MIKAEL EK

The Concept of Transfer of Goods pursuant to a Commission Contract in EU VAT*

The case-law of the Court of Justice of the European Union (CJEU) regarding supply of fuel to intermediary parties has been extensively discussed in the legal doctrine. When the case Vega International Car Transports and Logistics was decided in 2019, the discussion began anew. As the Court did not address whether the supply could constitute a transfer of goods pursuant to a commission contract in accordance with Article 14.2(c) of the VAT Directive,[1] questions have been raised concerning the scope of the article. Since then, two more cases with implications for the interpretation of Article 14.2(c) have been decided by the CJEU. In light of this, this article deals with the question of what it means for goods to have been transferred pursuant to a commission contract.

1 INTRODUCTION

In situations involving supply of goods where an intermediary does not acquire the right to dispose of the goods as owner, applying Article 14.1 or Article 14.2(c) of the VAT Directive will result in different tax treatments of the transactions. In the first case, the intermediary is not the recipient of and does not carry out a supply of goods for VAT purposes. Instead, the intermediary is considered to have supplied an intermediary or financial service. In the second case, the intermediary is deemed to have received and supplied the goods, creating a legal fiction of two taxable supplies of goods. As the transaction carried out by the intermediary is classified differently depending on which article is applicable, the consequences regarding invoicing, place of supply, tax exemptions and the right to deduct will also differ. Thus, it is important to make a distinction between the situations covered by the articles.

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1 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. The articles discussed in this text are always assumed to be those of the VAT Directive, unless otherwise stated.

The purpose of this article is to analyze what it means for goods to have been transferred pursuant to a commission contract[2] in the context of Article 14.2(c) of the VAT Directive. The analysis will be based on an examination of the case-law of the CJEU. On account of recent cases from the CJEU, there has been some discussion in the legal literature regarding the application of the stated article. The discussion concerns why the CJEU has not addressed whether the supply of fuel to an intermediary can qualify as such a transfer and thus constitute a taxable transaction.[3] In these cases, the Court only applied the main rule regarding supply of goods in Article 14.1.

In previous research, the concept of commission contracts has often been discussed in relation to how this concept is manifested in a specific case from the CJEU. Typically, the analysis has concerned the general consequences of the case at hand. The main contribution of this article is to present the general trends of the case-law of the CJEU in order to draw generalizable conclusions regarding the tax treatment of commission contracts involving goods. By applying a broad perspective, some insight may also be provided as to why the Court, in some situations, has omitted the application of Article 14.2(c).

The analysis in this article builds on what has already been written regarding commission contracts in a VAT context. Moreover, it contains an examination of the case-law regarding both Article 14.2(c) and Article 28, the latter which concerns supply of services.[4] This examination also

2 For the purpose of this article, the term *commission contract* will be used instead of *a contract under which commission is payable*. This is discussed further in Chapter 4.

3 *See* Jan Sanders, *Implications of the FBK Case on Chain Transactions*, International VAT Monitor 8 January/February (2016), Sebastian Kirsch & Caroline Orban, *CJEU Confirms that the Provision and Settlement of Fuel Cards May Constitute a Financial Service that Is Exempt from VAT in Vega International Case*, Intertax 898 Vol. 47, Issue 10 (2019), David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255 November/December (2019), Philippe Gamito, *A Look Back at EU VAT Developments in 2019 Regarding Insurance and Financial Services: Part 1*, International VAT Monitor 222 July/August (2020), Ad van Doesum & Frank J.G. Nellen, *Economic Reality in EU VAT*, EC Tax Review 213 n. 5 (2020), and Frank Nellen, Ad van Doesum, Simon Cornielje and Herman van Kesteren, *Fundamentals of EU VAT Law* 136 (2nd ed. 2020).

4 The selection of cases for the article was made based on a systematic review of all cases that either include Arts 14.2 or 28 of the current VAT Directive or Arts 5.4 or 6.4 of the Sixth VAT Directive (Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform

includes cases that were recently decided.[5] As the CJEU in several cases has stated that the same underlying principles apply to both Article 14.2(c) and Article 28, a systematical interpretation of these two articles is fundamental for the fulfillment of the stated purpose.

The structure of the article is as follows: Initially, a short introduction of the main characteristics of commission contracts is presented (Chapter 2) together with an overview of the concept of supply of goods within the common system of VAT (Chapter 3). The introductory part of the article is followed by an analysis of what it means for goods to have been transferred pursuant to a commission contract (Chapter 4). The conclusions drawn are then compared to the reasoning of the CJEU in three cases: *Auto Lease Holland*, *Fast Bunkering Klaipėda*, and *Vega International Car Transports and Logistics* (Chapter 5). The objective is to create an understanding for both Article 14.2(c) in general, and the way the Court reasons in these cases in particular. Finally, the article is concluded with a presentation of the main findings (Chapter 6).

2 COMMISSION CONTRACTS AND INDIRECT REPRESENTATION IN GENERAL

Some initial remarks on the characteristics of commission contracts and indirect representation will be made to establish a starting point for the examination of the VAT rules. The notion of a commission contract can be found in private law, foremost in Civil law contexts. Commission contracts are often denoted by the relation between a principal and an intermediary,[6] where the latter acts in its own name, but on behalf of the principal. In general, this means that the intermediary will appear as the contractual counterpart towards a third party at the same time as the principal receives the benefits and bears the burdens arising from a contract with the third party. Since the principal and the third party are not contractual parties and seldom know the identity of each other, national rules often

basis of assessment) in the reasoning of the CJEU. As a general rule, the cases are presented chronologically within the respective chapters of the article.

5 More specifically Case C-734/19, *ITH Comercial Timişoara*, [2020] EU:C:2020:919 and Case C-501/19, *UCMR –ADA*, [2021] EU:C:2021:50.

