(94)58 final of 2 March 1994, Article 17(2) states that "In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

- (a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

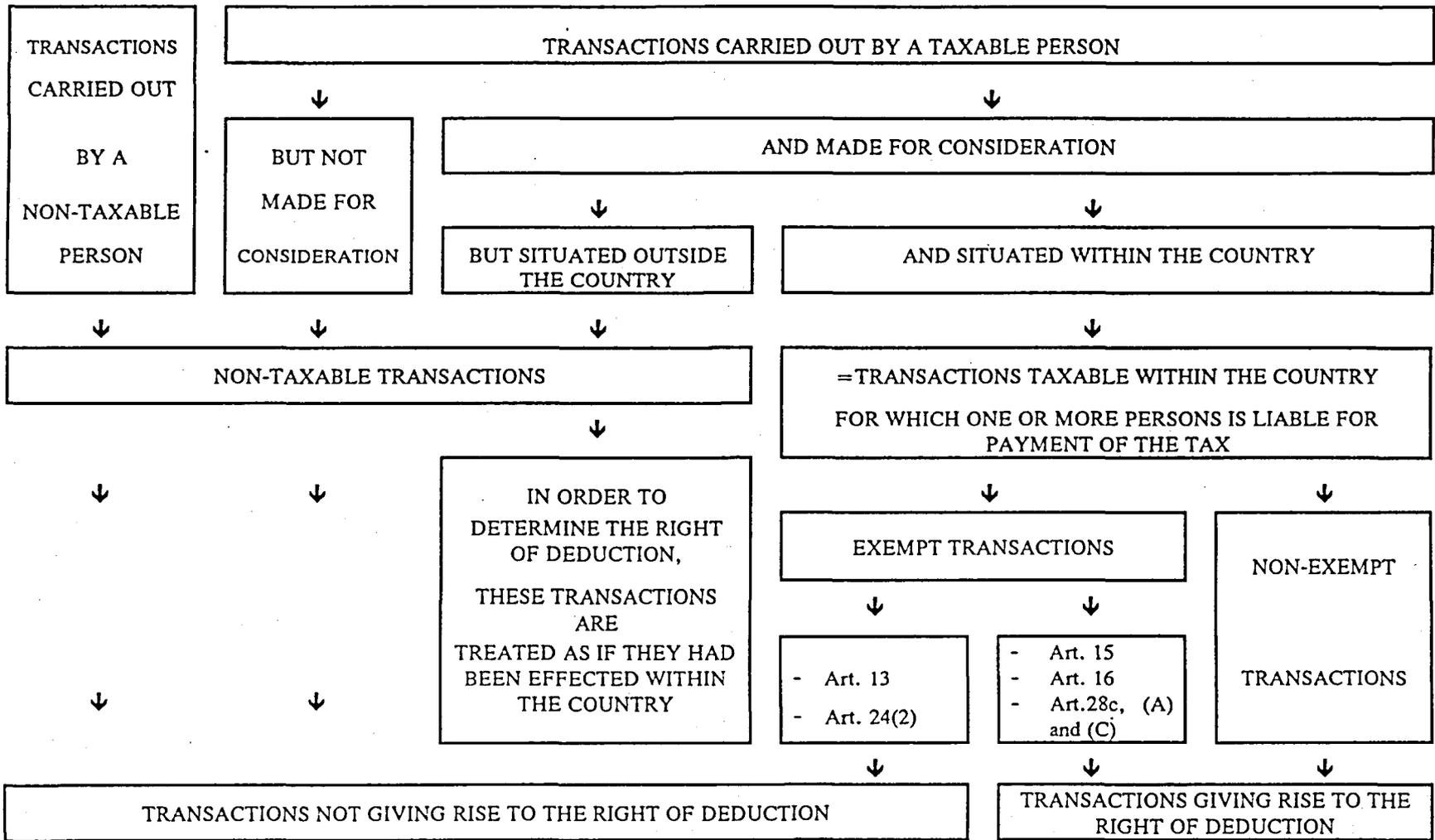
[...]."

(35) Article 17(3) completes the provision and provides that "Member States shall also grant every taxable person the right to the deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

- (a) transactions relating to the economic activities referred to in Article 4(2), carried out in another country, which would be deductible if they had been performed within the territory of the country;

[...]."

(36) These two provisions determine the extent of the right of deduction of a taxable person who effects transactions only in the Member State in which he is established, as well as that of a taxable person who effects transactions in another country, whether or not he is the person liable for payment of the tax in the country where the transactions take place. The table below summarizes these different situations.



(37) Hence, the extent of the right of deduction depends:

- in the Member State where the taxable person is established: on his transactions effected in that Member State, but also on the transactions he carries out outside that Member State (other Member State or outside the Community);
- in the Member State where the non-established taxable person receives supplies of goods or services or effects intra-Community acquisitions or importations: on the transactions effected in that Member State but also on the transactions he carries out outside that Member State (other Member State or outside the Community).

(38) Consequently, it is understandable why, in order to ensure that this right of deduction is monitored, it is necessary to require the taxable person to declare his taxable transactions in both the Member State where he is established and a Member State in which he is not established but where he effects taxable transactions (the person to whom the obligation applies in the latter case being the person liable for payment of the tax) and, where appropriate, the transactions this taxable person carries out outside the Community.

(39) Let us take the following example:

- taxable person A is established in MS 1 and not established in MS 2;
- in MS 1, A receives supplies of services which are taxable in that Member State and for which he has regularly been invoiced for MS 1's VAT;
- he also receives, in MS 2, supplies of services taxable in that Member State and for which he has regularly been invoiced for MS 2's VAT.

#### **SITUATION 1**

A does not carry out transactions outside MS 1 and the services received in MS 2 are used for the purposes of his transactions taxed in MS 1. A will thus be able to:

- deduct in MS 1 the tax for which he has been invoiced by another taxable person within the country (Article 17(2));
- obtain from MS 2 a refund of the tax on the services supplied to him in MS 2, in so far as he uses these services for the purposes of transactions effected in MS 1, but which would be deductible in MS 2 if they had been performed there (Article 17(3)).

## **SITUATION 2**

A also carries out taxable transactions in MS 2 for which he is himself the person liable for payment of the tax:

- if the services received in MS 1 are used solely for the purposes of his transactions carried out in MS 1, A will be able to deduct under the same conditions as in situation 1;
- if the services received in MS 1 are used jointly for the purposes of his taxable transactions in MS 2 and in MS 1, A will also be able to deduct the whole of the VAT due or paid in MS 1 (Article 17(3));
- similarly, A will also be entitled to deduct in MS 2 the whole of the tax he has been charged there for the goods and services he uses to carry out his transactions which are taxed in MS 2, but also for the goods and services he uses to carry out transactions effected outside MS 2 (in this instance, MS 1) but which would be deductible if they had been performed in MS 2.

(40) In terms of declaration making it possible to monitor the extent of the right of deduction, these situations result in the following obligations:

## **SITUATION 1**

A has to declare in MS 1 his taxable transactions located in that Member State for his deductions to be monitored (Article 17(2));

A has to declare that the taxable transactions effected in MS 1 would be taxed in MS 2 if they were located there (Article 17(3)).

## **SITUATION 2**

A has to declare his taxable transactions:

- in MS 1 in order to pay the tax and to justify the deduction of the tax invoiced in that Member State on supplies of goods or services used for his transactions, effected not only in MS 1 but also in MS 2 (Article 17(3)).

This obligation still stands even when A is not the person liable for payment of the VAT on the transactions he carries out in MS 2;

- in MS 2 in order to pay the tax on these transactions and to justify his deductions of the VAT charged on the services acquired in that Member State (Article 17(2)). If MS 2 has provided that another person is the person liable for payment of the tax on the transactions carried out by A, it is that person who will have to make this declaration. A must declare that the taxable transactions effected in MS 1 would be taxed in MS 2 if they had been performed there (Article 17(3)).

(41) Article 17(3)(a) thus defines in exactly the same way the extent of the right of deduction which taxable persons can invoke. While they have an effect on the procedures for exercising the right of deduction, the place of establishment and the status of person liable for payment of the tax in no way affect the determination of the amount of tax deductible by a taxable person:

- a taxable person established or liable to pay the tax in one Member State is allowed to deduct, in that Member State, all tax due or paid in respect of goods or services which he receives within the territory of the country, whether these goods or services are used for the purposes of his transactions taxed in the country, or for transactions carried out in another country, which would be deductible if they had been performed within the territory of the country;
- a taxable person who is neither established nor liable for payment of the tax in the Member State in which he is charged VAT, can also recover, by means of reimbursement, the tax on goods acquired and services used for the purposes of his transactions which are taxed within the country but for which another person is the person liable for payment, or for transactions effected abroad which would have been eligible for deduction if they had been performed within the country.

#### Procedures for exercising the right of deduction

(42) This right of deduction laid down in Article 17 of the Sixth Directive may be exercised:

- either by direct imputation against the tax which has become chargeable, since the chargeable and the deductible tax are indicated in the regular returns;
- or by an application for refund under the conditions laid down by the Eighth and Thirteenth Directives.

(43) For non-established taxable persons, the Community provisions explicitly provide for cases in which the taxable person exercises his right of deduction by means of a refund. In all other situations, the deduction is made by imputation.

(44) Article 17(4) states that:

"The refund of value added tax referred to in paragraph 3 shall be effected:

- to taxable persons who are not established within the territory of the country but who are established in another Member State in accordance with the detailed implementing rules laid down in Directive 79/1072/EEC, (\*)
- to taxable persons who are not established within the territory of the Community, in accordance with the detailed implementing rules laid down in Directive 86/560/EEC. (\*\*)

For the purposes of applying the above:

- (a) the taxable persons referred to in Article 1 of Directive 79/1072/EEC shall also be considered to have only carried out supplies of goods and services to a person who has been designated as the person liable to pay the tax in accordance with Article 21(1)(a);
- (b) the taxable persons referred to in Article 1 of Directive 86/560/EEC shall also be considered to have only carried out supplies of goods and services to a person who has been designated as the person liable to pay the tax in accordance with Article 21(1)(a);

[...]."

