Cooperation between Member States in presence of double VAT in the Union
Analysis of the state of the law and recent developments by the ECJ

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1. **Chapter 1: Introduction**

1.1. **Background**

Harmonization of VAT has been a great and indispensable step in the unification of turnover taxes within the Union, a unification necessary for the establishment of the internal market.\(^1\) Through the VAT Directive,\(^2\) the EU institutions have set up territoriality rules which determine the place – the Member State – in which each transaction should be taxed. The territoriality rules prescribed in the Directive ensure the well functioning of the internal market, as they are considered the guarantee of a fair share of taxing rights between Member States. The Union has put a lot of effort in ensuring the full coverage of all transactions by the Directive, as well as in allocating taxing rights to the most appropriate jurisdiction.

Yet, as thorough as the Directive can be, its application is submitted to an appreciation of the facts by Member States. This interpretation can diverge between jurisdictions, therefore leading to double taxation. As an example of a divergent interpretation of the facts, the *Aktiebolaget NN* case is a great illustration of double VAT claims that may arise within the Union.\(^3\) In this case was at stake the qualification of the transaction, as either good or service. The transaction consisted in the ‘supply and laying, between Sweden

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\(^3\) Case C-111/05 *Aktiebolaget NN v/ Skatteverket* [2007] ECJ.
and another EU country, of an undersea fibre-optic cable which will be used for the supply of transmission service to different telecommunications operators’. It is explicated in the contract that the cable will be fixed in the ground on the Swedish land, inland and territorial waters, continental shelf as coastal country, same applying to another Union Member State. The work consists in laying the cable and performing certain preliminary tests. The question was to know whether the transaction shall be qualified as a supply of goods or services. In this case, please note that there was no explicit double VAT issue: the legal reasoning takes place in a domestic Swedish perspective. However, the assessment of the facts in this case highlights a very high hypothetical risk of double taxation arising in similar situations. In fact, the ECJ qualified the transaction at stake as a supply of goods, on the ground that ‘the cable will be transferred to the client who will dispose of it as owner, that the price of the cable itself clearly represents the greater part of the total cost of that transaction, and that the supplier’s services are limited to the laying of the cable without altering its nature and without adapting it to the specific requirements of the client’.  

The difference of qualification between two Member States can be lethal for the general VAT system, as the allocation rules applicable can be contrary depending on the nature of the transaction. For instance, a B2C extra-Community supply of good shall be taxed in the State of destination. A divergent qualification of the supply as a supply of service will lead to taxation in the place of establishment of the provider, i.e. the State of origin.

This case is very interesting in the study of double VAT, as it is apparent that the ECJ has set up a detailed grid on the qualification of goods

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4 Case C-111/05 Aktiebolaget NN v/ Skatteverket [2007] ECJ, paragraph 40.
5 Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 146(1): ‘Member States shall exempt the following transactions: (a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor’.
6 Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 43: ‘The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides’.
and services: this framework should easily help qualify each transaction, preventing double taxation from arising. However, the general assessment of cases by the ECJ does not allow such a prevention. Indeed, the ECJ controls the application of the VAT Directive from a narrow, domestic perspective. Besides preliminary rulings where the qualification of the transaction is the purpose of the ruling, the ECJ assesses the good application of the VAT Directive from a national perspective, i.e. compares the national assessment of the facts to their treatment prescribed by the Directive and case law, with no regards towards the treatment of the transaction by the other Member State in case of a cross-border situation. Therefore, the divergent qualification in another Member State is not taken into account by the ECJ in the first proceedings when studying the qualification of the transaction in the first Member State. This method can be a source of double VAT within the Union.

1.2. Aim and delimitations

The scope of double VAT is difficult to grasp. Deriving from practical examples, it can be described as the situation arising when more than one country want to levy taxes on a transaction. The fact that the multiple taxation may be supported by different taxpayers shall not impact the qualification of double taxation.

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7 For instance, see case C-231/94 Faaborg Gelting Linien [1996] ECJ, paragraph 12 on the taxation of transactions consisting of the supply of meals for consumption on board ferries providing a scheduled service: ‘In order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features’.

8 Case C-297/89 Rigsadvokaten v/ Nicolai Christian Ryborg [1991] ECJ: ‘[The Directive] is to be applied by the Member States to individual cases within the framework of the provisions of their national law’.

9 The requirement of multiple taxation being a burden for the same taxpayer is present in direct taxation, for instance corporate income tax where an item of income should be taxed twice in the hands of the same taxpayer in order to be qualified as juridical double taxation. The taxation of the same item in the hands of different taxpayers is qualified as economic double taxation and is not tackled as thoroughly as juridical double taxation. In VAT, it is not the corporation that is taxed for its activities, but the transaction itself. Therefore, notwithstanding the existence of one or several taxpayers taxed on the same transaction, it is the existence of multiple taxation of the same supply that is considered double taxation.
Double VAT is a great threat to the well functioning of the internal market. The Union has two means of action to tackle such a threat. *On the one hand*, the EU legislator can use *priori* solutions by avoiding the non symmetrical application of the Directive by Member States. This consists in setting up provisions which clarify territoriality rules, in order to avoid the risk of double VAT. For instance, the use and enjoyment clause was introduced in 2015, bringing clarity to the rules applicable to cross-border supplies of services. Also, the ongoing BEPS project is great help when defining the territoriality rules applicable to online services. However, as clear as there rules can be, a divergent interpretation of the facts may still lead to unfortunate situations, as described above in the Aktiebolaget NN case. In this way, the taxpayer will suffer from the existence of multiple claims on a single transaction.

Therefore, *on the other hand*, the legislator can fall back on *posteriori* solutions. They consist in finding remedies to situations where the prevention rules were not efficient enough to grant the taxing rights to only one Member State. In this way, the Union has issued instruments said to be capable of curing double taxation, on the ground of cooperation between Member States. The aim of the thesis is to tackle *posteriori* solutions, in order to grasp to what extent Member States are cooperating today and should cooperate in order to relieve double VAT. Please note that this thesis will not tackle *a priori* solutions.

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10 See below for more information on the links between VAT and the internal market: the principle of external neutrality, a requirement of the internal market, forbids double VAT on a single transaction.

11 Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 58(b). See also: Joep J.P. Swinkels, ‘Effective Use and Enjoyment of Services under EU VAT’ (2009) International VAT Monitor 207. See also <http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/where-tax_en> (accessed on April 13 2017): ‘To prevent double taxation, non-taxation or distortion of competition, Member States may decide to shift the place of supply of services, which are either inside or outside the EU to inside or outside their territory, when according to the effective use and enjoyment of the services this differs from the place of supply as determined by the general rules, those for hire of means of transport, or certain B2C services to a customer outside the EU’.