6 The intermediary could also be called a commissionaire. As the word 'commissionaire' often has a specific meaning in civil law jurisdictions, the more general 'intermediary' is used in this article. Another reason for this choice is that 'intermediary', compared to 'commissionaire', is more frequently found in the case law of the CJEU.

dictate how and towards whom claims regarding issues such as damages and non-performance should be issued and resolved.[7]

When it comes to supplies of goods pursuant to commission contracts, the intermediary can either purchase the goods on behalf of the principal (purchase commission) or sell the goods owned by the principal to a third party (sales commission). In both situations, the VAT treatment of the supplies is subject to special provisions in the VAT Directive since the principal and the third party do not have a contractual relationship. These provisions ensure that correct invoices can be issued by deeming the intermediary to have carried out a supply.[8] What the concept of supply of goods in a VAT context means will be elaborated further in the following chapter, where the legal context of this taxable transaction will be examined.

3 THE CONCEPT OF SUPPLY OF GOODS WITHIN THE COMMON SYSTEM OF VAT

One of the four types of taxable transactions listed in Article 2 of the VAT Directive is supply of goods for consideration within the territory of a Member State by a taxable person. *Supply of goods* is defined in Article 14.1 as the transfer of the right to dispose of tangible property as owner. In addition, Article 14.2 states three other situations that also are considered to be supply of goods, namely: (a) the transfer, by order made by a public authority, of the ownership of property, (b) the handing over of goods pursuant to a hire-purchase contract, and (c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

Furthermore, the VAT Directive include the rules concerning deemed supplies found in Articles 16 and 17, as well as the rules in Articles 14.3 and 18 that allow Member States to treat certain transactions as supplies of goods.[9] In this article, the following discussion will primarily address criteria established in Articles 14.1 and 14.2(c). Thus, much of the analysis

7 For a comparative analysis of Dutch, German, English, UNIDROIT, and PECL rules regarding indirect representation, *see* Danny Busch, *Indirect Representation in European Contract Law* (2005). *See also* Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 231 ff. (3rd ed. 1998).

8 *See* Frank Nellen, Ad van Doesum, Simon Cornielje and Herman van Kesteren, *Fundamentals of EU VAT Law* 134 (2nd ed. 2020).

9 For the sake of completeness, Art. 15 should also be mentioned. This article stipulates that electricity, gas, heat, and cooling energy *shall* be treated as tangible property. Furthermore, Member States *may* treat certain interests and rights relating to immovable property as tangible property.

in this article concerns what it means to transfer the rights to dispose of tangible property as owner compared to the transfer of goods in pursuant to a commission contract. Therefore, a brief discussion of what it means to dispose of goods as owner is necessary.

The definition and criteria of supply of goods in Article 14.1 has no requirement of physical delivery for a supply to have taken place, even though some language versions of the Directive could give this impression.[10] Furthermore, the CJEU has on numerous occasions stated that the concept of supply of goods does not refer to the transfer of ownership according to national private law since one of the purposes of the VAT Directive is to have uniform definitions of taxable transactions.[11] Instead, it is often said that the classification from a VAT perspective should be based on the economic reality of the transaction in question.[12] According to the CJEU, the economic and commercial reality is a fundamental criterion for applying the common system of VAT.[13] When it comes to categorizing a transaction as a taxable transaction, this reality is normally reflected in the contractual terms stated in the agreement between the buyer and the sell-

10 *See, e.g.*, the German 'Lieferung von Gegenständen', the French 'livraison de biens', the Danish 'levering af varer' and the Swedish 'leverans av varor'. The CJEU also discussed if physical delivery is a requirement for a supply of goods to have taken place the Case C-159/14, *Koela-N*, [2015] EU:C:2015:513, where the Court explicitly stated that this was not the case. The same line of reasoning can also be indirectly seen in cases regarding chain transactions, for example Case C-245/04, *EMAG Handel Eder*, [2006] EU:C:2006:232, Case C-430/09, *Euro Tyre Holding*, [2010] EU:C:2010:786, and Case C-628/16, *Kreuzmayr*, [2018] EU:C:2018:84.

11 *See*, e.g., Case C-320/88, *Shipping and Forwarding Enterprise Safe*, [1990] EU:C:1990:61, Case C-63/04, *Centralan Property*, [2005] EU:C:2005:773, Case C-78/12, *Evita-K*, [2013] EU:C:2013:486, and Case C-277/14, *PPUH Stehcemp*, [2015] EU:C:2015:719.

12 *See*, *e.g.*, Oskar Henkow, *The Commission's Proposal for a Common System of Financial Transaction Tax: A Legal Appraisal*, EC Tax Review 5, 9 n. 1 (2012), Michel Lambion, *The influence of international accounting standards in the field of VAT*, World Journal of VAT/GST Law 158, 159 f. n. 2 (2012), Marie Lamensch, *The principle of 'substance over form' with respect to the exercise of the right to deduct input VAT – A critical analysis of the Barlis jurisprudence*, World Journal of VAT/GST Law 129, 136 n. 2 (2017), and Jasmin Kollmann, *Taxable Supplies and Their Consideration in European VAT* 45 (2019). For an in-depth analysis of the CJEU's use of economic reality, *see* Ad van Doesum & Frank J.G. Nellen, *Economic Reality in EU VAT*, EC Tax Review 213, 213 ff. n. 5 (2020).

13 *See* Case C-260/95, *DFDS*, [1997] EU:C:1997:77, para. 23, Case C-73/06 *Planzer Luxembourg*, [2007] EU:C:2007:397, para. 43, Joined Cases C-53/09, C-55/09 *Loyalty Management UK and Baxi Group*, [2010] EU:C:2010:590, para. 39, and Case C-295/17, *MEO – Serviços de Comunicações e Multimédia*, [2018] EU:C:2018:942, para. 43.

er.[14] Thus, when assessing whether a supply of goods has taken place, one should identify the economic characteristics of the transaction to which the conditions in Article 14.1 are to be applied.