(45) In fact, while the procedures for exercising the right of deduction (by imputation or by refund) depend on the established or non-established status of the taxable person, this status is not the only criterion but constitutes a minimum condition. The method of exercising the right of deduction also varies according to whether or not the non-established taxable person is the person liable for payment of the tax.

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(\*) OJ No L 331, 27.12.1979, p. 11.

(\*\*) OJ No L 326, 21.11.1986, p. 40.

(46) For, in accordance with the Eighth and Thirteenth Directives (Article 1 in each case), a taxable person not established in the territory of the country means "[...] a person as referred to in Article 4(1) of Directive 77/388/EEC who, during the period referred to in the first and second sentences of the first subparagraph of Article 7(1), has had in that country neither the seat of his economic activity, nor a fixed establishment from which business transactions are effected, nor, if no such seat or fixed establishment exists, his domicile or normal place of residence, and who, during the same period, has supplied no goods or services deemed to have been supplied in that country, with the exception of:

- (a) transport services and services ancillary thereto, exempted pursuant to Article 14(1)(i), Article 15 or Article 16(1), B, C and D of Directive 77/388/EEC;
- (b) services provided in cases where tax is payable solely by the person to whom they are supplied, pursuant to Article 21(1)(b) of Directive 77/388/EEC."

(47) The result of combining Article 1 in both the Eighth and the Thirteenth Directives with the second subparagraph of Article 17(4) of the Sixth Directive is that a taxable person cannot be refused the procedure of refund of the VAT for which he is invoiced in a Member State except on the twofold condition that he is not established in that Member State and that in that Member State he carries out only transactions which do not allow the imputation of the deductible tax (transactions for which the taxable person is not the person liable for payment of the tax; supplies of services which will be taxed on importation; supplies of services exempt on exportation and which, by themselves, do not justify the taxable person being subject to the obligation of drawing up regular VAT returns).

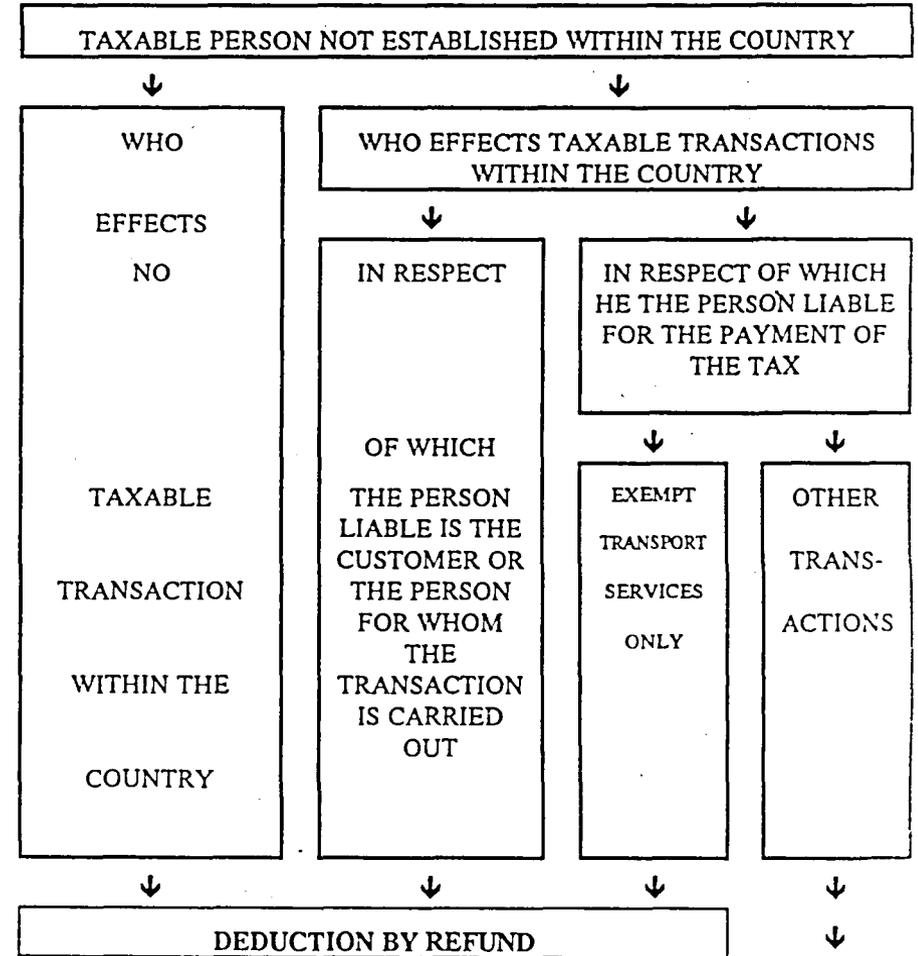
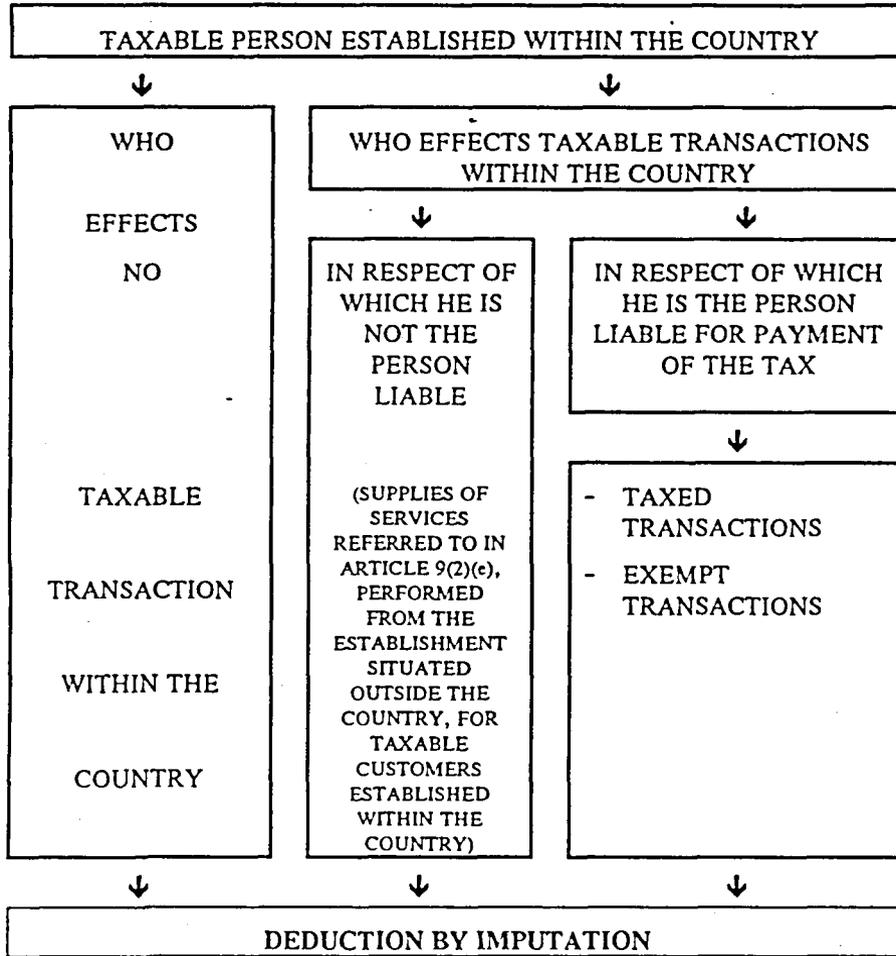
(48) As provided for by Article 1 in both the Eighth and Thirteenth Directives, the condition relating to transactions not being carried out in the country must be confirmed throughout the period to which the application for refund relates: Article 7(1) of the Eighth Directive states that the VAT which is to be refunded must relate to invoiced purchases of goods or services or to imports made during a period of not less than three months or not more than one calendar year. Applications may, however, relate to a period of less than three months where the period represents the remainder of a calendar year. The Thirteenth Directive (Article 3(1)) leaves it to the Member States themselves to determine the period which applications should cover.

## Conclusion

(49) The procedures for exercising the right of deduction may be summarized as follows:

- Taxable person established within the territory of the country = deduction by imputation.
- Non-established taxable person and person liable for payment of a tax due within the territory of the country by reason of transactions located in the country = deduction by imputation.
- Non-established taxable person effecting, within the territory of the country, exempt transactions giving him the right of deduction = deduction by imputation.
- Non-established taxable person carrying out in the country transactions other than those referred to in Article 1 of both the Eighth and the Thirteenth Directives for which the person for whom the transaction is carried out is the person liable for payment of tax pursuant to Article 21(1)(a) of the Sixth Directive = refund.
- Non-established taxable person carrying out transactions referred to in Article 1 of both the Eighth and the Thirteenth Directives = refund.

(50) It will thus be seen that the procedures for exercising the right of deduction (by imputation or by refund) vary according to whether or not the taxable person has the status of person liable for payment of the tax in the Member State within which he was charged the tax. The various situations possible are presented in the Table below.



(51) Irrespective of the procedures enabling him to exercise his right of deduction (by subtraction from the tax for which he is liable or by requesting a refund), every taxable person is entitled to deduct the tax he has been charged on his purchases of goods or services, whatever the Member State in which this tax was paid and whatever the place in which his transactions entitling him to deduction were carried out. Given the provisions laid down in Article 17(2), (3) and (4), the same taxable person can enforce his right of deduction in each of the Member States in which he bears a deductible tax, whether or not the goods or services received are used for the purposes of taxable transactions within the Member States concerned. This situation has sometimes led the Member States to implement "practical measures" which tend:

- either to limit the right of deduction by subtraction just to the tax borne by a non-established taxable person for the purposes of the transactions he effects within the country (geographical segmentation of the right of deduction);
- or to require taxable persons who are not established and not liable for payment of the tax within the country to present, in the same form as if the transactions had been effected within the country, accounting documents proving that these transactions are indeed deductible, in accordance with Article 17(3)(a),

whereas the inspection of taxable persons established within the country is more flexible, even when the deductions involved relate to transactions effected outside the country.