1.3 Legal method

The thesis deals with the relationship between the action of Member States and Union law. In this way, a traditional legal method is used, consisting in studying the possibility of cooperation in EU law (Chapter II) and analyzing the existing EU Regulation on cooperation (Chapter III). Although Member States remain sovereign, they are subject to European policies on VAT. As VAT legislation stems from the Directive, the Member States cannot depart from this latter. Therefore, the entire analysis provided by the thesis relies on the delegation of sovereignty exercised sovereignly by Member States in favor of the Union. When joining the European Union, the Member States ratify the Treaty and absorb the acquis communautaire.\(^{13}\) In this way, States agree on the primacy of EU law:\(^{14}\) both primary and secondary EU legislation bind Member States. Consequently, EU sources of law provided in this thesis are binding for Member States: both primary law for general EU principles laid down in the Treaties, and secondary law such as the VAT Directive and the Regulation on cooperation, are binding for Member States.

1.4 Outline

The thesis will focus on the posteriori solutions to double VAT, i.e. cooperation between Member States once the situation has arisen. Chapter II will tackle the compatibility between the need of cooperation and European law. The enforcement of a dialogue between Member States is necessary to mitigate or relieve double taxation by allocating a single place of taxation to each transaction. However, this enforcement shall be laid down in respect of European requirements. In this way, the origin or VAT provisions, stemming from a European Directive, can be considered a barrier to the implementation of cooperation between Member States, as the division of competences may not allow these latter to set up a dialogue between each other.

\(^{13}\) Depending on the monist or dualist constitutional nature of the State, this latter may have to simply ratify it, or also implement it within the national order.

\(^{14}\) Case C-65/64 Costa v ENEL [1964] ECJ.
After tackling the compatibility between cooperation and European law, Chapter III will focus on the existing cooperation instrument in force in the Union, namely Regulation n°904/2010. This Regulation was set up in 2010 as a tool to fight tax avoidance in the field of VAT. As its scope of application is quite vague, a study of this text will go through its applicability to double taxation cases, as well as the consequences of the applicability. The study will be reinforced by the recent ECJ case law, giving precisions on the substance of this Regulation.

As a conclusion, Chapter IV will contain an opening on the idea of making a distinction between fraud and absence of fraud in order to establish real cooperation between Member States. As the state of the law does not establish any cooperation between tax authorities, a distinction between fraudulent and non-fraudulent situations can be a first step towards the establishment of a dialogue between Member States.

2. Chapter 2: The need for cooperation in light of European law

2.1. Introduction

As the thesis focuses on the resolution of double VAT in the Union, it is necessary to understand the source of the existence of multiple taxing claims on a single transaction. The aim of this chapter is to study the compatibility between cooperation and European law. Therefore, the study of territoriality will be helpful in order to understand to what extent the VAT Directive does not fully protect transactions from being taxed more than once (2.2). Facing this risk of double taxation, comes the question of the level of action: competences are inflexibly shared in the Union between Member States and the Union, thus it is determinant to understand which level of action is preferable to solve double VAT cases (2.3). Lastly, the author will go through an existing general EU pillar principle – mutual trust between Member States – in order to study to what extent this principle can be used in cooperation between tax authorities to relieve double taxation (2.4).
2.2. The deficiency of territoriality rules as the source of double taxation

2.2.1. Preliminary remarks

The aim of this section is to understand the origin of double VAT. While territoriality is often perceived as the power of a State within its territory, it takes on a specific meaning in VAT as it should be combined with the notion of territoriality at a Union level. In this way, the VAT Directive sets up territoriality rules, also referred to as allocation rules, which allocate a place of taxation to each transaction. These territoriality rules are decisive, as they help prevent double taxation cases from arising (2.2.2). Yet, the application of these rules by Member States does not fully guarantee the taxation of each transaction in only one jurisdiction: the friction between jurisdictions can lead to the multiple taxation of a single transaction. Facing this risk, cooperation is needed to relieve double taxation; yet, the EU origin of the territoriality rules is a barrier to cooperation (2.2.3).

2.2.2. The harmonization of territoriality rules as the guarantee of single taxation

Although briefly discussed in the field of VAT, territoriality is often referred to in a national perspective as follows: within a jurisdiction, VAT is ‘applicable to transactions which take place within the national territory’. In other words, this principle enables a jurisdiction to tax any transaction occurring within its borders or sharing a link with its territory. This typical, domestic approach is clearly linked to the notion of sovereignty, which enables a State to enforce its own legislation in a given territory. There is no discussion regarding the conformity of the VAT legislation to this acceptation: it is certain that in order to raise taxes on a given transaction, the State needs to share some links with the transaction. Of course, these links

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can be of different natures; all the same, there has to be a connection with the State. The raise of VAT is possible thanks to the existence of sovereignty of each Member State: *as a first step*, the VAT Directive sets up criteria in order to qualify the transactions and apply the adequate rules in order to determine the State of taxation; *as a second step*, the tax authorities enforce their fiscal power by formally levying the tax due according to the VAT Directive.

This common acceptation of the principle of territoriality should nonetheless be balanced by the supra-national requirements that Member States are facing. Although Member States are sovereign within their borders, their power to levy VAT is in a way delegated to the Union. The legislation which determines the place of taxation of a transaction does not stem from the Member State’s legislation, but from EU harmonized provisions. The VAT Directive sets up rules which determine the qualification of each transaction, as well as their place of taxation, i.e. in which jurisdiction VAT is due. The determination of the place of taxation takes the form of territoriality rules, also referred to as allocation rules, as they share the taxing rights between Member States depending on the applicable rules laid down in the Directive.

In other words, while territoriality is linked to the sovereignty of the State, these two notions should not be understood as synonyms: the understanding of territoriality in VAT is more of a barrier to the sovereignty of the State, as Member States are subject to the requirements of the Directive. The existence of this acceptation of territoriality is crucial, as its efficiency is

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16 A transaction can be taxed in a jurisdiction on the ground of different factors, usually torn between the State of origin and destination. For instance, a B2B intra-community supply of good shall be taxed in the country of destination. At the same time, a B2C intra-community supply of good should be taxed in the State of origin.  
17 To understand the European meaning of territoriality rules, a comparison with income taxation can be relevant. In the field of income taxation, each State sovereignly chooses its own taxing rules, i.e. the tax base, rates and procedures. Then, if the income turns out to be cross-border implying double taxation, the two States may decide to cooperate. In this way, they should have a tax treaty in force, so they can apply it and mitigate or relieve double taxation. In the field of VAT, the power of the State is very different: Member States do not sovereignly choose their own taxing rules, as these are dictated by the Union through the VAT Directive.
the guarantee of the absence of double taxation within the Union: if territoriality rules are efficient, a unique place of taxation will be attributed to each transaction, meaning that each transaction will be taxed once and only once.