How the transfer of the right to dispose of tangible property as owner is reflected in the contractual terms has been addressed by the CJEU in its case-law. The cases *Auto Lease Holland*, *Fast Bunkering Klaipėda*, and *Vega International Car Transports and Logistics* all concerned the supply of fuel between three parties.[15] In these cases, the Court stated that the intermediary could under no circumstances dispose of the fuel as owner since the fuel company held that right until the consumer had filled up the vehicle. At that point, the consumer had the power to dispose of the fuel as owner.[16] Since the intermediary could never decide the qualities and quantities of the goods supplied or the time of the supply, it could be neither the recipient nor the supplier of the goods when applying Article 14.

Considering this, it is possible to conclude that some form of economic control over the goods needs to be transferred in order for a transaction to qualify as a supply of goods.[17] Exactly how this control is expressed will likely vary depending on the nature of the goods in question. For instance, a right to sell the goods might be important when determining if the right to dispose of stock inventory as owner, whereas the right to earnings might be decisive when it comes to capital goods.[18]

This line of reasoning can be seen in cases that deal with financial leasing transactions. In both *Eon Aset Menidjmunt* and *NLB Leasing*, the CJEU stated that, for the sake of applying Article 168(a), a financial leasing contract that transfers substantially all the rewards and risks incidental to legal ownership to the lessee, and where the total amount of the lease payments

14 *See* Case C-653/11, *Newey*, [2013] EU:C:2013:409, para. 43. Granted, this is not the case when the contractual terms constitute a wholly artificial arrangement, as seen in *Newey* as well as other case-law regarding the prohibition of abuse of law such as Case C-255/02, *Halifax*, [2006] EU:C:2006:121, Case C-425/06 *Part Service*, [2008] EU:C:2008:108, and Case C-251/16, *Cussens*, [2017] EU:C:2017:881.

15 These cases will be discussed more in-depth in Chapter 5.

16 *See* Case C-185/01, *Auto Lease Holland*, [2003] EU:C:2003:73, paras 34–37, Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, paras 48–52 and Case C-235/18 *Vega International Car Transports and Logistics*, [2019] EU:C:2019:412, paras 36–39 respectively.

17 *Cf.* Opinion of AG Van Gerven in Case C-320/88, *Shipping and Forwarding Enterprise Safe*, [1989] EU:C:1989:413, para. 16.

18 *Cf.* the conclusions drawn in Jasmin Kollmann, *Taxable Supplies and Their Consideration in European VAT* 43 (2019).

corresponds to the market value of the goods, results in an acquisition of capital goods.[19] That goods have been acquired consequently means that the goods have been subject to a supply.[20] Hence, risks and rewards connected to legal ownership can be said to be circumstances that reflect the economic reality of the transaction.[21]

On account of the case-law of the CJEU, the categorization of a transaction as a supply of goods under Article 14.1 should be conducted on a case-to-case basis. In particular, it should be considered if the economic reality of the transaction reflects a situation where the buyer has acquired the right to dispose of the goods as owner. The decisive circumstances for this assessment will, to some extent, likely vary from one case to another. As there is no standard evidence to rely on, this means that the assessment of whether a transaction qualifies as a supply of goods can indeed, as Sanders points out, 'turn out to be quite a treacherous one'.[22] However, even if one cannot establish firm conditions for when a supply of goods has taken place, we see from the CJEU's case-law that the criteria in Article 14.1 are substantive rather than formal and that an analysis of the contractual terms is almost always necessary. The same can be said about the criteria in Article 14.2, which will be examined in the next chapter.

4 THE TRANSFER OF GOODS PURSUANT TO A COMMISSION CONTRACT

According to Article 14.2(c), the transfer of goods pursuant to a contract under which commission is payable on purchase or sale shall be regarded as a supply of goods.[23] The definition in the English language version

19 *See* Case C-118/11, *Eon Aset Menidjmunt*, [2012] EU:C:2012:97, para. 40 and Case C-209/14, *NLB Leasing*, [2015] EU:C:2015:440, para. 32.

20 It is argued here that the CJEU is interpreting supply within the context of 14.1 rather than 14.2(b) since the Court is discussing the transfer of the right to dispose of tangible property as owner. This will be discussed further in Chapter 4.

21 *See also* Richard Kettisch, *Intra-Community Chain Supplies* World Journal of VAT and GST Law 88, 93 n. 3 (2014), who views risks and rewards as decisive factors for determining if a supply of goods has taken place.

22 *See* Jan Sanders, *Implications of the FBK Case on Chain Transactions*, International VAT Monitor 8, 8 January/February (2016).

23 Art. 14.2(c) does not specify if the supply also is deemed to have been for consideration. However, the legal fiction created by the article seems to be sufficient for the deemed supply to constitute a taxable transaction. For a further discussion, *see* Frank Nellen, Ad van Doesum, Simon Cornielje and Herman van Kesteren, *Fundamentals of EU VAT Law* 134 f. (2nd ed. 2020).

differs slightly from the one in the German, French, Swedish, and Danish language versions of the VAT Directive. According to these, the transfer of goods pursuant to a commission contract for purchasing or sales shall be regarded as supply of goods. In the versions mentioned, *commission* is used as a qualification of a specific type of contracts rather than something that describes the type of remuneration received according to the contract. Avery Jones suggests that this deviation is just an unfortunate translation deriving from the fact that, as opposed to Civil law, Common law does not make the same distinction regarding disclosed and undisclosed agents.[24] Nevertheless, the practical significance of this difference should not be exaggerated, as will be seen in the analysis of the case-law of the CJEU later in this chapter.