## **CHAPTER 2**

### **PERSONS LIABLE FOR PAYMENT OF THE TAX PAYABLE UNDER THE INTERNAL SYSTEM (ARTICLE 21)**

(52) Article 21 of the Sixth Directive defines the person liable for payment of the tax as the person by whom the tax is payable and states, by category of taxable transactions, which are the persons by who the tax may be payable.

(53) The structure of Article 21, as regards the determination of the person liable for payment of the tax, can be broken down by taxable transactions as follows:

OPERATIONS	PERSON IN PRINCIPLE LIABLE TO PAY	TRANSACTIONS FOR WHICH EXCEPTIONS ARE ENVISAGED
Supplies of goods and services	taxable person who effects the taxable transaction	<ul style="list-style-type: none"> <li>• services other than those referred to in Art. 21(1)(b) supplied by <u>non-established taxable persons</u></li> <li>• supplies of goods effected as part of triangular transactions<sup>(1)</sup>, by <u>non-established taxable persons</u></li> <li>• <i>other supplies of goods and services effected by <u>non-established taxable persons</u></i></li> </ul>
Intra-Community acquisitions of goods	person who makes the intra-Community acquisition	<ul style="list-style-type: none"> <li>• <i>intra-Community acquisitions effected by a <u>non-established person</u></i></li> </ul>
Indication of VAT on an invoice	person who indicated the tax	-

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(1) subject to the last subparagraph of Article 21(1)(a)

*Italics = option left to Member States*

## **Section 1. Principle**

(54) Article 21 lays down as a principle that it is the taxable person carrying out the taxable transaction who is himself the person liable for payment of the tax. Only in the case of non-established taxable persons are derogations from this principle laid down: a derogation common to all Member States for the transactions referred to in Article 21(1)(b) or (d), and a derogation left to the choice of Member States for the other transactions carried out by a non-established taxable person.

(55) There is no problem when the taxable person who effects the transaction is established in the country. In this case he is bound to be the person liable for payment of the tax in so far as, since he falls within the scope neither of (b), nor of the derogations and options provided for by the second and following subparagraphs of (a), he is governed by the principle set out in the first subparagraph of Article 21(1)(a).

## **Section 2. Derogations and options**

(56) Article 21 provides for exceptions to the principle that the taxable person carrying out the transaction is himself the person liable for payment of the tax only when that taxable person is not established in the country.

(57) In this connection, and for every category of transactions carried out by a taxable person, a number of compulsory derogations from the principle, or options granted to the Member States, are provided for. The various cases concerned are presented in the Table below:

OPERATIONS	PERSON LIABLE TO PAY
Supplies of services referred to in Article 21(1)(b)	person to whom services are supplied
Supplies of goods effected as part of triangular transactions	person to whom goods are supplied <sup>(1)</sup>
Other supplies of goods	non-established taxable person
and	tax representative of non-established taxable person
supplies of services other than those referred to in Article 21(1)(b)	<i>person for whom the transaction is carried out</i>
Intra-Community	person who makes the intra-Community acquisition of goods
acquisitions of goods	<i>tax representative of the non-established person who makes the intra-Community acquisition</i>
Indication of VAT on an invoice	person who indicated the tax

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(1) subject to the last subparagraph of Article 21(1)(a)

*Italics = option left to Member States*

#### **Derogation from the principle determining the person liable for payment of the tax**

(58) There is only one exception to the principle that the taxable person who effects the transaction is the person liable for payment of the VAT on supplies of goods or services other than those referred to in Articles 9(2)(e) and 28c (C), (D) and (E).

(59) This is a provision inserted in Article 21(1)(a) by Directive 92/111/EEC of 14 December 1992 and which requires the person for whom the transaction is carried out to be named as person liable for payment of the tax on a supply of goods subsequent to an intra-Community acquisition as part of a triangular transaction.

(60) This exception, which is the only obligatory one laid down by Article 21, is nevertheless limited in its practical application by an option granted to the Member States, who may provide a derogation from this obligation when the non-established taxable person already has a tax representative in the country.

#### **Options available to the Member States for determining the person liable for payment of the tax**

(61) As already stated (see § 54), these options, which are applicable only in the case where the taxable person is not established, concern the following transactions:

- supplies of goods or services other than those referred to in Article 21(1)(b), for which Member States may provide that a person other than the taxable person carrying out the transaction can be liable for payment of the tax; in particular a tax representative or the person for whom the transaction is carried out may be considered as persons liable for payment of the tax;
- intra-Community acquisitions of goods for which Article 21(1)(d) lays down a similar provision, while in this case obviously excluding the possibility of naming the person for whom the transaction is carried out as the person liable for payment of the tax;

- the supply subsequent to an intra-Community acquisition carried out as part of a triangular transaction. In this case a derogation from the principle that the taxable person carrying out the transaction is the person liable for payment of the tax requires Member States to provide that the person for whom the transaction is carried out is the person liable for payment of the tax. However, Article 21(1)(a) allows them to provide that, in the case where the taxable person carrying out the transaction has a tax representative in the country, it is the tax representative, and not the person for whom the transaction is carried out, who is the person liable for payment of the tax on the supply.

### Conclusions

(62) The options which Member States are allowed in determining the person liable for payment of the tax on transactions carried out by a non-established taxable person are not unlimited and, when they exercise one of these options, Member States must follow them to their logical conclusion, in line with the provisions of Article 21, namely:

- the person liable for payment of the tax is in principle the taxable person who effects the taxable transaction. Derogations from this principle, which emerges from reading Article 21, exist only for non-established taxable persons;
- only one person is liable for payment of the tax for each transaction. It is important to stress that there can only be one person liable for payment of the tax for each transaction. For while Article 21 provides that the tax may be payable by a person other than the non-established taxable person, that person would replace him. It is hardly conceivable that a single taxable transaction could generate two tax debts in respect of two different persons or that two persons could fulfil an obligation of the same nature. Hence, when a person other than the non-established taxable person is the person liable for payment of the tax by reason of a taxable transaction, he is liable instead of that taxable person;

- disregarding the case of the services referred to in Article 21(1)(b), a single obligatory derogation from the principle. There is only one single case in which Member States have to provide a derogation from the principle: the case of the person liable for payment of the tax on supplies of goods subsequent to an intra-Community acquisition effected as part of a triangular transaction. In addition, the option granted to Member States to provide a derogation from the principle that the person liable for payment of the tax is the person for whom the transaction is carried out applies only to cases in which the non-established taxable person has designated a tax representative in the country. It is important to note that the use of this derogation is not permitted in the event of the direct identification of the taxable person in the country.

## CHAPTER 3

### JOINT AND SEVERAL LIABILITY FOR PAYMENT OF THE TAX DUE

(63) In the Sixth Directive there is no general principle introducing joint and several liability for payment of the tax due on a transaction. The designation of a person as jointly and severally liable is only an option laid down by Article 21, the use of which is left to the discretion of the Member States.

(64) It must be made clear, right away, that the following remarks relate only to the joint and several liability introduced in respect of VAT, on the legal basis constituted by the Sixth Directive: these remarks in no way concern other cases in which the joint and several liability of two or more persons is invoked, for example in connection with amicable or contentious proceedings of a civil or commercial nature.

(65) While the concept of joint and several liability with the person liable for payment of the tax is not defined in the Sixth Directive, certain conclusions can be drawn from reading Article 21.

(66) First, in general, the terms used differ according to whether they relate to the person liable for payment of the tax or to the person jointly and severally liable for payment. Whereas the tax is payable by the former, it must be paid by the latter. This difference is not just a question of terminology: it is also reflected in different obligations incumbent respectively upon the person liable to pay the tax and the person jointly and severally liable.

(67) Next, the meaning of joint and several liability for payment must be understood as a guarantee that the tax payable by the person liable for payment of the tax will be recovered, if the person liable for payment of the tax does not pay. Therefore, even if, once the recovery proceedings have been initiated, the person liable for payment of the tax and the person jointly and severally liable for payment become jointly and severally liable co-debtors, each being then liable for the whole of the debt, it nevertheless remains the case that only if the person liable for payment of the tax fails to pay it, will the liability of the jointly and severally liable person be invoked: for this reason he would be sued in a "secondary" capacity.

(68) Lastly, the interpretation of Article 21 makes it possible to determine the scope and the effects of establishing joint and several liability for payment which may result in the need to initiate proceedings for the recovery of a sum payable by a non-established taxable person. In this case, whether the debt is owed by a person jointly and severally liable for payment or by the person liable for payment of the tax, the Member States have a Community framework of mutual assistance in recovery.

### **Section 1. Scope and effects of joint and several liability**

#### **Persons who can be jointly and severally liable for payment**

(69) For each category of transactions effected by a non established taxable person, Article 21 lays down the persons who can be jointly and severally liable for payment of the tax with the person liable for payment of the tax, as follows.

OPERATIONS	PERSON LIABLE TO PAY THE TAX	PERSON WHO CAN BE JOINTLY AND SEVERALLY LIABLE TO PAY THE TAX
Supplies of services referred to in Article 21(1)(b)	person to whom services are supplied	supplier of the services
Supply of goods effected as part of triangular transactions	person to whom goods are supplied <sup>(1)</sup>	a person other than the taxable person who supplies the goods
Other supplies of goods and supplies of services other than those referred to in Article 21(1)(b)	non-established taxable person	a person other than the taxable person who effects the transaction
	tax representative of non-established taxable person	
	person for whom the transaction is carried out	
Intra-Community acquisitions of goods	person who effects the acquisition	a person other than the one who effects the acquisition
	tax representative of the non-established taxable person who effects the acquisition	
Indication of VAT on an invoice	person who indicated the tax	-

(70) These provisions make it clear which persons may be required to pay the tax.

(71) Thus, for supplies of goods or of services other than those referred to in Article 9(2)(e) and Article 28(b) (C), (D) or (E), only a person other than the taxable person may be held jointly and severally liable for payment. This assertion, which derives explicitly from the wording of Article 21(1)(a), similarly applies to acquisitions pursuant to point (d) of the same provision.