2.2.3. **The European source of territoriality rules as a barrier to cooperation**

The issue lies in the application of the VAT territoriality rules. The Union has been working very hard on laying down harmonized, clear and efficient territoriality rules which cover all transactions and attribute them a place of taxation. Nevertheless, the power left under the discretion of the Member States to assess, interpret the fact themselves and apply the EU legislation shows the absence of total efficiency of allocation rules. The application of the VAT Directive is a two-step process: *first*, the transaction shall be qualified; *second*, the appropriate allocation rules enable the attribution of a place of taxation to the transaction according to its qualification. The possibility of a divergent qualification of the transaction is a threat to the well-functioning of the Directive: if the qualification is different between two Member States, the territoriality rules applied by different Member States may not match, threatening the allocation to the transaction of a single place of taxation, thus leading to double taxation.

The Union has already put a lot of effort into making clear territoriality rules. Nevertheless, the friction of interpretation is not an issue which can be solved in the Directive, but rather through cooperation between Member States. Indeed, in case of a mismatching interpretation of the facts, leading to a friction between the taxing claims of different Member States, the only way to mitigate or relieve the existence of multiple claims on a single transaction is the existence of cooperation between Member States which, through a dialogue, might agree on a common understanding.

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18 Case C-111/05 Aktiebolaget NN v Skatteverket [2007] ECJ (see introduction for more information on this case) is a typical example of a possible divergence of interpretation between two Member States, qualifying the transaction either as a service or a good.
There is no real focus on the relief of double VAT today at the level of the Union; the reason behind this passive resistance might be of political and logical nature. The VAT legislation derives directly and solely from the Union, as it stems from the Directive. The Member States have no power but to implement the Directive in domestic law and apply it in conformity with the ECJ case law. These harmonized rules between Member States are the key to the efficiency of the system at the level of the Union. The allocation rules in the Directive have an intrinsically harmonized nature: therefore, admitting the need of cooperation would imply admitting the lack of efficiency of these rules, which are the pillar of the general VAT system. In this way, the Union would recognize the weaknesses of its own system.

2.3. The conferral of competences as an incitation to enforce cooperation at the level of the Member States

2.3.1. Preliminary remarks

The aim of this section is to understand the preferable level of action to fight double VAT. Within the Union, the Treaty operates a thorough division of competences, shared between the Union itself and the Member States. Although VAT falls under the competence of the Union, the ECJ has been very reluctant to take up a position on the relief of double taxation; whilst its role is conferred by the Treaty, this competence is de facto not exercised by the Court, which refuses to adopt a clear position on this central issue which affects the internal market (2.3.2). This role is then left between the hands of Member States, encouraged to take on this responsibility on the ground of the principle of neutrality (2.3.3). Yet, although this action from the Member States is highly recommended, as it would help enforce single taxation within the internal market, a guarantee of neutrality, the absence of explicit conferral of competences to Member States might be an issue (2.3.4).
2.3.2. The necessary but deficient action of the Union

The division of competences in the Union is crucial in the study of cooperation between Member States. When signing up to the common VAT system, the Member States have agreed on implementing VAT in their domestic legislation,\(^\text{19}\) and on abolishing any other turnover tax.\(^\text{20}\) In other words, they have accepted to delegate their power to the Union. This mechanism is the manifestation of the principle of conferral:\(^\text{21}\) the existence of a harmonized turnover tax is necessary to enforce the internal market;\(^\text{22}\) the power to legislate on this turnover tax should be conferred to the level which has the better means to achieve the given goal; the Union is the best level by which harmonized legislation can be dictated; therefore, the competence in VAT is attributed to the Union.

Unfortunate situations can arise from the friction between interpretations of facts by the tax authorities. The Member States have given up their competence on VAT: therefore, according to the principle of conferral, it is the role of the Union to solve the issue. Through its case law, the Union should process the cases and mitigate double taxation. Yet, when double VAT cases arise, the ECJ upholds a surprising method as it upholds a

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\(^\text{19}\) Article 113 TFEU: ‘The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition’. On this ground, Member States have no power in adopting provisions regarding VAT, as all the power is delegated to the Union in order to enforce the well functioning of the common market.

\(^\text{20}\) On the prohibition of other turnover taxes, see article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: ‘Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes (…) which cannot be characterized as turnover taxes’. Also, see Case C-252/86 Gabriel Bergandi v/ Directeur général des impôts [1988] ECJ.

\(^\text{21}\) Article 5 TEU: ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’.

\(^\text{22}\) Please note that the objective of the harmonisation of VAT within the Union through the conferral of competences to the Union is the well functioning of the market, according to article 113 TFEU (‘to ensure the establishment and the functioning of the internal market and to avoid distortion of competition’). Therefore, the existence of this objective, clearly explicated in the Treaty, is the reason why all the competences in VAT can be delegated to the Union.
domestic point of view: the ECJ assesses the application of the VAT Directive in the given Member State, with no regard towards the assessment performed by the other jurisdiction at stake. In this way, the ECJ pays no attention to the existence of double taxing claims on the same transaction, and only assesses the case in a one Member State perspective. The existence of taxing claims from another Member State on the same transaction is out of the scope of the analysis of the Court, which only tackles the transaction regarding the jurisdiction at stake. A very clear example of this one Member State perspective can be found in the Ryborg case, where the ECJ stated the following formula: 23

It must first be observed that, according to Article 10§1) and (3), Directive 83/182 is to be applied by the Member State to individual cases within the framework of the provisions of their national law which implement the Directive or which may be adopted subsequently in the area covered by the Directive.

In this case, a Danish national purchased a car in Germany, where he paid VAT on the transaction, and used it in Denmark without filling any VAT requirement. The car was later confiscated by the Danish authorities, on the ground that Danish VAT was due on the transaction. Therefore, VAT was claimed by both Germany, where the taxpayer had already paid VAT, and Denmark, which created a situation of double taxation. The ECJ clearly stated in this case that the VAT Directive should be applied in a domestic perspective, within the framework of the provisions of national law. Although the background of the case if not current Directive but the old VAT Directive, 24 the ECJ clearly encourages Member States here to interpret facts

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23 Case C-297/89 Rigsadvokaten v/ Nicolai Christian Ryborg [1991] ECJ.
according to their domestic law, regardless of the existence of any other interpretation performed by other tax authorities.\textsuperscript{25}

This interpretation is very surprising regarding the harmonized character of VAT provisions. As the Directive is applicable in the whole Union territory,\textsuperscript{26} the appreciation of the assessment of facts should be performed within the frame of guidelines rendered by the Union, helping Member States to appreciate facts in a similar manner. However, the position upheld by the Union consists in a comparison between the national assessment of the case and the assessment prescribed by the Directive, without taking into consideration the existence of multiple taxing claims on the transaction. The position of the Court is very consistent in this respect, as for instance in the \textit{Ryborg} case where the ECJ summarized its position and stated the following formula:\textsuperscript{27}

\begin{quote}
\{The Directive\} does not require the Member State to cooperate in each individual case in which the application of that Directive raises difficulties.
\end{quote}

This statement is the clear approval, or at least the absence of disapproval, of double VAT within the Union. As the logical consequence of the absence of any obligation to interpret the facts of a case in a similar manner between tax authorities, the ECJ clearly wipes the slate clean of any claim of a taxpayer relying on an obligation of cooperation between two Member States.