Before discussing what *commission contracts* in Article 14.2(c) means in a VAT context, the systematic relation between Article 14.1 and 14.2 needs to be established. Article 14.2 states that 'in addition to the transactions referred to in paragraph 1, each of the following shall be regarded as a supply of goods'.[25] This indicates that the article serves as an extension of Article 14.1. This is further supported by a comparison to Article 25, a provision concerning the scope of supply of services. According to the latter article, '[a] supply of services may consist, inter alia, in one of the following transactions'. Thus, in the first case, the article extends the scope of a taxable transaction, whereas in the second case, the article provides examples for when a transaction is a taxable one.[26]

The CJEU has also confirmed this systematic relation in its case-law. The Court has in both *Mercedes-Benz Financial Services UK* and in the first[27] and second *Gmina Wrocław* cases stated that it follows from the

24 For a longer discussion regarding the English language version of Art. 14.2(c), *see* John F. Avery Jones, *What Is a "Contract under which Commission is Payable"?*, VAT in an EU and International Perspective, Essays in honour of Han Kogels 63 (Henk van Ardendonk et al. ed., 2011). *See also* Danny Busch, *Indirect Representation in European Contract Law* 127 ff. (2005).

25 The predecessor of Art. 14.2(b) in the Sixth VAT Directive, Art. 5.4, has a similar wording; '[t]he following shall also be considered supplies within the meaning of paragraph 1'. In the Proposal for the Sixth VAT Directive (COM(73) 950 final), p. 6 f., this subject is only briefly mentioned. It is, however, stated that the transfer of goods according to certain contracts should be *treated* as supplies for reasons of impartiality. Note that Art. 5.4 was proposed as 5.2.

26 N.B.: Opinion of AG Kokott in Case C-604/19, *Gmina Wrocław*, [2020] EU:C:2020:647, para. 49, where the Advocate General uses the same argument for the *opposite* conclusion.

27 It is actually the second published VAT case titled *Gmina Wrocław*, but the first (Case C-276/14, [2015] EU:C:2015:431) mainly concerned the interpretation of the term independently in regards to Art. 9. For the sake of simplicity in the context of this article, the

wording and structure of Article 14 that the first paragraph contains a general definition, while the second paragraph stipulates further conditions that are independent of those stated in the first.[28] Hence, the conclusion is that no transfer of the right to dispose of tangible property as owner is necessary for a supply of goods to have taken place according to Article 14.2.[29]

What characterizes a commission contract is not defined in the VAT Directive. However, the CJEU has stated that such a contract is 'in principle, an agreement by which an intermediary undertakes to carry out in his own name one or more legal transactions on behalf of a third party'.[30] This can be compared to Article 28, which stipulates that '[w]here a taxable person acting in its own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.'[31]

The CJEU has in several cases addressed both Article 14.2(c) and Article 28. In *Commission v Luxembourg*, the Court commented on the function of Article 14.2(c) by stating that it creates a legal fiction of two identical supplies of goods made consecutively.[32] The statement was made in relation to Luxembourg's alleged failure to comply with the said article. The Court confirmed the function of Article 14.2(c) in *Valstybinė mokesčių inspekcija*, where the CJEU, by citing the judgment in *Henfling and Others*, also referenced its case-law regarding the interpretation of Article 28.[33] In these cases, the Court stressed that the same underlying principles applies to both Article 14.2(c) and Article 28. This means that, in order to create an understanding for Article 14.2(c), the case-law regarding Article 28

cases concerning Art. 14 are referred to as the first and second. *See also* the unpublished Case C-72/13, [2014] EU:C:2014:197, named *Gmina Wrocław* as well.

28 *See* Case C-665/16, *Gmina Wrocław*, [2018] EU:C:2018:431, para. 36, Case C-164/16, *Mercedes-Benz Financial Services UK*, [2017] EU:C:2017:734, para. 31, and Case C-604/19, *Gmina Wrocław*, [2021] EU:C:2021:132, paras 54–56. respectively.

29 *See also* the Proposal for a second Council Directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added (submitted by the Commission to the Council on 14 April 1965), Explanatory Memorandum, para. II, comments on Art. 3.2(e).

30 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, para. 33.

31 Regarding the requirement that the intermediary needs to take part in the supply, the ECJ has stated that the intermediary has to have an economic role in the supply, *see* Case C-1/08, *Athesia Druck*, [2009] EU:C:2009:108, para. 36.

32 *See* Case C-274/15, *Commission v Luxembourg*, [2017] EU:C:2017:333, para. 89.

33 *See* Case C-312/19, *Valstybinė mokesčių inspekcija*, [2020] EU:C:2020:711, para. 49.

needs to be examined, especially regarding what it means to act in one's own name but on behalf of another.

In the case *Henfling and Others*, the referred question concerned whether the exemption on betting, lottery, and gambling is applicable to situations when an economic operator takes part in collecting bets in his own name, but on behalf of the organizer that manages the bets.[34] In such situations, the CJEU found that one legal relation is brought about between the principal and the intermediary, and another between the intermediary and the consumer. To determine if the legal relation between the principal and the intermediary constitutes a situation covered by Article 28 – which would mean that the exemption in question is applicable – it is according to the Court necessary to examine the contract between the parties. Additionally, circumstances indicating that the intermediary is acting in its own name and not in the name of the principal are relevant for the assessment. Such circumstances could be that the customers' receipt(s) state the name of the principal, that the customers agree to the terms and conditions set by the principal, and that the business run by the intermediary carries the sign of the principal.[35]

The CJEU briefly dealt with what it means to *act in his own name* and *on behalf of another* in *Amărăşti Land Investment*. The case concerned with the situation where a buyer of immovable property had acquired services from other taxable persons to fulfill the obligation to have the property registered in the Land Register, an obligation imposed on the buyer.[36] In the case, it was undisputed that the buyer had acted in his own name since contracts regarding the services in question had been entered into without the involvement of the seller. When it came to the question if the buyer had acted on behalf of the seller, the CJEU stated that if the buyer at his own expense carries out the activities that result in a registration, which

34 *See* Case C-464/10, *Henfling and Others*, [2011] EU:C:2011:489, paras 14–26. The case concerned the Sixth VAT Directive and the Arts 6.4 and 13(B)(f), which correspond to the current Arts 28 and 135.1(i).

35 *See* Case C-464/10, *Henfling and Others*, EU:C:2011:489, paras 34–43. The Court also cited a similar line of reasoning from cases regarding travel agents, namely Case C-163/91, *Van Ginkel*, [1992] EU:C:1992:435, para. 21, and Case C-200/04, *ISt*, [2005] EU:C:2005:608, paras 19–20.