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(1) subject to the last subparagraph of Article 21(1)(a)

*Italic = option left to Member States*

(72) The logical consequence must be that, since the person liable for payment of the tax is not the non-established taxable person, but the tax representative or the person for whom the transaction is carried out, the taxable person carrying out the taxable transaction can no longer be held liable for payment of the tax in so far as:

- he is no longer the person liable for payment of the tax within the meaning of Article 21;
- he cannot be held jointly and severally liable for payment of the tax.

(73) The only case in which the taxable person carrying out the transaction may incur joint and several liability for payment is explicitly laid down in Article 21(1)(b). When the person to whom services are supplied is the person liable for payment of the tax on a transaction referred to in Article 9(2)(e) or Article 28(b) (C), (D) or (E) carried out by a non-established taxable person, this provision gives the Member State a legal basis on which to provide for the joint and several liability of the non-established taxable person.

#### Applications

(74) Article 21, as amended by Directives 91/680/EEC and 92/111/EEC, raises the question of the scope of joint and several liability for payment of the tax and more particularly the question of its implementation when the taxable supplier is established within the territory of the country.

(75) Article 21 of the Directive lays down the option of providing that a person may be jointly and severally liable for payment, in respect of each of the categories of transaction identified by that Article (supplies of goods or of services other than those referred to in Article 21(1)(b), supplies of services referred to in Article 9(2)(e) and Article 28b (C), (D) or (E), and intra-Community acquisitions).

(76) In the version which preceded the transitional arrangements, and as regards supplies of goods or of services other than those referred to in Articles 9(2)(e), Article 21 could be interpreted as limiting joint and several liability to the case where the taxable person effecting the taxable transaction was not established in the country.

(77) The sentence permitting joint and several liability to be applied, introduced by "the Member States may also provide that ...", came directly after the one allowing arrangements whereby tax is payable by another person, when the taxable transaction is effected by a non-established taxable person.

(78) Whereas, as regards intra-Community acquisitions, the text of Article 21(1)(d) as amended by Directive 91/680/EEC takes over the same wording, the same is not true for the wording of Article 21(1)(a) (supplies of goods or of services other than those referred to in Article 9(2)(e) and Article 28b (C), (D) or (E).

(79) The new Article 21(1)(a) changes not only the wording but also the position of the sentence concerning joint and several liability for payment, which is now in the form of a last independent subparagraph. In addition, the word "also" has disappeared in the new version, thus ending the link with the non-established taxable person which existed in the preceding version.

(80) Consequently, it is possible, by interpreting Article 21(1)(a) as amended, to maintain that joint and several liability may be provided for even in the case where the taxable person who effects the transaction is established in the country.

(81) If this interpretation is accepted, the question arises of whether the wording of point (d) concerning acquisitions should be amended accordingly and be aligned on the wording of point (a). This question of the scope of joint and several liability will not be resolved until the practical scope of this option has been examined as part of an evaluation of possible areas of simplification.

## **Section 2. Practical scope of joint and several liability**

### **Effect of joint and several liability**

(82) The consequence of bringing into play the liability of the person jointly and severally liable with the person liable for payment of the tax is to create a new debtor for the tax. As regards payment, the latter is placed on an equal footing with the person liable for payment of the tax, i.e. the authorities can enforce their rights equally vis-à-vis the two jointly and severally liable co-debtors in respect of the total amount of the claim. In practice, and as has already been stated, the co-debtor's liability is invoked only in the event of default by the person liable for payment of the tax on the taxable transaction.

(83) Where Member States provide that a person other than the taxable person who effects the transaction is liable for payment of the tax:

- the taxable person is discharged of his obligation to pay the tax payable by reason of the transaction he effects, since this obligation is transferred to the other person, who is the only one liable for payment of the tax;

- the taxable person is also discharged of all statement obligations in the Member State where the taxable transaction is located, since this obligation is also transferred to the other person liable for payment of the tax.

(84) However, where it is provided that a person is jointly and severally liable for payment:

- the person liable for payment of the tax is still held to the payment and statement obligations imposed on every person liable for payment of the tax;
- in the event of default by the person liable for payment of the tax (non-declaration leading to non-payment or simple failure to pay on a declared transaction) the person jointly and severally liable simply has to pay the VAT without having to comply with any statement obligation.

(85) The practical scope of joint and several liability depends on the use made by the Member States of the various options they are given for determining the person liable for payment of the tax on a transaction carried out by the non-established taxable person. Thus, after identifying, by category of person liable for payment of the tax, the person who can be jointly and severally liable for payment, the limits of the practical effectiveness of this idea should be examined.

#### Choice of person liable and consequences for joint and several liability for payment

(86) Apart from the case of the transactions referred to in Article 21(1)(b), the person who may be jointly and severally liable for payment varies according to the choice made by the Member States as to the determination of the person liable for payment of the tax borne by a taxable transaction carried out by a non-established taxable person.

(87) When the person liable for payment of the tax is directly the non-established taxable person, the persons who can be jointly and severally liable for payment are:

- the person for whom the transaction is carried out;
- another person.

(88) This other person is sometimes wrongly called the tax representative. In effect this term is currently used in national legislation to define

- whether, within the meaning of the first subparagraph of Article 21(1)(a), the person who becomes liable for payment of the tax instead of the non-established taxable person and has to fulfil all the statement and payment obligations connected with this status,
- whether the person who is jointly and severally liable for payment of the tax within the meaning of the last subparagraph of Article 21(1)(a) and, as such, only held to a payment obligation.

(89) While this provision permits Member States to provide that "other persons" may be jointly and severally liable for payment and to formalize this status of person jointly and severally liable (explicit acceptance of his undertaking by the person jointly and severally liable, provision of a guarantee, etc.), it does, however, require them to follow in full the logic of the fact that this is not a person liable for payment of the tax but simply a person jointly and severally liable for payment, namely:

- the non-established taxable person remains the person liable for payment of the tax within the meaning of Article 21 and must fulfil all the resulting statement and payment obligations;
- the other person is only a co-debtor jointly and severally liable for payment of the tax.

(90) When the person liable for payment of the tax is the tax representative of the non-established taxable person, only the person for whom the transaction is carried out or a "person" other than the supplier may be named as jointly and severally liable for payment.

(91) When the person liable for payment of the tax is the person for whom the transaction is carried out:

- for transactions other than those referred to in Article 21(1)(b), only a person other than the supplier may be jointly and severally responsible for payment, since the joint and several liability of the non-established taxable person and of the tax representative are excluded for obvious reasons;
- for the supplies of services referred to in Article 21(1)(b) (services falling within Article 9(2)(e) and Article 28b (C), (D) or (E)), the person who may be jointly and severally liable for payment is the non-established taxable person carrying out the transaction.

### Real effectiveness of joint and several liability

(92) It would seem, as the texts stand at present, that only the person for whom the transaction is carried out or a person other than the supplier may be held liable for payment of the tax jointly and severally with the non-established taxable person. This, therefore, raises the question of the practical scope of joint and several liability if it can be envisaged only in residual cases. In addition, the real effectiveness of the joint and several liability of the person for whom the transaction is carried out is inhibited by the conditions in which it can be implemented and the limits thereto.

(93) Before being able effectively to invoke the joint and several liability for payment of the person for whom the transaction is carried out, it is necessary to establish the existence of a claim by the authorities against a person liable for payment of the tax. Only after it has been established that the latter has not complied with his obligation to pay the tax will the authorities approach the person who is jointly and severally liable. This is why invoking the liability of a person jointly and severally liable may be regarded as only of secondary importance, appropriate only in the event of default by the person liable for payment of the tax and after an anomaly or irregularity has been detected (invoice which does not indicate the tax, goods purchased without an invoice, etc.); such irregularities are generally picked up when the documents of the customer of the taxable person liable for payment of the tax are inspected.

(94) Even when it has been established that the person liable for payment of the tax has failed to pay, it may be asked how far the joint and several liability of the person for whom the transaction is carried out can be invoked in all situations and in particular when he is acting in good faith.

(95) For while, in the cases mentioned above - an invoice wrongly "exempt" of VAT or a sale without an invoice - it is possible to demonstrate that collusion occurred between the vendor and the purchaser, the same is not true when the VAT invoiced to the purchaser or to the person to whom services are supplied and duly deducted by him, has not been passed on to the authorities by the person liable for payment of the tax. In this case, and unless there has been collusion between the supplier and his customer, it is particularly difficult to understand why the payment of the tax owing should be sought from the customer, for the sole reason that the supplier is not established within the territory of the country: when the same irregularity is established in respect of a taxable person established within the territory of the country, the Member States do not proceed for recovery of the tax against the customer who has legitimately exercised his right of deduction.

(96) It would therefore seem that the practical scope of joint and several liability as introduced by Article 21 for transactions other than those referred to in Article 21(1)(b) is extremely limited, not only because of the residual nature of the cases in which it can be envisaged, but also because of the practical obstacles encountered when it is implemented.

### **Section 3. Mutual assistance in recovery**

(97) In order to resolve the difficulties inherent in recovering a sum from a natural or legal person established in another Member State who did not spontaneously discharge his tax debt, Member States have the bilateral or multilateral agreements they have concluded, and Directive 76/308/EEC<sup>(1)</sup> on mutual assistance for the recovery of claims. The scope of this Directive, originally limited to EAGGF claims and to agricultural levies and customs duties, was extended to VAT by Directive 79/1071/EEC<sup>(2)</sup> and to excise duty by Directive 92/108/EEC<sup>(3)</sup>. The detailed rules of application were laid down by a Commission Directive (77/794/EEC)<sup>(4)</sup> amended by Directives 85/479/EEC and 86/489/EEC.

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(1) OJ L 73 of 19.3.1976, p. 18.

(2) OJ L 331 of 27.12.1979, p. 10.

(3) OJ L 390 of 31.12.1992, p. 124.

(4) OJ L 333 of 24.12.1977, p. 11.