\textsuperscript{25} Isle de Troyer, 'International Cooperation to Avoid Double Taxation in the Field of VAT: Does the Court of Justice Produce a Revolution?' (2016) EC Tax Review 3.
\textsuperscript{26} Please read articles 5 to 8 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax for the territorial scope of VAT.
\textsuperscript{27} Case C-297/89 \textit{Rigsadvokaten v Nicolai Christian Ryborg} [1991] ECJ, paragraph 35.
2.3.3. The neutrality requirements in VAT

There is no explicit obligation to relieve double VAT within the Union: in this way, the failure to act of the Union cannot be condemned. Yet, it is interesting to study the need or the obligation of cooperation between Member States under the light of the principle of neutrality. The respect of the principle of neutrality is very decisive in the Union, as it is necessary for the well-functioning of the internal market; a breach of neutrality by granting benefits to a category of taxpayers would be a breach of the well-functioning of the internal market. Neutrality is very wide and encompasses different acceptations: the interesting aspect linked to cooperation is external neutrality, which was defined in the first Directive, and explained more in details as follows:

External neutrality means a neutral functioning of the tax frontiers: the tax on importation is not to exceed the internal tax on domestic goods and the refund on exportation has to be the amount that has actual been levied.

This practical definition means that national production and foreign production which are consumed in the same State should be taxed in the same manner. Therefore, a cross-border inbound transaction should not bear a heavier burden than a domestic transaction. Neutrality is present in the VAT Directive, as the common VAT system should result in neutrality of competition, meaning that all transactions should be taxed in a similar

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28 The failure to act procedure is indeed not applicable. Article 265 TFEU: ‘Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act’.


manner, regardless of their domestic or cross-border characteristics. The OECD Guidelines on VAT and GST also deal with this principle, as follows:

With respect to the level of taxation, foreign businesses should not be disadvantaged or advantaged compared to domestic businesses in the jurisdiction where the tax may be due or paid.

It is clear from this definition that external neutrality shares links with the principle of non-discrimination; indeed, this latter implies that nationals and non-nationals should be treated in a similar manner. In case of double VAT, the domestic transaction will be taxed once, while the cross-border transaction will be taxed in two Member States, thus suffering from higher taxation than the purely domestic transaction. The lack of cooperation as a corrective tool shows the breach of neutrality.

The position upheld by the ECJ as described above is very interesting as it is contradiction with the principles of external neutrality and non-discrimination. Indeed, the ECJ advocates in favor of a domestic interpretation of the facts, without taking into consideration the existence of other claims on the same transaction. This contradiction implies a breach of the well functioning of the internal market.

One could wonder about the binding force of the neutrality principle. The main source on VAT is the Directive: any information on the binding force of the principle of neutrality in the field of VAT should be found in this

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31 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, introduction (7): ‘The common system of VAT should, even if rates and exemptions are not fully harmonized, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain’.


33 As the Union does not respect the principle of neutrality in its treatment of double VAT, this implies a breach of the well functioning of the internal market. Please note that through its case law, the ECJ has set up a system in which a breach of the internal market can be explained by a justification which, if proportional, will legitimate the action of the Union or the Member States. In the area of cooperation, there seems to be no justification to legitimate the breach of neutrality by the Union.
text. There is no reference to its binding force; however, it is mentioned several times, turning it into an objective that the harmonized system of VAT needs to achieve. When taken into consideration in parallel with the requirements of the internal market, neutrality takes on its real significance as it is necessary to enforce this principle in order to make sure that domestic and cross-border transactions are taxed in a similar manner. Therefore, neutrality should be seen as a principle that the action of the Union is subject to.

2.3.4. The conciliation between conferral of competences and neutrality

Due to the absence of action taken at the level of the Union in order to tackle double VAT situations, the Member States may want to protect the taxpayers by enforcing their own cooperating tools through a discussion with other Member States. Such an action is supposed to be not allowed by the Union, as Article 5 TFEU clearly states that Member States should not rule in areas where the competences are conferred to the Union. At the same time, according to the Treaty and the Directive, the existence of the internal market and the very linked neutrality principle do not allow the existence of this risk of double taxation.

Please note that the sources which deal with the conciliation of these two principles are rare: therefore, a typical hierarchical analysis should be performed here, in order to compare the application of the principle of neutrality by Member States to the guarded competences of the Union.

Two arguments weight in favor of the possibility of an action by Member States. Firstly, as said before, the internal market and its functioning can be used as a ground for Member States to relieve double taxation: the existence of double VAT is a threat to neutrality and therefore to the functioning of the internal market, so this risk should be mitigated by any mean. Secondly, the principle of subsidiarity can play a role. This principle is dealt along with the principle of conferral, in the same Article. In this way, subsidiarity should only be applied when the Union does not have the
exclusive competence in the given area. In VAT, the competence is fully
given to the Union through Article 113 TFEU: there is no share of
competences with Member States. However, the issue of cooperation in case
of double VAT does not stem directly from the Directive, which is clearly
under the competence of the Union, but rather from the interpretation of the
facts, that the ECJ said itself in the Ryborg case that it is left under the
discretion of the Member States. Therefore, through an extensive acceptance,
subsidiarity can be applied when interpreting the facts of a double VAT case.
Thus, according to subsidiarity, when an action can be performed at two
different levels, the most inferior level is given preference to: in this way, as
the Union is taking no action against double VAT, subsidiarity could easily
justify the action of Member States.

2.4. The non-applicability of mutual trust between tax authorities

2.4.1. Preliminary remarks

Through the study of conferral of competences in the Union, it appears that
Member States should play an active role in the fight against double taxation.
Therefore, the aim of this section is to analyze the relevance of existing
general EU law in this respect. The EU principle of mutual trust between
Member States has been raised by a taxpayer asking for the relief of double
taxation on a transaction: although general, this principle was claimed in
order to oblige Member States to take into account each other’s interpretation
of facts and cooperate to relieve double taxation. The application of this
principle was rejected by the Court (2.4.2), through a differentiation between
procedural and substantial trust (2.4.3). The study of this principle highlights
the inadequacy between the very general EU principles, and their effective
application.
2.4.2. The non application of mutual trust to double taxation cases

The principle of mutual trust between Member States arose in the ECJ case law in the late 1980s, when this latter laid down a principle of recognition of procedural acts between the authorities of different Member States.\footnote{Case C-25/88 Wurmser [1989] ECJ.} This principle arose in criminal proceedings against a company which was charged with ‘offence of deceit for having offered for sale or caused to be offered for sale textile products bearing false information as to their composition’. As the French prosecutor was seeking more technical and chemical analysis, which had already been performed by another jurisdiction in the Union, the ECJ stated:\footnote{Case C-25/88 Wurmser [1989] ECJ, paragraph 18.}

The authorities of the State of importation are however not entitled unnecessarily to require technical or chemical analyses when the same analyses or tests have already been carried out in another Member State and their results are available to these authorities.