36 *See* Case C-707/18, *Amărăşti Land Investment*, [2019] EU:C:2019:1136, paras 15–21.

is a statutory obligation of the seller, then the activities must be deemed to have been carried out on behalf of the seller.[37]

Furthermore, the CJEU discussed the meaning of acting on behalf of another when interpreting both Article 14.2(c) and Article 28 in Case *ITH Comercial Timişoara*.[38] The relevant question in this context concerned whether a taxable person could be deemed to be a commissionaire, in particular for the purpose of Article 28, without a contract granting mandate to act on behalf of the other. The CJEU initially repeated what had been said in previous case-law concerning the legal fiction created by Article 14.2(c) and Article 28 and held that the same line of reasoning is relevant for both articles in this situation. The Court then went on and stated that two conditions must be met for the articles to apply. First, mandate for the intermediary to act on behalf of the principal must exist. The mandate does not require a specific form, but since Article 14.2(c) uses the term *contract*, some type of agreement between the parties is necessary. Second, the goods or services acquired by the intermediary need to be identical to those supplied by that party and, in the relevant cases, the ownership of the goods needs to be transferred to the final consumer.[39]

Finally, in *UCMR –ADA*, the CJEU found that a collective management organization, by granting licenses to users of protected musical works and collecting remuneration for the use, acted in its own name, but on behalf of the right holders. The Court did not elaborate on why this was the case, but merely stated that it followed from all circumstances of the case put together. These circumstances included that collective management is mandatory to exercise the right to publicly perform musical work. Thus, the right holders could not be seen as having given the organization a mandate. In addition, the exclusive economic rights of the right holders could not be transferred to the organization. Furthermore, the organization was obliged to grant licenses to users that apply for it and draw up methodologies for payment. Lastly, the payment included the amount collected on behalf of the right holders.[40] These circumstances pertain both to the relation between the agent and the consumer (in its own name) and between the principal and the agent (on behalf of another), even though

37 *See* Case C-707/18, *Amărăşti Land Investment*, [2019] EU:C:2019:1136, paras 39–41.

38 This case has not yet been published in English.

39 *See* Case C-734/19, *ITH Comercial Timişoara*, [2020] EU:C:2020:919, paras 47–55.

40 *See* Case C-501/19, *UCMR –ADA*, [2021] EU:C:2021:50, paras 41–46.

the Court did not split the assessment into two parts as it did in *Amărăşti Land Investment*.

By reviewing the cases discussed in this chapter, it is possible to say something about the overall picture created by the collective case-law. For Article 14.2(c) to be applicable, three parties need to be involved. The legal relations between, on the one hand, the principal and the intermediary, and on the other hand, the intermediary and the third party need to be of a certain nature. None of these legal relations require a certain form, but the economic and commercial reality of the relations should mirror that the intermediary acts on behalf of the principal and in its own name, respectively.[41] In the assessment of these legal relations, the CJEU has not always elaborated why certain circumstances constitute a commission contract pursuant to Article 14.2(c). Rather, the Court has merely concluded that a specific legal relation is deemed to constitute a commission contract in the context of VAT. To be able to draw generalizable conclusions, it is therefore necessary to analyze the trends expressed by the circumstances of the cases.

As for the relation between the principal and intermediary, an initial question concerns what it means that goods have been *transferred* pursuant to a commission contract. The transfer is, regarding sales commission, the event that is deemed to be the first supply of goods, whereas the second supply occurs once the customer receives the right to dispose of the goods as owner from the principal. When it comes to purchase commission, the opposite is true. The transfer from the seller to the intermediary is the first (deemed) supply and the following transfer of the right to dispose as owner to the principal is the second supply.[42]

The CJEU has not addressed which circumstances are relevant for goods to have been transferred according to purpose of Article 14.2(c). At the very least, it should be a different transfer than the transfer of the right to dispose of tangible property as owner.[43] In addition, the transfer should not need to be the physical handing over of the goods to the intermediary since it is not certain that the intermediary actually is in physical posses-

41 *Cf.* chapter 3 regarding the economic and commercial reality.

42 *Cf.* David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255, 256 November/December (2019).

43 As discussed in Chapter 4.

sion of the goods at any point.[44] Since the term 'transfer' is used rather than 'the actual handing over of goods' found in Article 14.2(b), it is possible to conclude that the legislator intended for different situations to be covered by the respective paragraphs of the article.

However, this line of reasoning does not answer what is meant by transfer in this context. It seems clear that the situation when the intermediary acquires the physical possession of goods without the right to dispose of them as owner pursuant to a commission contract is covered by Article 14.2(c), but to what other situations does the term transfer refer? If no physical possession is necessary, does it include the transfer of some rights to dispose of the goods without having full rights to dispose as owner? And if so, what kind of rights? Alternatively, is it possible that the legislator had a specific, and hence narrow, situation in mind when drafting the article, i.e., an agreement where the intermediary acquires goods on behalf of the principal without becoming the owner and where the goods are kept separate from the intermediary's other assets?[45] These questions will be discussed further in Chapter 5.

Prior to that, the relation between the principal and the intermediary should be addressed. In other words, what does it means for the intermediary to act on behalf of the principal? To act in such a manner, the CJEU has clarified that the intermediary needs to have a mandate to carry out transactions on behalf of the principal. To identify further aspects that indicate that the intermediary acts on behalf of another, it is necessary to make a distinction between sales and purchase commission. Here, factors such as risks and rewards can be utilized as an outset for the analysis, especially since risks and rewards have been used both by the CJEU[46] and in

44 *See* the Proposal for a second Council Directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added (submitted by the Commission to the Council on 14 April 1965), Explanatory Memorandum, para. II, comments on Art. 3.2(e).