(98) Directive 76/308/EEC lays down the rules which must be contained in the laws, regulations and administrative provisions of Member States with a view to ensuring, in each Member State, the recovery of claims which have arisen in another Member State. In the context envisaged here, these claims may be those which a Member State exercises not only against the person liable for payment of the VAT but also against the person held jointly and severally liable for payment with the person liable for payment.

(99) It should be noted that exchanges of information or judicial proceedings pursuant to the Directive always take place following a request from the requesting authority. The Directive provides for different stages in the implementation of mutual assistance in recovery.

(100) Even though the information available to the Commission on this subject is very limited, it seems that Member States do not make frequent use of the provisions of the Directive and/or do not necessarily make a distinction, in the data they publish, between the requests they send or receive on the basis of Community provisions and those they draw up or receive in their capacity as signatories to particular multilateral or bilateral agreements.

(101) Yet, firms have long been engaged in transactions on the territory of Member States within which they are not established. This being so, it is, to say the least, surprising that Member States have focused on collecting and exchanging information on the transactions effected by traders who, if not established within the country, are at least already known to the tax authorities (intra-Community supplies of goods effected from other Member States for purchasers identified for VAT purposes within the territory of the country) without showing the same concern for monitoring transactions which are purely internal, but carried out by non-established taxable persons. Yet it must be said that the action taken with regard to combating evasion would prove fruitless if it cannot lead to the actual recovery of the tax payable: the detection and prosecution of evasion have no real point unless they result in the full collection of the tax payable. Whether or not the detection and establishment of a shortfall of taxation is the result of administrative cooperation between the Member States, the injured authorities must take action to recover all tax evaded whether the shortfall established relates to transactions subsequent to purchases under the internal system, to resale under the internal system of goods or services bought from another Member State, or to the amount of a tax reported as deductible.

(102) In the context of this analysis of the person liable for payment of the tax payable in respect of transactions effected by non-established taxable persons, these various points give rise to the following question concerning causes and effects: is it to be inferred that the Member States do not have recourse to mutual assistance in recovery because the person they consider as liable for payment of the tax is necessarily established within the territory of the country, or is it to be inferred that it is to avoid difficulties in implementing mutual assistance in recovery, that Member States have routinely sought as person liable for payment of the tax a person established or already accounted for within their territory?

(103) Whatever the answer, or answers, to this question, the objective to be pursued is to give the Member States the necessary guarantees for the recovery of all tax payable, without the measures taken to this end penalizing the taxable persons who carry out transactions taxable in Member States in which they are not established. The large number of provisions with which non-established taxable persons today have to cope probably meet the concern of guaranteeing the recovery of the tax, even if the measures taken prove to be not very effective in practice, but they are a very long way from measuring up to the commitment of Member States to provide for simple and immediate implementing measures.

(104) In this respect, the implementation of the provisions of Directive 76/308/EEC is, however, particularly suitable when the claim relates to a tax payable by a taxable person liable for payment of the tax who is not established in the country, or who has left the territory of the requesting Member State, but who has an establishment within the territory of another Member State.

(105) This report will therefore examine methods of reviving the use of this Directive and the action to be taken to make it more effective.

## CHAPTER 4

### OBLIGATIONS OF PERSONS LIABLE FOR PAYMENT OF THE TAX DUE UNDER THE INTERNAL SYSTEM (ARTICLE 22)

(106) The obligations of persons liable for payment is the subject of Title XIII of the Sixth Directive: obligations under the internal system (Article 22) and obligations in respect of imports (Article 23).

(107) The question of the statement obligations is a key one in the study here devoted to the person liable for payment of the tax payable in respect of transactions effected by a non-established taxable person, given the many difficulties encountered by all the traders concerned (non-established taxable person, tax representative, recipient of the transaction) in becoming acquainted with their respective obligations.

(108) After an examination of the general question of who has to comply with the statement obligations and which transactions these obligations cover (Section 1), an analysis will be made of the content of the obligations incumbent on an established taxable person (Section 2), and of these obligations in the case of a taxable person carrying out transactions in a Member State in which he is not established, whether these are obligations incumbent on the taxable person or the person liable for payment of the tax payable by reason of these transactions (Section 3), or obligations incumbent on persons held jointly and severally liable for payment of the tax (Section 4).

#### Section 1. Scope of Article 22

(109) The question which arises in relation to the scope of Article 22 determine which person will be held responsible for fulfilling the obligations laid down by this text and which transactions have to be declared.

## Persons held to statement obligations

(110) The obligations of keeping accounts, and declaring and paying the tax devolve in principle on the person liable for payment of the tax (wording of Title XIII of the Sixth Directive). Under the internal system, taxable transactions in compliance with the provisions of ordinary law are all transactions carried out by taxable persons (Article 2: the supply of goods or services; Article 28a(1): intra-Community acquisitions of goods). Also, the person in principle liable to pay the tax due on these transactions is the taxable person who carries out the transaction or the taxable acquisition (Article 21). It is only as an exception to these rules of ordinary law that a person other than the taxable person can be designated as the person liable to pay the tax, and it is only under special schemes that non-taxable persons can carry out taxable transactions. The structure of Article 22 also follows this pattern (principle/special cases).

(111) The obligations of declaring (paragraphs 1, 2, 4, 6), invoicing (paragraph 3) and paying the net amount of tax due (paragraph 5) devolve in principle on the taxable person who is liable for payment of the tax.

(112) By referring to "every taxable person", Article 22 paragraphs 1 to 6 endorses the principle established by Article 21 that the person liable for payment of the tax on a taxable transaction is the taxable person who carries out the transaction: cf Title XIII: obligations of persons liable for payment.

(113) However, since Member States may provide a derogation from the principle that the taxable person is the person liable for payment of the tax when he is not established in the country, Article 22(7) requires them to follow the logic of the exceptions they have introduced for determining the person liable for payment of the tax, with regard to the content of the statement obligations.

(114) These obligations are applicable to taxable persons who, in accordance with Article 21, are considered to be liable to pay the tax instead of a taxable person or who are jointly and severally liable for the payment. Similarly, paragraphs 10 and 11 extend these obligations to non-taxable persons who make intra-Community acquisitions of goods. The case of non-taxable persons is not examined below.

### **Territorial scope**

(115) Article 22, and more particularly paragraph 1 thereof, does not enable the territorial scope of the obligations of taxable persons to be determined directly. The question which therefore arises is to determine whether this Article limits obligations to transactions carried out in the country or, if it applies to all transactions whatever their place of taxation.

(116) Because paragraph 1 refers not to the transactions carried out by the taxable person but to his activity as a taxable person it could, if it was interpreted strictly without reference to its title, have the effect of obliging every taxable person within the meaning of Article 4 to state when his activity commences, irrespective of whether this activity is carried out in the country or in another Member State or even in a third country.

(117) Given the principles of taxation laid down by the Sixth Directive, the obligations must be made conditional on the territorial attachment of the taxable transactions to which they relate. Thus Article 22 imposes obligations in the Member State in which the taxable transactions are effected (the obligations in question being then incumbent on the person liable for payment of the tax, who may be the taxable person himself or another person) or transactions giving the right of deduction.

### **Conclusions**

(118) Article 22 imposes statement obligations on:

- the taxable person who carries out taxable transactions for which he is the person liable for payment of the tax;
- the person designated as person liable for payment of the tax on a transaction carried out by a non established taxable person.

these obligations being limited, for a given Member State, to the taxable transactions which are situated or deductible in that Member State.

## **Section 2. Obligations of taxable persons established within the territory of the country**

(119) In so far as he is established in a Member State, the taxable person who carries out the taxable transaction is always the person liable for payment of the tax (see § 66); it is therefore this taxable person who is required to fulfil all the obligations imposed by Article 22, both in respect of his taxable transactions located in the Member State in which he is established and those located in another country but which give him the right of deduction in the Member State in which he is established.

(120) Article 22 provides for the following obligations:

- statement of when activity as a taxable person commences, changes or ceases and statement that the taxable person is effecting intra-Community acquisitions (Article 22(1)(a) and (b)): this obligation is essential in order to make known to the administration traders who effect transactions, or intra-Community acquisitions of goods which are taxable within their territory, but also taxable persons who cease to carry out transactions giving them the right of deduction within the territory of the country;
- identification by means of an individual number of the taxable persons effecting transactions for which the identification obligation is laid down (Article 22(1)(c));
- the keeping of accounts in sufficient detail for value added tax to be applied and inspected by the tax authority (Article 22(2)(a)) and the keeping of specific registers (Article 22(2)(b)): materials used for contract work, goods dispatched or transported for the purposes of a transfer not treated as an intra-Community supply/acquisition);
- issue of an invoice containing certain compulsory information, or a document serving as invoice, in respect of transactions effected for another taxable person or a non-taxable legal person or even for a private individual in the case of distance sales, and in respect of any payment to account made to him before the transaction is completed (Article 22(3));
- submission of a regular return (Article 22(4)), setting out all the information needed to calculate:
  - the tax that has become chargeable;
  - the deductions to be made;

- and, where appropriate, the total value of the transactions relative to such tax and deductions and the value of any exempt transactions.

It is for this reason that a taxable person will possibly have to declare the transactions referred to in Article 17(3)(a), i.e. transactions carried out in another country but giving him the right of deduction;

- payment of the net amount of the VAT when submitting the regular return (Article 22(5));
- option for Member States to require the taxable person to submit a statement including all the particulars contained in the regular returns for the preceding year (Article 22(6)(a));
- submission of a recapitulative statement of the identified acquirers to whom the taxable person has supplied goods in the context of an intra-Community transaction (Article 22(6)(b));
- lastly, Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons (Article 22(8)).

(121) The above obligations are obligations in principle; indeed Member States can exempt certain categories of taxable persons, and in particular taxable persons effecting only exempt transactions, from some or all obligations (Article 22(9)).

### **Section 3. Case of non established taxable persons**

(122) The question of which person has to comply with the obligations laid down by Article 22 does not arise when the person liable for payment of the tax is established in the country, since all the obligations in paragraphs 1 to 6 are incumbent on him.

(123) However, where, pursuant to Article 21 of the Directive, Member States provide that the person liable for payment of the tax is not the taxable person who carries out the transaction, it should be stated how these Member States allocate the general statement obligations between the person liable for payment of the tax and the non-established taxable person.