This statement means that the authorities should trust each other on a procedural perspective. This principle, which arose in non-tax cases, was raised in the double taxation \textit{WebMindLicenses} case:\footnote{Case C-419/14 WebMindLicenses Kft. v/ Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatósáig [2015] ECJ.} resulting from a fraud, the taxpayer is required to pay VAT on a single transaction both in Portugal (the first Member State that levied VAT on the transaction) and in Hungary (the State which, after noticing the fraud, considers the transaction to be taking place within its jurisdiction). Thus, the taxpayer raised the applicability of mutual trust between Member States, asking for a dialogue between tax authorities in order to uphold the same place of supply. In this case, the Advocate General stated:\footnote{Case C-419/14 WebMindLicenses Kft. v/ Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatósáig [2015] ECJ, Opinion of Advocate General Wathelet delivered on 16 September 2015, paragraph 91.}
As the Commission observes, however, double taxation could be avoided only if EU law imposed on the tax authorities of the Member States an obligation on each of them to recognize the others’ decisions. Neither the VAT Directive nor Regulation No 904/2010 creates such an obligation.

The ‘obligation on each of them to recognize the others’ decisions’ is a synonym of the principle of mutual trust between Member States: indeed, the purpose of this principle is to recognize the decisions taken by other Member States in order to ensure a coherent treatment and application of law within the Union. In this judgment, the Advocate General, followed by the ECJ, got rid of mutual trust between authorities in tax cases. A very narrow acceptation of the principle of mutual trust is upheld in this case: accordingly, the principle is present neither in the VAT Directive nor in the Regulation, therefore it should not be applied. This reasoning is surprising: whilst it is certain that this principle is not explicitly mentioned in the different sources of VAT provisions, its absence from these texts should not lead to its non applicability. Mutual trust between Member States takes on the form of a EU general principle: these principles, although non written, were set up by the ECJ and are binding. They are applicable in all fields, and should thus be applied in this case. In this way, the solution upheld by the Advocate General and followed by the ECJ is very surprising.

2.4.3. The necessary distinction between procedural and substantial cooperation

By welcoming the reasoning of the Advocate General in the WebMindLicenses case, the ECJ validated the rejection of mutual trust

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between Member States in VAT. Behind this reasoning which is unfavorable to the taxpayer, there might lie a deeper logic.

The issue lies in the absence of clear scope of this principle. According to a practical definition of mutual trust, a Member State should rely on the procedural acts taken by another Member State during proceedings. The Wurmser case was not tax related: therefore, it is necessary to exercise an analogical analysis between this case and double VAT cases. When different Member States claim taxing rights on the same transaction, cooperation would require the Member States to discuss in order to classify the transaction in a similar manner, so that the adequate territoriality rules can be applied to the transaction which will then be taxed only once. Cooperation here does not deal with procedural aspects, but with the substance itself: in double taxation situations, it consists in sharing information on how each tax authority interprets the facts. In this way, an application of the Wurmser case to a situation where a divergent interpretation of the facts has led one transaction to multiple taxation would imply the following treatment: firstly, a first Member State decides to levy taxes on a transaction; later on, a second Member State wants to raise taxes on the same transaction. As required by a thorough application of the principle of mutual trust, the second Member State should rely on the position taken by the first Member State and accept its claims. This analogy highlights the difficulties to apply the principle of mutual trust to substantial frictions: the second Member State would be bound by the decision rendered by the first Member State, and would have no possibility to raise VAT within its own territory despite the existence of rules in its favor.

In this way, a difference needs to be made between the procedural and the substantial aspects of mutual trust between Member States. In the field of cooperation, the existence of multiple claims towards a single transaction requires a substantial cooperation, which cannot be covered by mutual trust between Member States.
2.5 Conclusion

The need for cooperation in EU law is certain: the requirements of the internal market advocate for the existence of instruments relieving double VAT. While the source of double taxation lies in the deficiency of the territoriality rules laid down in the Directive and the flexible interpretation of the facts of a case left under the discretion of Member States, the division of competences in force in the Union calls for an action at the level of the Union. Yet, it was proven that the Union lacks effective means to adjust such situations: this competence is de facto left under the competence of the Member States, which need to enforce cooperation between each other on their good will. An initiative from the Member States is therefore needed.

3. Chapter 3: The absence of mandatory cooperation within the Union

3.1 Introduction

Double VAT is an issue that Member States are aware of. In this way, Member States gathered through the EU VAT Forum, a platform where business and VAT authorities meet to discuss how the implementation of the VAT legislation can be improved in practice. Several Member States have agreed on the possibility of a ‘dialogue between the Member States concerned in case of double taxation of a single transaction’. This cross-border dialogue is very interesting at it can open a door in the future for the mitigation or relief of double taxation. Yet, please note that this initiative does not bring any update on cooperation between Member States at this stage, as this initiative has no binding effect so far. Also, the details provided by the Mandate Report clearly stipulate that this dialogue would have no

40 EU VAT Forum, First mandate report (2012-2015), paragraph 3.1.2.
performance obligation, as the reach of an agreement will be left to the discretion and good will of Member States.⁴¹

Such an initiative was seen as necessary by different Member States, facing the inefficiency of existing tools. Indeed, the means set up by the Union to enforce cooperation between Member States are not efficient: whilst the text of Regulation n°904/2010 on cooperation in the field of VAT might indicate that the relief of double taxation is out of scope (3.2), the ECJ case law seems to confirm this idea (3.3).

3.2. The mismatch between Regulation n°904/2010 on cooperation and the relief of double taxation

3.2.1. Preliminary remarks

In 2010 was set up a new Regulation dealing with cooperation in VAT, as the result of the amendments of a Regulation from 2003 on the same issue. The title of the Regulation n°904/2010 is ‘administrative cooperation and combating fraud in the field of VAT’: this title is not very clear, as it can be read as administrative cooperation when combatting fraud, or as tackling two issues separately which are administrative cooperation and the combat against fraud. A study of the Preamble of the Regulation highlights the main concern of the text, which is the fight against tax avoidance: double VAT is therefore implicitly excluded from the scope of the Regulation. This exclusion is surprising, as the ground used to justify the need to relieve double taxation is identical to the one used to explain the action of the Regulation on the fight against tax avoidance (3.2.2). In this way, the Regulation mainly focuses on the exchange of information in case of tax avoidance: it is interesting to study to what extent this procedure might be used to relieve double taxation (3.2.3).