45 This could also be supported by the Proposal for the second VAT Directive, which can be interpreted as the legislator takes the meaning of commission contracts for granted and only discusses the consequences of such an agreement. *See* the Proposal for a second Council Directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added (submitted by the Commission to the Council on 14 April 1965), Explanatory Memorandum, para. II, comments on Art. 3.2(e).

46 *See* Case C-118/11, *Eon Aset Menidjmunt*, [2012] EU:C:2012:97, para. 40 and Case C-209/14, *NLB Leasing*, [2015] EU:C:2015:440, para. 32.

the literature[47] to determine if a supply of goods according to Article 14.1 has taken place.

According to a contract of sales commission, one can assume that the principal bears the risks incidental to the goods and that those risks are not transferred to the intermediary, especially since Article 14.2(c) is applicable when the intermediary does not acquire the right to dispose of the goods as owner.[48] Such risks could include that the principal bears the economic consequences of the goods not being sold. Conversely, the principal should also have the right to the profit made on the sale, while the intermediary receives a fee – or commission – in relation to the performed transaction. Indeed, it would be difficult to say that the transaction is performed on behalf of another if the intermediary, rather than the principal, benefits from negotiations with the customer resulting in a higher price. The same type of arguments can be applied regarding purchase commission, albeit under somewhat different conditions. When it comes to business risks, the principal should not under normal circumstances have a right of rejection regarding the purchased goods. Additionally, the principal, and not the intermediary, should be the one with an interest in that the price of the goods is kept as low as possible.

The second relation that needs to be assessed is the one between the intermediary and the third party. More specifically, what characterizes an intermediary acting in its own name? Exemplifying circumstances from the case-law of the CJEU can provide some insight concerning this question. One major aspect that is represented in the case-law is if the intermediary appears as the contracting party from the perspective of the customer/seller. This includes the situation when the name or brand of the principal is not apparent to the third party. In connection to this, the intermediary can be deemed to have acted in its own name if it is mainly the intermediary that dictates the terms and conditions of contract with the customer/seller. This could include the price and the specific goods that are to be bought or sold. Finally, that the intermediary is responsible for other practical aspects relating to the transaction with the customer/seller seems also to be a relevant factor. Conversely, the situation where the intermediary mainly

47 *See* Richard Kettisch, *Intra-Community Chain Supplies* World Journal of VAT and GST Law 88, 93 n. 3 (2014).

48 Normally, the right to dispose of tangible property as owner are transferred when the risks and rewards incidental to ownership have been acquired by the buyer. *See* Chapter 3 and the references made there.

undertakes necessary steps to allow the principal and customer/seller to enter into a contract would constitute a mediation service rather than a purchase in one's own name.

The deemed supply following from the application of Article 14.2(c) is characterized by a situation where the intermediary does not acquire the right to dispose of the goods as owner, but still acts as the contractual party to the buyer/seller of the goods. However, there are some cases involving three parties characterized by circumstances discussed in this chapter where the CJEU found that only one supply of goods had taken place. Consequently, a discussion of these cases is important in order to understand the scope of Article 14.2(c). Such a discussion will be carried out in the following.

5 THE DISTINCTION BETWEEN SITUATIONS WHERE ARTICLE 14.1 AND ARTICLE 14.2(C) ARE APPLICABLE

The question discussed in this part of the article is why the CJEU only addressed the applicability of Article 14.1 and not 14.2(c) in some situations with circumstances akin to those discussed in Chapter 4. For the purpose of this analysis, the cases *Auto Lease Holland*, *Fast Bunkering Klaipėda*, and *Vega International Car Transports and Logistics* will be examined. References are only made to the parts of the cases that concern the question raised in this chapter.

In *Auto Lease Holland*, the company Auto Lease Holland (ALH) was a leasing company that also provided the lessees with the option of a fuel management agreement. According to the agreement, the lessee could fill up the vehicle with fuel in the name of and at the expense of ALH using an issued credit card. Every month, the lessee would pay one-twelfth of the likely annual fuel cost. At the end of the year, the account would be settled according to the actual consumption. ALH also charged the lessee an extra surcharge for the fuel management.[49]

The question was if one or two supplies had taken place. The CJEU concluded that the lessee obtained the fuel directly at filling stations and that ALH did not at any time have the right to decide in what way the fuel will be used or to what end. Since the lessee could decide the quality and quantity of the fuel, as well as the time of purchase, ALH could not be regarded to have acquired and resupplied the fuel to the lessee, even if the purchase

49 *See* Case C-185/01, *Auto Lease Holland*, [2003] EU:C:2003:73, paras 10–12.

from the fuel company had been made in ALH's name. Rather, the CJEU found that ALH had supplied a service in the form of financing the fuel purchase. Thus, only one supply of goods could have taken place – one supply directly from the fuel company to the lessee.[50]

The case *Fast Bunkering Klaipėda* concerned supply of fuel to vessels for navigation on the high seas. The company Fast Bunkering Klaipėda delivered fuel to such vessels. However, the orders were sent by different intermediaries and not by the operator of the ships. Without taking part in the physical delivery, the role of the intermediaries was to purchase and resell the fuel to the ships, centralize orders, and ensure payment of the supplied fuel.[51]

A main part of the case dealt with the scope of the exemption in Article 148(a). To apply that exemption, it was necessary to determine if one or two supplies of goods had taken place. The CJEU initially noted that according to Article 14.2(c), the transfer of goods to an intermediary acting in its own name on behalf of another constitutes a supply of goods. In such situations, the exemption in question cannot be extended to include the supplies to the intermediaries since only the transaction to the final consumer is covered by Article 148(a).[52]

Then, the Court stated that the circumstances indicated that the transfer of ownership to the intermediaries was made when the fuel had been fully loaded, meaning that the invoice to the intermediaries was sent when the operator of the ship had acquired the right to dispose of the fuel as owner. At no time had the intermediaries been in a position to dispose of the quantities supplied. Hence, they could not have disposed of the goods as owner. The CJEU cited case-law regarding Article 14.1 and concluded that the transactions could not be classified as supplies made to intermediaries acting in their own name. Instead, they should be regarded as being supplies made directly to the operators of vessels.[53] This way of structuring the answer is noteworthy and will be discussed later on in this chapter.