(124) Article 22, in paragraphs 1 to 6, provides for obligations only for "every taxable person". However, paragraph 7 of that Article requires Member States to take "the measures necessary to ensure that those persons who, in accordance with Article 21(1)(a) and (b), are considered to be liable to pay the tax instead of a taxable person established abroad or who are jointly and severally liable for the payment comply with the above obligations relating to declaration and payment".

(125) A similar provision is contained in Article 22(10) with regard to non-taxable legal persons who carry out intra-Community acquisitions and in Article 22(11) in respect of acquisitions of products subject to excise duty or of new means of transport (acquisitions outside the general arrangements).

#### **Content of obligations imposed on the person liable for payment of the tax**

(126) On reading Article 22(7) it is difficult to determine immediately the extent of the obligations which Member States may impose on the person liable for payment on the tax due on a transaction carried out by a non-established taxable person.

(127) It could be asked what the expression "obligation relating to declaration" covers and in particular whether the keeping of accounts or the issuing of invoices may fall within this obligation.

(128) From reading Article 22(7), it would seem that the literal interpretation does not cover points 2(a) and (3) which do not impose declaration obligations in the strict sense even though, in practice, transactions which have been declared cannot be inspected without the presentation of invoices recording the transactions (of sales and of purchases) and providing proof of the amount of the tax chargeable or deductible.

(129) This is why the assumption made here is that all declaration or similar obligations (keeping of accounts or issuing of an invoice) must be fulfilled by the person liable for payment of the tax instead of a taxable person not established in the country.

#### **Respective obligations of the non-established taxable person and the person liable for payment of the tax, and place of these obligations**

(130) In so far as they make use of the options offered by Article 21 for determining the person liable for payment of the tax, Member States must follow the logic thereof as regards the obligations of persons liable for payment of the tax laid down by Article 22.

*Declaration obligations in the Member State where transactions carried out by a non-established taxable person are located*

(131) The person liable for payment of the tax is required to declare and pay the tax in the country where the taxable transactions are located.

(132) This principle holds good, whatever the established or non-established status of the taxable person effecting the transaction. Thus, when Member States make use of the options laid down in Article 21 and then they anticipate that a person other than the taxable person carrying out the transaction as the person liable for payment of the tax, the obligations relating to declaration and payment are incumbent on that person, in the country where the transactions are carried out.

(133) Consequently, in so far as the taxable person is no longer the person liable for payment of the tax, he no longer has to fulfil this type of obligation in the country in which he is not established but where he carries out taxable transactions.

(134) However, if the non-established person purchases, in the Member State in which he effects transactions for which he is not the person liable for payment of the tax, goods or services for the purposes of taxable transactions which he carries out in the Member State in which he is established, the question arises of what obligations relating to declaration will be required of him to justify his right to refund. It has to be asked, in particular, whether the Member State in which the tax is borne can, for example, demand accounts recording all transactions, effected in the country of establishment, and which have incurred expenses bearing VAT.

*Declaration obligations in the Member State of establishment*

(135) The taxable person who carries out transactions in a Member State within whose territory he is not established is still required, in his Member State of establishment, to justify the amount of his rights of deduction, in particular by declaring the amount of his transactions carried out in another country and giving him the right of deduction pursuant to Article 17(3).

#### **Section 4. Obligations of persons jointly and severally liable for payment of the tax due**

(136) Again, Article 22(7) requires Member States to take the measures necessary to ensure that persons who are jointly and severally liable for the payment of the tax comply with their obligations. The analysis of paragraph 7 of the Article leads to the conclusion that the only obligation with which the person jointly and severally liable for payment has to comply is the payment obligation, which is incumbent on him because of his status of jointly and severally liable co-debtor. It is inconceivable that obligations with the same content would be imposed on a person liable for payment of the tax and a person jointly and severally liable for payment: while it is legitimate for the person liable for payment of the tax due on a transaction to have to comply with the declaration and payment obligations necessary to pay the tax, the same is not true of the person who is simply jointly and severally liable for payment. In the opinion of the Commission, the only obligation which can be imposed on the person jointly and severally liable with the person liable for payment of the tax is that of paying the tax: specific returns cannot reasonably be demanded of a person who does not have all the relevant data for complying with such an obligation and who is responsible to the authorities only to ensure the recovery of their claim.

## **TITLE II. WAYS OF OVERCOMING THE DIFFICULTIES ENCOUNTERED BY OPERATORS**

(137) The manner in which Member States apply Articles 21 and 22, is a source of great complexity for traders carrying out transactions in a Member State in which they are not established. It is necessary to identify a number of conclusions and avenues for simplifying matters for traders, whilst guaranteeing to Member States effective control of these operations.

### **CHAPTER 1.**

#### **THE DIFFICULTIES ENCOUNTERED BY OPERATORS**

(138) When they carry out taxable transactions in a Member State where they are not established taxable persons are confronted not only with the problem of determining the person liable for payment but also with the consequences in terms of declaration obligations or the arrangements for exercising the right to deduct - consequences which, for the same category of transactions, vary considerably from one Member State to another, even where Member States provide for the same person to be liable for payment of the tax.

##### **Section 1. Determining the person liable for payment**

(139) Generally speaking, any taxable person who for the first time carries out a transaction in a Member State in which he is not established is faced with the problem of determining the person liable for payment of the tax due in respect of that transaction.

(140) Given the various options available to Member States under Article 21 for determining the person liable for payment of the tax due in respect of a transaction carried out by a non-established taxable person, traders are faced with situations which vary from one Member State to another.

(141) A company which carries out the same kind of transaction in a number of Member States will thus have to implement different administrative procedures according to which person is designated by the Member State in question as the person liable for payment.

(142) Furthermore, given that the arrangements for determining the person liable for payment vary according to the nature of the transaction carried out, the taxable person will again be faced with the question of determining who the person liable for payment of the tax is whenever he carries out transactions of a different kind for which a new category of person liable for payment may be stipulated.

(143) The implementation of Article 21 by Member States thus means that traders are not faced with the problem of determining the person liable for payment simply when they commence taxable transactions in a Member State but whenever they carry out transactions of a different kind in that same Member State. This complex situation facing traders can be solved only by rationalizing the choices available within the same body of legislation and is an argument in favour of measures for ensuring that the person liable for payment within the same Member State is a single person.

## **Section 2. The person liable for payment is the non-established taxable person**

(144) In cases where the non-established taxable person is directly the person liable for payment, traders take the view that language barriers and the absence of any compulsory local intermediary make it difficult not only to gather information prior to carrying out transactions but also to complete the formalities necessary for registering with the authorities and for fulfilling their declaration and payment obligations.

(145) On the other hand, this situation makes it possible to cut costs since, with the non-established taxable person being alone responsible for paying the VAT, there is no intermediary to pass on the financial costs of his involvement to that taxable person.

(146) However, the guarantee required by some Member States of a non-established taxable person who is directly liable for payment of the tax due constitutes an additional cost.

(147) Finally, whenever they themselves are liable for payment of tax, traders can deduct the VAT on purchases of goods and services in the country through the imputation method on their regular tax returns, which represents a considerable advantage in cash-flow terms, and this even where the taxable person is in tax credit since the "internal" refunds are generally made more rapidly than those under the eighth and thirteenth Directives.

### Section 3. The person liable for payment is the tax representative

(148) The main difficulties encountered by traders are due partly to the wide diversity of conditions and procedures for appointing the tax representative and partly to the extent of the tax representative's responsibility.

(149) Where they require a tax representative to be appointed, Member States provide for a wide variety of procedures. This lack of harmonization (documents to be provided, persons responsible for completing the formalities involved in appointing the tax representative, criteria for being a tax representative, etc.) leads to ignorance of the procedures to be followed and places the traders concerned in impossible situations where they carry out taxable transactions in a number of Member States in which they are not established.

(150) The main effect of the extent of the tax representative's responsibility is that the latter passes on to his client the financial cost of the risk that he will be made personally liable for transactions about which the non-established taxable person has not warned him.

(151) In addition, the financial cost of appointing a tax representative is further increased by the fact that the guarantee required by some national administrations of the tax representative is passed on to the non-established taxable person.

(152) In some situations, the extent of the responsibility borne by tax representatives is such that non-established taxable persons - in particular SMEs - encounter many difficulties in finding persons prepared to act as their tax representatives. In addition, in some Member States, the appointment of a tax representative for VAT is regarded as constituting a fixed establishment in the area of direct taxation: such provisions "discourage" non-established taxable persons from becoming at all involved in transactions within the Member States concerned.

(153) All of these difficulties, which sometimes lead to some taxable persons simply deciding not to carry out transactions in other Member States, do not cancel out the two principal advantages of appointing a tax representative, namely:

- having, in the Member State of taxation of the transaction, an intermediary with knowledge of the language and the procedures;
- being able to deduct tax through the imputation method on regular tax returns rather than applying the refund arrangements provided for in the Eighth and Thirteenth Directives.

#### **Section 4. The person liable for payment is the recipient**

(154) Taxable persons who carry out taxable transactions in a Member State in which they are not established recognize that the simplest solution to the problem of fulfilling the declaration obligations is to designate the recipient as the person liable for payment of tax. They are then relieved of any obligation in the Member State in which the transactions take place, the declaration and payment of the tax being undertaken by the recipient.

(155) However, they all regret having then to exercise their right to deduct under the refund procedure provided for in the Eighth or the Thirteenth Directive. Given the refund delays, they are compelled to prefinance the tax over lengthy periods.

(156) Furthermore, it frequently happens in practice that traders are compelled to use local advisers to assist them in submitting their requests for VAT to be refunded: the "recipient-refund" duo does not always obviate the need to employ a local agent who must be paid for the service he supplies and it frequently gives way to the "recipient-representative-refund" trio.

(157) Finally, it should be pointed out that the general adoption of systematic designation of the recipient as the person liable for payment of the tax due in respect of transactions carried out by a non-established taxable person entails a total lack of prefinancing of the tax between the moment it is paid to the supplier and that when it is deducted and has the effect of reducing the cost of purchases made from a non-established purchaser relative to that of purchases made under the internal system and therefore distorts the very principle of the fractioned payment of tax.