⁴¹ EU VAT Forum, First mandate report (2012-2015), paragraph 3.1.2: ‘However, there is no guarantee (and no obligation) that the Member States concerned come to an agreement on the VAT treatment of the transactions at stake’. 
3.2.2. The implicit and surprising exclusion of double taxation cases from the scope of the Regulation

The Preamble of the Regulation highlights the purpose of the text. Paragraphs 7 and 10 are noteworthy, as they cast light on the need to assess VAT correctly. The obligation laid down in the Regulation is not only for Member States to assess cross-border VAT correctly within their jurisdiction, but also to ensure that VAT is assessed correctly in the Union, i.e. in other jurisdictions. In this way, Member States have two obligations: firstly, stemming from the VAT Directive, they must ensure the correct application of rules within their jurisdiction; secondly, deriving from the Regulation on cooperation, they must ensure the correct application of VAT rules in the other Member States involved in the transaction. The purpose of such obligations is to enforce harmonization of VAT provisions within the Union: through this cooperation, Member States should not care only about their jurisdiction, but also help ensure the proper assessment of VAT cases in other Member States. This method is the key to the uniform interpretation and application of VAT rules within the Union. From these two paragraphs could be drawn an obligation to relieve double taxation: the obligation for Member States to ensure the correct application of VAT all over the Union could be ground for an obligation for Member States to assess the facts in a similar manner, qualifying transactions identically between Member States.

Nevertheless, these paragraphs should be read all together with the rest of the Preamble, which is very clear on the purpose of the Regulation. Paragraphs 2, 3 and 4 set the scene for the Regulation by stating its principal aim: they all deal with the fight against tax avoidance.

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42 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT (recast), Preamble (7): ‘For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State. Preamble (10): ‘In cross-border situations, it is important to specify the obligations of each Member State so that the tax can be effectively monitored in the Member State in which it is owed’.

43 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT (recast), Preamble (3): ‘Tax evasion and tax
relevant, as it qualifies the Regulation as an ‘instrument to combat fraud’. Therefore, it is clear that the Regulation focuses on the fight against double non-taxation and tax avoidance: it is not easy to draw from the wording of the Regulation any obligation for Member States to cooperate in case of double taxation.

After stating the purpose of the Regulation, which is to fight tax avoidance, the Regulation gives precisions on the principles which justify this action from the Union. In this regard, paragraph 3 is very relevant:44

[Tax evasion and tax avoidance] are also liable to bring about distortions of capital of movements and of the conditions of competition. They thus affect the operation of the internal market.

This statement shows that the principles used to justify the need of a fight against tax avoidance are the same principles as the ones that can be used to justify the fight against double taxation. Indeed, these same justifications are mentioned above as justifications to the necessary cooperation between Member States in case of double taxation.45 These justifications consist in the risk of distortions of competition and the functioning of the internal market. The use of the same justification for combatting double taxation and double non-taxation is very surprising, but most of all highlights the lack of total inadequacy of the Regulation in the need to relieve double taxation. In this way, it is interesting to see if the Regulation, despite the implicit exclusion from the scope of application, could be used in double taxation cases.

avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation. They are also liable to bring about distortions of capital movements and of the conditions of competition. They thus affect the operation of the internal market’. See also Preamble (4): ‘Combating VAT evasion calls for close cooperation between the competent authorities in each Member State responsible for the application of the provisions in that field’.

44 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT (recast), Preamble (3).
45 Please read paragraph 2.3.3 for more information on the links between the internal market and the need of cooperation.
3.2.3. **The hypothetical application of the Regulation in double taxation cases**

The preliminary remarks of the Regulation provide guidelines on the scope of application; however, no provision explicitly prohibits a wider scope of application which would encompass the fight against double taxation. Therefore, it is interesting to see whether the Regulation could actually be used in order to relieve double taxation.

The core of the Regulation mainly deals with exchange of information. There is no provision in the Regulation that shall be read as an invitation for Member States to use this tool to fight double taxation. Yet, in case of double taxation, Member States can, on their good will, start the procedure of exchange of information by getting in touch with other tax authorities in order to get a whole picture of the transaction and allocate the taxing rights to the adequate Member State. Please note that this approach is very hypothetical, as it is left under the discretion and good will of Member States: they have no obligation to cooperate and reach a satisfactory solution where a transaction is taxed in only one State. Also, may a taxpayer rely on the very vague scope of application of this Regulation in order to consider double taxation included within the scope of application: the Regulation contains provisions on the burden imposed to tax authorities. Accordingly, the Member States can refuse the request of other tax authorities if the collection of such information is too burdensome for the administration.\(^\text{46}\)

This open door can be found at paragraph 6 of the Preamble:\(^\text{47}\)

\(^{46}\) Isle de Troyer, 'International Cooperation to Avoid Double Taxation in the Field of VAT: Does the Court of Justice Produce a Revolution?' (2016) EC Tax Review 3, 173: ‘However, Articles 7(4) and 54(1) of this Regulation explicitly state that the requested authority may refuse to provide a requesting authority in another Member State with the information requested – and refuse an administrative enquiry – if the number and the nature of the requests for information made by the requesting authority within a specific period impose a disproportionate administrative burden on that requested authority’.

\(^{47}\) Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of VAT (recast), Preamble (6).
Administrative cooperation should not lead to an undue shift of administrative burdens between Member States.

Please note that the wording of this provision remains vague: the Member States can have their own conception of a burdensome request, and therefore refuse to exchange information.

3.3. The imperfect clarification of the scope of application of Regulation n°904/2010 by the European Court of Justice

3.3.1. Preliminary remarks

The ECJ recently had the opportunity to give precisions on the scope of application of Regulation n°904/2010. In the WebMindLicenses case, a company registered in Hungary acquired a know-how free of charge from a Portuguese company. On the same day, the know-how was made available to another company established in Portugal through a licensing agreement. As the economic activity is said to be performed on the Portuguese territory, Portugal levied VAT on the transaction. Yet, according to the Hungarian tax authorities, the transfer of the know-how through a licensing agreement from Hungary to Portugal does not correspond to a genuine economic transaction, as the know-how is exploited in fact by the Hungarian company. Accordingly, as the activity takes place on the Hungarian territory, the Hungarian tax authorities claim taxing rights on the transaction. This case is very interesting as it might set the scene for the redefinition of the scope of application of Regulation n°904/2010 (3.3.2), although the implications of this hypothetical redefinition remain unclear (3.3.3).

48 Case C-419/14 WebMindLicenses Kft. v/ Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság [2015] ECJ.
3.3.2. The possible redefinition of the scope of application of the Regulation

In the WebMindLicenses case, the Hungarian Court asks for a preliminary ruling, in which it asks for clarifications regarding the width of Regulation n°904/2010. Question 16 asked to the ECJ is relevant, as the Hungarian Court wants to know if Member States should cooperate on the ground of the Regulation. The purpose of this question reaches further than what is stated in the Preamble of the VAT Regulation, as it regards its binding force: are Member States obliged to make such a request to the tax authority of the other Member State?