The final case, *Vega International Car Transports and Logistics*, displays some similarities to *Auto Lease Holland.* In the case, the parent company Vega International organized and managed the supply of fuel cards issued by different fuel suppliers to its subsidiaries. Vega International thus pur-

50 *See* Case C-185/01, *Auto Lease Holland*, [2003] EU:C:2003:73, paras 33–37.

51 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, paras 11–13.

52 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, paras 29–36.

53 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, paras 47–52.

chased the fuel from the suppliers and then sold it to its subsidiaries with an added surcharge. The question for the CJEU was if Vega International carried out services granting credits or supplies of goods.[54]

Based on previous case law, the CJEU found that Vega International did not dispose of the fuel as if it was the owner. The fuel was purchased by the subsidiaries directly from the suppliers and at their sole discretion. In particular, the subsidiaries freely decided on the quality, quantity, and type of fuel, as well as when to purchase and how to use it. Furthermore, the subsidiaries bore the costs connecting to the refueling, as Vega International passed it on. Thus, Vega International had not carried out any supplies of goods. Instead, the CJEU concluded that the transactions should be classified as exempt grants of credit.[55]

In the following, the outcome of these cases will be discussed in relation to the conclusions drawn regarding commission contracts according to Article 14.2(c). In this discussion, a distinction will be made between, on the one hand, *Auto Lease Holland* and *Vega International Car* Transports and Logistics and on the other hand, Fast Bunkering Klaipėda. This distinction is primarily based on the similarities and differences of the circumstances of the cases. In the first mentioned cases, the intermediary provided the final consumer of the fuel with a card that was used to purchase the goods from the fuel companies. In *Fast Bunkering Klaipėda* the intermediary instead bought and sold the fuel to facilitate both the payment and the supply. Furthermore, in the latter case, the CJEU had a different approach to the question regarding the application of Article 14, which in itself is an incentive for a separate discussion.

Starting with the cases involving credit or fuel cards, there has been some debate as to why the CJEU did not apply the fiction of two consecutive supplies stipulated in Article 14.2(c). The Confédération Fiscale Européenne raises this question and argues that the Court's judgment in *Auto Lease Holland* is contrary to common business practice.[56] Regarding *Vega International Car Transports and Logistics*, several authors criticize the lack of discussion of the mentioned article. Kirsch and Orban state that

54 *See* Case C-235/18 *Vega International Car Transports and Logistics*, [2019] EU:C:2019:412, paras 13–22.

55 *See* Case C-235/18 *Vega International Car Transports and Logistics*, [2019] EU:C:2019:412, paras 25–51.

56 *See* Confédération Fiscale Européenne, *Opinion Statement of the CFE on the Auto Lease Holland BV Case (C-185/01)*, European Taxation 43, January (2010).

it is unfortunate that the Court did not discuss the concept of commission contracts, especially since Article 14.2(c) seemingly was dismissed in *Fast Bunkering Klaipėda*.[57]

Gómez and Echevarría Zubeldia surmise that the Court did not seem to find any trace of either sales or purchase commission in the contract between the parties, despite the fact that the issuance of fuel cards often are supported by the existence of such a contract. The authors then continue to discuss the VAT consequences of applying Article 14.2(c) to the circumstances in *Vega International Car Transports and Logistics*. They illustrate that the reasoning of the CJEU is linked only to the interpretation of Article 14.1 and cannot be extended to similar situations where a commission contract is present.[58] Gamito largely agrees with Gómez and Echevarría Zubeldia by stating that the lack of reference to Article 14.2(c) suggests that the circumstances in *Vega International Car Transports and Logistics* did not satisfy the requirements of being a commission contract.[59]

While I generally concur with what has been stated in the literature, none of the mentioned authors discuss why the CJEU ostensibly dismissed the applicability of Article 14.2(c). One could say that in both *Auto Lease Holland* and *Vega International Car Transports and Logistics*, the Court found that the commercial and economic reality implies that the transactions at hand are exempt supplies of financial services, rather than transfers of goods pursuant to a commission contract.[60] This does not answer the question of *why* this is the case, however. By comparing the judgments in both cases to the conclusions drawn in Chapter 4, some light can be shed on this topic.

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57 *See* Sebastian Kirsch & Caroline Orban, *CJEU Confirms that the Provision and Settlement of Fuel Cards May Constitute a Financial Service that Is Exempt from VAT in Vega International Case*, Intertax 898, 900 Vol. 47, Issue 10 (2019). *See also* Kyriaki Yiallourou, *CJEU: Developments on VAT Exemptions in 2019*, Intertax 678, 684 Vol. 48, Issue 6 & 7 (2020).

58 *See* David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255, 255 ff. November/December (2019).

59 *See* Philippe Gamito, *A Look Back at EU VAT Developments in 2019 Regarding Insurance and Financial Services: Part 1*, International VAT Monitor 222, 229 July/August (2020).

60 *See* the explicit mention of economic reality regarding the judgment in *Auto Lease Holland* in Joined Cases C-53/09 and C-55/09, Loyalty Management UK and Baxi Group, [2010] EU:C:2010:590, para. 39. *See also* Philippe Gamito, *A Look Back at EU VAT Developments in 2019 Regarding Insurance and Financial Services: Part 1*, International VAT Monitor 222, 229 f. July/August (2020).

In the following, it will be assumed that if a commission contract is present in the cases, then it is in the form of purchase commission where ALH/Vega International act as the intermediaries, the lessees/subsidiaries as the principals, and the fuel company as the independent seller.[61] If ALH/Vega International should be deemed to have acted on behalf of the principals, then some form of mandate to act in such a manner is necessary.[62] That the parties in both cases had entered fuel management agreements, where the intermediaries distributed fuel or credit cards issued in the intermediaries' names for the purpose of acquiring fuel on behalf of the principals, can be viewed as such a mandate. A further indication that the intermediary acts on behalf of the principal is that the principal should bear the business risks, while the intermediary only receives a fee linked to the purchase. In both *Auto Lease Holland* and *Vega International Car Transports and Logistics*, the fuel cost was borne by principals and they were consequently the ones affected by any price fluctuations. These circumstances thus make it possible to argue that the intermediaries acted on behalf of the principals.