## CHAPTER 2.

### MEANS OF SIMPLIFICATION

(158) These proposed ideas have a dual purpose: to find ways of simplifying the procedures for taxing transactions effected by non-established taxable persons and to boost cooperation between Member States

#### **Taxation procedures**

(159) First of all this involves meeting the commitment undertaken by the Commission at the time of the adoption of the simplification Directive (92/111/EEC) in December 1992, to submit to the Council a report on tax representation. This commitment was set out in a statement in the minutes of the Council session of 14 December 1992 under the following terms:

"On the basis of the information to be communicated to it by the Member States by 31 December 1992, the Commission will submit to the Council by the end of February 1993 a report on the arrangements made by the Member States for the realization of the concept of the fiscal representative, and will if necessary make proposals for the harmonization of the laws of the Member States on this matter. Until the submission of the report and, if applicable, of the proposals for Community rules, the Member States shall take all necessary measures to ensure correct and straightforward application of the provisions relating to the nomination of a fiscal representative as laid down by this directive. "

(160) At the time of the negotiations on Directive 92/111/EEC, the Commission had proposed a complete redrafting of the provisions on the person liable to pay the tax, because these had appeared as one of the principal causes of the difficulties encountered by operators in the fulfillment of their obligations in a Member State where they were not established.

(161) The Council did not follow the proposal by the Commission, but agreed to amend Article 21 only as required in the treatment of triangular operations, maintaining without modification the other provisions in force since the adoption of the Sixth Directive. As the fiscal representation concept is only one facet of the broader question with which the operators are confronted regarding the determination of the person liable to pay the tax, this report makes its analysis within the general framework envisaged by Article 21.

## Administrative cooperation and mutual assistance

(162) This also involves putting these proposals in the context of strengthened administrative cooperation. Indeed, since 1 January 1993 and in accordance with the provisions of the regulation on administrative cooperation in the field of indirect taxation<sup>(\*)</sup>, a common system of information exchanges on intra-Community transactions between the competent authorities of Member States has been set up. This system named VIES (VAT Information Exchange System) offers various functions mainly to the national administrations but also to the operators who can thus obtain confirmation of the validity of a particular person's identification number.

(163) Setting up a network of central liaison offices responsible for supervising questions pertaining to administrative cooperation encouraged the development of communications between the Member States in this field. The effective existence of a single contact point makes it possible to avoid the difficulties connected with the division of responsibility within Member States - according to the taxable persons' location, the nature of the request, etc ... - and ensures a rapid transmission and treatment of the requests for assistance.

(164) In point of fact, Member States in various fora expressed their wish to proceed beyond the provisions of the regulation alone and also to use systematically the other legal instruments currently available as regards administrative cooperation or mutual assistance. Thus the mutual assistance Directive<sup>(1)</sup> should in future be invoked more frequently in the field of VAT. In fact it provides for automatic and spontaneous exchanges of information, and exchanges on request. The examination of these various possibilities is currently in hand within the Standing Committee on Administrative Cooperation and the Member States gave a very positive reception to the approach adopted by the Commission regarding the identification "of the needs of users".

(165) With regard to the Directive on mutual assistance for recovery<sup>(2)</sup> the Member States also feel the need to give new impetus to its use.

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(\*) Council Regulation (EEC) No 218/92 of ..... 1992, OJ L .....

(1) Council Directive 77/799/EEC

(2) Council Directive 76/308/EEC

## **Simplifications sought and their limits**

(166) However, from now on it has to be said that the aim of continuing simplification conflicts with the principles of taxation in force during the period of application of the VAT transitional system. Indeed, within this context solutions which can address the operators' concerns are inevitably very incomplete insofar as any in-depth change would clash with certain essential principles of the current system, in particular the identification of the place of the taxable operations, as well as the impossibility, for a taxable person, of exerting his right to deduction in a Member State other than that where the tax is invoiced.

(167) Within this framework, the objective is to try to mitigate the principal handicaps encountered by taxable persons when they carry out operations in a Member State in which they are not established, such as:

- obligations too diverse in each of the Member States;
- obligations too diverse when operations within the same Member State are carried out by persons liable to pay the tax who fall into different categories;
- obligations too heavy or too expensive compared with the operations carried out, particularly for small and medium-sized enterprises;
- high revenue costs owing to the repayment deadlines observed by the Member States in the event of recourse to the Eighth and Thirteenth Directives.

(168) As it has been described, (§ 138), operators are confronted with two principal difficulties which are the identification of the person liable to pay the tax due on an operation and, once he is identified, the diversity and onerousness of the obligations put upon him.

(169) This is why, to meet their needs, it is appropriate:

- to establish the concept of the person liable to pay the tax, regardless of the Member State in which the tax is due,
- to reduce and harmonize the various obligations and procedures which are the responsibility of the taxable person in a Member States in which he is not established.

(170) These guidelines must of course guarantee to Member States the recovery of tax owed to them, and suitable means of control and mutual assistance.

## **Section 1. Proposal for a person in principle liable to pay the tax**

(171) The choice in identifying the person in principle liable to pay the tax, should be made between certain categories of pre-determined persons. These are:

- the non-established taxable person,
- the recipient,
- the fiscal representative, whether a complete fiscal representation, or a "reduced" one as can be set up in certain Member States.

(172) Even if this choice cannot be exercised freely irrespective of the operation concerned, it has however to allow:

- the reduction of the business costs of a taxable person in a non-established Member State;
- to encourage the exercise of the right to input tax deduction to avoid recourse to the repayment procedures provided for by the Eighth and Thirteenth Directives;
- to maintain competitive equality between operations carried out with established taxable persons and those carried out with non-established taxable persons.

### **Operations referred to in Article 21(1)(a) other than triangular operations**

(173) For these operations, the solution to be adopted should provide that the non-established taxable person is himself the person liable to pay tax.

(174) Indeed, this solution is one which makes it possible to meet most effectively the operators' expectations regarding the identification of a person in principle liable to pay the tax in all the Member States for the greater part of taxable operations, since only the supply of goods carried out within the framework of a triangular operation and the service provisions referred to in Articles 9(2)(e) and 28b(C), (D) and (E) are excluded from it. The other cases of possible persons liable to pay the tax should be considered separately for the following reasons.

(175) The identification of the recipient as the person liable to pay the tax cannot be generalized insofar as, on one hand, it imposes on the non-established taxable person recourse to the repayment procedures provided for by the Eighth and Thirteenth Directives to exert their right to deduction; on the other hand, it affects the basic principles of VAT (invoicing by the supplier and deduction by the purchaser), resulting in a purchase tax, when the supplier of the goods or services is not established in the country.

(176) The solution in which the person in principle, liable to pay the tax, would be the fiscal representative is not a satisfactory solution either.

(177) When traditional fiscal representation is involved, the representative's responsibility for the payment of tax on all the operations carried out by the taxable person not established in the country considerably increases the costs for the non-established taxable person. In fact, the fiscal representative's charges reflect the possible full extent of his liability. In certain cases, it even leads to a non-established taxable person being unable to find persons agreeing to be their tax representative.

(178) Moreover, operators are confronted, when they enter the market in certain Member States, with the fact that since they have a fiscal representative in the country they are regarded as established not only for the application of VAT, but also for the requirements of direct taxation, with all the consequences that involves: accountancy of the permanent establishment, determination of profits, assignment of overheads, payment of the local tax .... In certain cases, operators prefer not to trade in the Member State concerned rather than being confronted with this problem.

(179) As the operators stress (cf. paragraph 154), the advantage of the fiscal representation rests in the fact that it constitutes a satisfactory solution, making it possible for the non-established taxable person to fulfill his declaratory obligations in a Member State in which he is not established.

(180) But the appointment of a fiscal representative as the person liable to pay the tax, and consequently entirely responsible for the payment of the tax on all the operations carried out by a non-established taxable person, with all the resultant financial consequences, is disproportionate in relation to the aim of achieving a solution to the practical problem of the effective observance of the taxable persons' obligations.

## **Operations referred to in Article 21(1)(b) and triangular operations**

(181) When a non-established taxable person only carries out operations falling within Article 21(1)(b) or triangular operations, the recipient can be retained as the person in principle liable to pay the tax, to avoid the taxable person having to be identified on the basis that he carried out only these categories of operations.

(182) However, these exceptions to the principle whereby the non-established taxable person himself is liable to pay the tax on the operations that he carries out are no longer justified since this taxable person is already liable to pay tax within the country on the basis of the carrying out of an operation falling within Article 21(1)(a).

(183) In this case the uniqueness of the person liable to pay the tax which is imposed by the Member State concerned or allowed as an option permits them:

- to prevent the taxable person carrying out several categories of operations challenging the identification of the person liable to pay the tax according to the nature of the operation that he carries out,
- an equal treatment between the non-established taxable persons and the established taxable persons.

(184) Moreover, the taxable persons sometimes wish, for reasons of commercial policy in particular, to be themselves liable to pay tax on the basis of operations that they carry out for which it is foreseen that the recipient would be the person in principle liable to pay the tax.

(185) Certain operators indeed had wondered, at the time of the adoption of the new intra-Community VAT rules whether, for questions relating to trade with their customers, they could deal with the sales destined for a taxable person identified in another Member State for which they arrange transport, not as a delivery exempted in the country of departure followed by an intra-Community acquisition by the customer in the country of arrival of the goods, but as a taxable transfer carried out by the supplier followed by an internal delivery. This solution enables the supplier to be the person liable to pay tax in the internal regime.

(186) Those operators who so desire could implement this solution so as not to impose on their customers obligations regarding statements and payments concerning VAT, and the burden of the acquisition, the latter receiving an invoice identical to that issued by a supplier under the internal system. The conclusions on this point identified in Working Party No. 1 ratified this interpretation which results in allowing operators to replace intra-Community deliveries destined for particular taxable persons with a taxable transfer followed by an internal supply.