The legal question asked by the Hungarian Court is very interesting, as it regards the obligation of cooperation between Member States in case of double taxation. The national Court considers the application of this Regulation in case of double taxation, and wants more information on the mandatory character of the exchange of information. Indeed, a double taxation situation has arisen from the existence of taxing claims by both Portugal and Hungary. Therefore, as Portugal has already levied VAT on the transaction, the Hungarian tax authorities want to know is there is an obligation for them to request information from the Portuguese authorities. The answer from the ECJ is the following one:

Regulation No 904/2010, which, as provided in Article 1, lays down the conditions under which the competent national

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49 Case C-419/14 WebMindLicenses Kft. v/ Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság [2015] ECJ, paragraph 28(16): ‘Also having regard to question 6, must [Regulation No 905/2010], in the light, in particular, of recital 7 in its preamble, according to which, for the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed and, in order to do so, they must not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State, be interpreted as meaning that, in a situation where the facts are as in the present case, the tax authority of the Member State which discovers the tax debt must make a request to the tax authority of the Member State in which the taxable person was subject to a tax inspection and complied with its obligation to pay tax?’

50 Case C-419/14 WebMindLicenses Kft. v/ Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság [2015] ECJ, paragraphs 56 to 59.
authorities are to cooperate with each other and with the
European Commission and lays down rules and procedures to
that end, does not specify the circumstances in which the tax
authorities of a Member State might be required to send a
request for administrative cooperation to the tax authorities of
another Member State. However, having regard to the duty, set
out in recital 7 in the preamble to that Regulation, to cooperate
to help ensure that VAT is correctly assessed, such a request
may prove expedient, or even necessary. That may be so, in
particular, where the tax authorities of a Member State know
or should reasonably know that the tax authorities of another
Member State have information which is useful, or even
essential, for determining whether VAT is chargeable in the
first Member State.

After reminding the national Court the general aim of the Regulation,
the assessment of the ECJ relies on the notions of useful and essential
information: Member States have a duty to cooperate when the information
owned by one of them is useful or essential to the other one. Subject to
conditions, the ECJ seems to grant a mandatory character to the Regulation.
As highlighted by Isle de Troyer, this statement is very surprising regarding
the established case law from the ECJ. In both the Ryborg and Twoh
International cases,\textsuperscript{51} the ECJ clearly stated that the Regulation on
administrative cooperation was not mandatory: \textsuperscript{52}

Whilst those authorities have the possibility of requesting
information from the competent authority of another Member
State, such a request does not in any way constitute an
obligation.

\textsuperscript{51} Cases C-297/89 Ryborg [1991] ECJ and C-184/05 Twoh International [2007] ECJ.
\textsuperscript{52} Case C-184/05 Twoh International [2007] ECJ, paragraph 32. See also: Case C-297/89
Ryborg [1991] ECJ, paragraph 35: ‘It must therefore be stated in reply to the second question
that Article 10(2) of Directive 93/182 does not require the Member States to cooperate in
each individual case in which the application of that Directive raises difficulties’. 
The establishment of a mandatory character for the Regulation is unanticipated, as it departs greatly from the wording of the Regulation. However, this should be balanced by the scope of application of this mandatory cooperation between tax authorities: indeed, according to the ECJ, the exchange of information is mandatory on the ground of the Regulation only when the information possessed by the other Member State are useful or essential. Questions on the understanding of useful or essential information arise. No further detail is given on how to appreciate the usefulness or essentiality of information. As no detail is provided, only a hypothesis can be presented here. This formula can be interpreted as drawing a line between tax avoidance and absence of tax avoidance. *On the first hand*, in case of tax avoidance, there is no reason to relieve double taxation: the taxpayers have played with the rules, have lost, and shall pay the price for their misconduct. In this way, there is no reason to help them relieve double taxation through a dialogue between Member States. *On the other hand*, when the taxpayer has had a fair behaviour, which has unfortunately resulted in for instance the rise of double taxing claims on the same transaction, the information owned by a Member State can be capital to ensure a fair taxation in other Member States, resulting in the overall fair taxation of the transaction within the Union. In this way, the exchange of information between tax authorities can be essential for the well-functioning of the internal market, making sure that honest taxpayers do not suffer from divergent interpretations and mismatches between jurisdictions. Under this interpretation of the wording of the *WebMindLicenses* case, the ECJ might be enforcing a mandatory cooperation between tax administrations in case of double taxation, possibility when the situation stems from a fair behaviour of taxpayers.

However, this analysis may be not the one upheld by the Court. Also, this formula was rendered in the *WebMindLicenses* case, taking form of a preliminary ruling in front of the ECJ: therefore, there has been no concrete application of this statement to the case. Please note that this statement has not been reiterated by the ECJ yet.
3.3.3. The unclear consequences of this redefinition

Following the hypothesis provided above on the possible interpretation of useful and essential information, the consequences of such an interpretation need to be considered. Indeed, if the ECJ to grant the Regulation a mandatory character in presence of double taxation cases, the consequences of the exchange of information procedure remain unclear. Indeed, when two Member States sovereignly raise taxes on the same transaction, the existence of useful or essential information may make the exchange of information compulsory between the two tax authorities: in this case, once the tax agencies have exchanged the necessary information, is there any obligation for the Member States involved to adjust their taxing claims in order to relieve double taxation?

The purpose of the exchange of information is to enable both Member States to have a global picture of a transaction, in order to apply the VAT Directive as thoroughly as possible, in respect with the needs of the internal market. Therefore, the mandatory exchange of information should lead the tax authorities to assess the case in a similar manner, leading to the single taxation of the transaction. Yet, the wording of the ECJ judgment does not give any detail on the understanding of the statement. It is therefore uncertain if Member States have an obligation of means, meaning that they are obliged only to start the exchange of information procedure, or a performance obligation, meaning that they have to reach an agreement. There is no precision on any obligation to reach an agreement on the place of taxation: the obligation seems to be an obligation of means, meaning that when it is judged useful or essential, the Member States have to start the procedure of exchange of information with each other. Nevertheless, no outcome seems to be expected from the ECJ: as long as the tax authorities cooperate by exchanging information, the obligation is fulfilled, regardless of the actual outcome of the case.
3.4. Conclusion

This interpretation seems very unfortunate, as it does not help enforce cooperation between Member States: indeed, even if the new scope of application of the Regulation sets up a mandatory cooperation between Member States in case of double taxation, there is no information on the obligation for them to reach an agreement on the place of taxation of the transaction. In this way, there is no guarantee that the tax authorities will make any effort to reach such an agreement: the wording of the ECJ, although surprising at first sight, does not bring novelty and progress to cooperation between Member States in case of double taxation.

4. Chapter 4: General conclusion on the need for a further-reaching cooperating instrument

4.1. Preliminary remarks

The interpretation provided by the ECJ remains vague. Yet, a hypothetical interpretation of the meaning of this judgment may draw a line between fraud and absence of fraud. In this way, exchange of information under Regulation n°904/2010 may be mandatory when without any tax avoidance intention, a transaction is taxed multiple times. This differentiation between fraud and absence of fraud might be relevant, as it reestablishes a fair situation for honest taxpayers, while malicious ones will not recover double taxation (4.2). It was shown that the exchange of information procedure may not be performant, as it relies on the good will of Member States to agree on a similar position: there is no performance obligation to reach an agreement. Therefore, as a conclusion, the author would like to introduce a possible distinction of treatment in cooperation to relieve double taxation, between fraud and absence of fraud (4.3).
The direct cause of the existence of multiple taxing claims on a single transaction may derive from a misinterpretation of the facts, qualified distinctively by different tax authorities, leading to the appreciation of different provisions to the same transaction. Yet, the reason behind this divergent appreciation of the facts of a case lies in two types of behaviors from taxpayers: there are two ways to reach a point where a transaction is taxed in several jurisdictions. On the one hand, the existence of multiple claims can simply derive from the application of different provisions by different tax authorities: in this way, the responsible for the existence of double taxation are the Member States which, as not coordinated, apply the allocation rules in a distinctive manner. On the other hand, the situation above can stem from a malicious behavior from taxpayers, who use frictions between jurisdictions in the interpretation of the facts and the application of the Directive to not pay taxes on the transaction. Indeed, as cooperation is not compulsory within the Union, the assessment of a piece of information in a Member State does not automatically imply a symmetrical adjustment in the other Member State in which the transaction takes place. Taxpayers may play on these rules in order to create double non-taxation, meaning that the transaction will be taxed neither in the State of origin nor destination. A readjustment will easily create a double taxation situation.

54 For instance: Case C-419/14 WebMindLicenses Kft. v Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság [2015] ECJ: The Hungarian tax authorities claimed VAT on a supply of services whose VAT was already paid to the Portuguese tax authorities.
4.3. The possible and necessary difference of treatment in cooperation between fraud and absence of fraud

The Regulation does not differentiate between fraud and absence of fraud. However, through the new condition laid down and relying on useful or essential information, the ECJ is very likely to create such a distinction. The main issue encountered here is the absence of source gathering all VAT cases rendered by the ECJ. Yet, through a thorough analysis of cases studied by doctrine, it is possible to highlight a difference in the reasoning used by the ECJ when solving double taxation cases. Please note that these cases were rendered before the important WebMindLicenses case.

In presence of fraud, the reasoning used by the ECJ is limpid: the ECJ has explicitly validated double taxation in order to tackle tax avoidance. For instance, the R. case is significant. In this case, the taxpayer – registered in Germany – hid the identity of purchasers of cars – located in Portugal – in order to let them avoid paying taxes. The ECJ stated the following formula:

The refusal of exemption in the case of non-compliance with an obligation provided by national law (...) has a deterrent effect which is intended to ensure compliance with that obligation and to prevent any tax evasion or avoidance.

This formula shows the clear approval of the ECJ of double taxation in case of fraud. According to Han Kogels, this position is justified: ‘the battle against fraud is a justified battle’. In this way, as the taxpayer decides to

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55 This distinction is upheld by the doctrine: see Ben Terra and Julie Kajus, ‘Case C-419/14 (WebMindLicenses), IBFD, 2016: ‘if an abusive practice is found (…), the fact that VAT has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located’.
56 Case C-285/09 R. v Generalbundesanwalt beim Bundesgerichtshof [2010] ECJ.
play with the rule, it seems normal that the double taxation flowing from a reassessment of the situation is not relieved.

Yet, in absence of fraud, the method is very different. The ECJ analyses the application of the legislation in the given Member State, regardless of the assessment performed in the other Member State involved. Therefore, the ECJ does not explicitly agrees on double taxation in this case, but simply adopts a one Member State perspective and controls the assessment of the facts regarding the requirements of the VAT Directive only in the Member State at stake.\textsuperscript{59}

It is certain that the outcome of the judgments rendered by the ECJ is very similar in both cases, as the ECJ never explicitly forbids double taxation. Nevertheless, the reasoning behind the cases is very different: while double taxation is explicitly allowed in presence of fraud, the ECJ adopts a curious attitude in absence of fraud by taking on a purely national perspective, regardless of the existence of other taxing claims on the same transaction. In this way, the ECJ does not explicitly allow double taxation. The difference in the reasoning can be a ground to explain the recent \textit{WebMindLicenses} judgment, where the ECJ may want to take a step further by establishing a difference between fraud and absence of fraud, i.e. between honest and malicious taxpayers. In this way, the ECJ would be setting up a difference of treatment between fraud and absence of fraud: \textit{on the one hand}, in presence of fraud, double taxation is explicitly allowed; \textit{on the other hand}, in absence of fraud, whilst the approval of double taxation remains silent, the exchange of information between Member States might be rendered mandatory to help Member States reach a satisfactory outcome through a single taxation of the transaction at stake.

Please note that casuistry plays a great role in the analysis of the judgments, as for instance the discussion about cooperation in certain cases

\textsuperscript{59} Please read paragraph 2.3.2 on the \textit{Ryborg} case on the one Member State perspective.
may be the result of the claims of one of the parties, instead of a deliberate choice of the ECJ.

4.4. Final conclusion

Such an interpretation is justified under the light of the principle of neutrality. When double taxation does not stem from a fraud, the absence of cooperation is a clear and direct threat to the internal market; the taxpayer was carrying out a business and ends up being taxed multiple times on a single transaction simply due to a divergent interpretation by two Member States. In this way, the good faith of the taxpayer should be presumed: this latter should not suffer from the difference of interpretation. In contrast, when double taxation stems from a fraud, there is no breach to the principle of neutrality or to the well-functioning of the internal market: the taxpayer tried to avoid paying taxed, failed, and should bear the consequences by being taxed multiple times on the same transaction. The respect of the principle of neutrality is threatened in absence of cooperation: whilst it can be justified in the situation where the taxpayer tried to avoid taxes, it puts loyal and honest taxpayers into an unfavourable situation. These latter, as they perform cross-border transactions, will carry a tax burden much higher than taxpayers performing purely domestic transactions, creating a situation which is in breach of the internal market, that the common VAT system was created to help enforce.

60 Han Kogels and Mariken van Hilten, 'Never a Dull Moment', (2017) International VAT Monitor 28(2): ‘It seems evident that by this line of interpreting the VAT Directive, the ECJ is nibbling at the external neutrality of VAT: if VAT is a burden in more than one Member State, and/or if VAT is a burden for various participants in a chain of transactions, a cascading effect moves in and – within the EU internal market – the destination principle is lost. Whether one agrees or disagrees that combating VAT fraud outweighs the functioning of the system, the ECJ has spoken and the VAT Directive must be interpreted as such’.
61 OECD ‘International VAT/GST Guidelines’ (November 2015) 13-14: ‘Taxation should seek to be neutral and equitable between forms of electronic commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Tax payers in similar situations carrying out similar transactions should be subject to similar levels of taxation’.
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