(187) In the same way, a non-established taxable person carrying out for example supplies of services referred to in Article 9(2)(e) can choose, for commercial reasons, to be himself the person liable to pay tax and to discharge his customer from any obligation of accounting for and paying the tax accruing on these operations. This is why such an attitude open to enabling them, at their option, to be the person liable to pay tax, could be adopted.

## **Section 2. The obligations of non-established taxable persons**

(188) Insofar as the non-established taxable person can or cannot be the person liable to pay tax according to the nature of the operations that he carries out, it is advisable to determine which solutions can be proposed to reduce the formalities which encounters in each of these situations.

### **The non-established taxable person is the person liable to pay VAT.**

(189) Once the principle is established, then for all the operations referred to in Article 21(1)(a), except for the supply of goods subsequent to an intra-Community acquisition carried out within the framework of triangular operations, it is the non-established taxable person who is the person liable to pay tax, it remains to be determined according to which procedure he will be able to discharge materially the obligations which are this persons' responsibility under Article 22.

(190) As previously indicated (cf. paragraph 144), those economic operators not established in a Member State have practical difficulties in carrying out the formalities connected with the taxable operations in the Member State owing to ignorance of procedures, linguistic barriers and lack of proximity. These disadvantages disappear however each time a fiscal representative becomes the person liable to pay the tax in the place of the non-established taxable person, but are replaced by higher costs because of the financial effect on the non-established taxable person and the extent of the liability of his fiscal representative.

(191) Any taxable person should be able to entrust the execution of his VAT declaration and payment obligations to an authorized agent, in the Member State in which he carries out taxable operations. This agent does not have the authority of the person liable to pay tax and, consequently, he is not personally responsible to the administration, neither for the completion of the declaratory obligations nor for the payment of the tax accruing on the taxable operations carried out by his principal.

(192) In the event that he acts in the name of and on the account of a non-established taxable person, this agent could thus carry out, all the declaratory obligations related to the operations that he performs in the Member State concerned and possibly carry out the payment of VAT, always to the order of and on the account of his principal, as is practised, under internal regimes, in all the Member States. Insofar as the agent incurs no direct responsibility to the fiscal authorities, the cost of his services passed on to the non-established taxable person is limited to the physical implementation of the obligations imposed on the person liable to pay the tax within the country. Within this framework, calling to account the neglect of his responsibility could only be carried out, in the event neglect of his duties, on the basis of the mandating contract concluded.

(193) In addition, in order genuinely to bring down the operating costs of a taxable person in a Member State in which he is not established, the tax agent's joint and several liability for payment with the person liable for payment of the tax, and the requirement to furnish guarantees for the sole purposes of VAT should be abolished, since these two requirements are bound to have repercussions on the operating costs of traders in a Member State in which they are not established.

(194) Under these conditions, the only person remaining jointly liable with the person liable to pay the tax would be the recipient of the goods or the purchaser of the service.

**The non-established taxable person is not the person liable to pay VAT.**

(195) When a non-established taxable person only carries out operations which fall within Article 21(1)(b) or triangular operations, the recipient being capable of being the person in principle liable to pay the tax, the non-established taxable person is not the person liable to pay the tax on these operations.

(196) This situation has two consequences:

- The non-established taxable person is discharged from any obligation in the Member State where his taxable operations are located, such as obligations regarding statements, payments, invoicing or the management and registration of accounts. With regard to invoicing, in particular, it must be spelled out that the taxable person who is thus not the person liable to pay should not have to be concerned with the declaration of matters concerning VAT (taxable amount, rates, due VAT) the determination of which falls on the recipient.
- The non-established taxable person who is not the person liable to pay the tax within the country, has no choice but to exert his right to deduction, by resorting to the repayment procedures provided for in the eighth and thirteenth Directives. This situation, which constitutes a major problem for operators, could be improved, either by accelerating tax repayment, or by allowing the non-established taxable person, by choice, to become himself the person liable to pay the tax due on the basis of the operations referred to in Article 21(1)(b) or of the triangular operations that he carries out.

(197) Moreover, whilst this option would not be offered to taxable persons, one can nevertheless wonder how far the provisions of Article 21(1)(c) prevent this same result from being achieved.

(198) This Article specifies that "The following shall be liable to pay value added tax:

(1) under the internal system:

(a) (...)

(b) (...)

(c) any person who mentions the value added tax on an invoice or other document serving as invoice;

(d) (...)".

(199) Thus, the non-established taxable person, who, in theory, does not qualify as the person liable to pay the tax, could acquire this quality by the simple fact of mentioning VAT on the invoice that he issues.

(200) The question which arises however, is to determine if the taxable person is, in this case, the person liable to pay tax due on account of this operation, thus discharging the recipient from his obligations as liable to pay the tax.

(201) It is, in effect, difficult to determine if Article 21(1)(c) was drafted in order to guarantee the payment of a tax which is mentioned on an invoice or other document insofar as it can be deducted or, if it offers to each taxable person the possibility of being himself the person liable to pay the tax accruing on an operation and thus enabling him to declare the tax due and to deduct possible taxes that he bore, by imputation.

### **Section 3. Revenue security in the Member States in respect of control methods and tax recovery**

(202) The proposed solutions addressing the operators' concerns developed above result in, on the one hand, the disappearance of the fiscal representative as a person responsible for the payment, and, on the other hand, the suppression of the supply of guarantees or of joint liability required by certain Member States.

(203) These solutions are justified by the need to lower operating costs of taxable persons in countries where they are not established.

(204) This result could be obtained only insofar as the cost of the guarantee of tax recovery is no longer imposed on operators but is borne by Member States, the risk of non-recovery being minimized by a real investment in administrative cooperation.

(205) The options set out concerning the person in principle liable to pay the tax and the obligations which fall on him, force Member States to make a precise application of the obligations enacted by Article 22 of the Sixth Directive and, for security reasons, to envisage centralized administrative management of the non-established taxable persons making it possible to apprehend and check the entire taxable operations carried out by a particular taxable person.

(206) In the same way, effective control of the right to deduction has to be set up owing to the multiplicity of places of possible deduction.

(207) One must be able to check that the operations carried out outside a Member State really do open up the right to deduction of the tax borne in this Member State accruing on goods and services used for operations carried out abroad. As it is not possible to make unique the place where the right to deduction is exercised within the framework of the current principles established by the Directive, the control of deduction has to be sought:

- when the input tax is deducted, through a better knowledge of the operations carried out by taxable persons in Member States in which they are not established and which opens up the right to deduction in the Member State of establishment;
- when the deduction is exercised via repayment, by the adoption of a harmonized procedure, under the Eighth Directive, taking into account, for partially taxable persons and for taxable persons who have a part of their income outside the scope, limits to the right to deduction.

(208) Finally, the best control of operations carried out by non-established taxable persons and of their right to deduction should be accompanied by the development of effective mutual assistance for recovery.

(209) With the introduction of the internal market, the removal of some specific obligations imposed on non-established taxable persons (fiscal representatives, guarantory or persons jointly and severally liable) is fully justified.

(210) The disappearance of the advantage, real or supposed, of these measures, the practical usefulness of which is often limited (cf. paragraph 92) can advantageously be replaced by a strengthening of mutual assistance for recovery. The necessary means for this development already exist:

- a legal base provided by Directive 76/308/EEC, of which the effectiveness could probably be improved;
- a strengthened and effective spirit of administrative co-operation which was developed for the implementation of the transitional system of VAT.

(211) The willingness of each Member State to set up mutual assistance procedures for enforcing VAT claims would make it possible to implement the proposed measures to improve the conditions in which taxable persons carry out operations in a Member State in which they are not established, whilst allowing Member States security for recovery at least equal to that which they have with regard to established taxable persons.

## CONCLUSION

(212) As can be seen from the arguments set forth in this report, when traders carry out transactions in a Member State in which they are not established, they find it extremely difficult to determine their obligations. This is due to the unharmonized application of the provisions concerning the determination of the person liable for payment of the tax and the obligations incumbent on him, in cases where a taxable transaction is carried out by a non-established taxable person.

(213) The need to take measures to simplify the conditions under which taxable persons can engage in their activity in Member States in which they are not established is today unavoidable and applies to all.

(214) With this document the Commission has met its undertaking to examine the arrangements for tax representation. It has also broadened the scope of this study to embrace the concept, as a whole, of the person liable for payment of the tax, so that the origin and nature of the difficulties encountered by non-established traders can be more clearly identified: this must be done before genuine simplification measures can be prepared.

(215) As a preliminary conclusion, an examination of Community provisions currently in force relating to the definition of the person liable for payment and to the determination of his obligations (Articles 21 and 22 of the Sixth Directive) shows that they provide a framework which is broad and flexible enough for the concerns of traders to be taken into account. This alone enables the Member States to amend their laws so as to simplify the determination of both the person liable for payment of the tax on transactions carried out by non-established taxable persons and the content of their obligations, without it being necessary to amend the Directive. In this respect, a better application of the provisions relating to non-established taxable persons can be rapidly achieved if the laws of each of the Member States contain the following three elements as facets of the same questions:

- the concepts of person liable for payment of the tax and person jointly and severally liable for payment,
- the definition of the respective obligations of the taxable person, the person liable for payment and the person jointly and severally liable for payment,
- the provisions relating to the arrangements for the right of deduction.

(216) The proposals presented in this report have been put together on the basis of an examination of the provisions of the Sixth Directive and the arrangements for implementing them: they seek to improve harmonization in relation to the person liable for payment of the tax and the obligations incumbent on him. But they can only be translated into practice if the Member States change or modify the way in which they now use certain options allowed by the Directive.

(217) The working basis today represented by Articles 21 and 22 of the Sixth Directive enables many of the concerns expressed by the business community to be allayed. Similarly the provisions currently in force with regard to administrative cooperation or mutual assistance are instruments for the greater security of recovery when a trader from another Member State is involved. This exercise in simplifying or reducing the formalities and obligations imposed on non-established traders is, however, bound to have its limits, in view of the taxation principles adopted by the Sixth Directive with regard to place of taxation, and the fact that it is now impossible for the VAT invoiced in one Member State to be deducted in another Member State.

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