When determining if the intermediaries had acted in their own name, one important factor is that the intermediaries appear as the contractual partner towards the seller. The circumstances in the cases indicate that the intermediaries had acted in such a manner since the fuel purchases were made in the name of ALH/Vega International, the invoices were issued to them, and the seller did not know the identity of the final consumer of the fuel. However, another indication that the CJEU has highlighted is if the intermediary dictates the terms of the purchase. In both *Auto Lease Holland* and *Vega International Car Transports and Logistics*, the principal decided the quality, quantity, and time of the purchase, while the intermediaries' involvement in the purchase can be seen as somewhat limited. The question is whether this was the reason for the Court to view the transactions carried out by the intermediaries as grants of credits.[63] This question will be elaborated on in the analysis of *Fast Bunkering Klaipėda*.

61 The reason for this is that the circumstances of the cases do not suggest that ALH/Vega International has any form of agreement to act on the fuel companies' behalf, which could indicate a sales commission contract. *Cf.* the hypothetical cases in David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255, 256 f. November/December (2019).

62 *See* Case C-734/19, *ITH Comercial Timişoara*, [2020] EU:C:2020:919, para. 51.

63 For an opposite opinion, *see* David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255, 258 November/December (2019).

When it comes to the literature discussing the case *Fast Bunkering Klaipėda*, similar trends as those summarized earlier regarding the fuel management cases can be noticed. Sanders observes that it is unclear why the CJEU did not discuss if the intermediaries could qualify as undisclosed agents for the purpose of applying Article 14.2(c).[64] Kirsch and Orban conclude that the application of the fiction created by Article 14.2(c) was dismissed by the Court since the intermediary could not be considered as taking part in the supply chain.[65] Van Doesum and Nellen go further and criticize the CJEU for disregarding the economic reality constructed by the parties involved.[66]

When examining the circumstances of *Fast Bunkering Klaipėda*, the same line of reasoning as the one presented regarding *Auto Lease Holland* and *Vega International Car Transports and Logistics* can be applied. The intermediaries did not bear the business risk. They acted as the contractual partner to Fast Bunkering Klaipėda, but had minimal involvement in the actual supply of the fuel. However, one difference in *Fast Bunkering Klaipėda* is that the CJEU stated that 'transactions carried out by an economic operator, such as FBK, cannot be classified as supplies made to intermediaries acting in their own name, but should be regarded as being supplies made directly to the operators of vessels'.[67]

Does this mean that the CJEU explicitly rejects the application of Article 14.2(c) in the case? Nellen et al. argue that the Court seems to consider the transfer of the right to dispose of tangible property as owner as a requirements for the application of Article 14.2(c), which would contradict the judgment in the second *Gmina Wrocław* case.[68] However, in my view, the quoted statement does not concern Article 14.2(c), but rather 14.1, even if the CJEU used the words 'intermediaries acting in their own name'. The reason for this is that the statement refers to the paragraph where the Court discussed the transfer of the right to dispose of goods as owner, i.e.,

64 *See* Jan Sanders, *Implications of the FBK Case on Chain Transactions*, International VAT Monitor 8, 10 January/February (2016).

65 *See* Sebastian Kirsch & Caroline Orban, *CJEU Confirms that the Provision and Settlement of Fuel Cards May Constitute a Financial Service that Is Exempt from VAT in Vega International Case*, Intertax 898, 900 Vol. 47, Issue 10 (2019).

66 *See* Ad van Doesum & Frank J.G. Nellen, *Economic Reality in EU VAT*, EC Tax Review 213, 255 n. 5 (2020).

67 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, para. 52.

68 *See* Frank Nellen, Ad van Doesum, Simon Cornielje and Herman van Kesteren, *Fundamentals of EU VAT Law* 136 (2nd ed. 2020).

the criteria of Article 14.1. The use of 'intermediaries acting in their own name' could instead be a reference to how the national court phrased the question rather than a reference to Article 14.2(c).[69] This would mean that the CJEU was as silent about the interpretation and application of Article 14.2(c) in the present case as it was in *Auto Lease Holland* and *Vega International Car Transports and Logistics*, even though the fiction the article creates initially was mentioned.[70] Since the actual reference to Article 14.2(c) in the case was done generally, without applying the criteria of the article to the circumstances,[71] it seems puzzling why it was included in the judgment at all.

In summary, many of the characteristics of a commission contract are present in the circumstances of the cases discussed here. The main difference between these three cases and the case-law on the subject of acting in one's own name, on behalf of another is that the intermediaries in the former category of cases had very little involvement in the purchase from the seller. In the cases discussed in this chapter, the presumptive principal decided the time of purchase, the quality, quantity, and type of fuel, as well as the usage of the fuel. In addition, the specifics of the transaction were decided at the same time as the principal acquired the goods.

A conclusion is that the present circumstances would be enough not only to disqualify the intermediary from having received and supplied goods according to Article 14.1 – as was explicitly stated in the cases – but also to disqualify an intermediary from having received goods pursuant to a commission contract. In other words, the circumstances indicate that the intermediary did not have enough of an economic role in the supply.[72] Thus, the limited involvement could have meant that the intermediaries had not acted in their own name, on behalf of the principals. With this line of reasoning, a more direct involvement regarding the specifics of the transaction would have been required for article 14.2(c) to be applicable.

Furthermore, one could also question whether it has even been a *transfer* of goods to the intermediary as stipulated by Article 14.2(c). A discus-

69 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, para. 21, where the Lithuanian court defined one of the parties involved specifically as intermediaries acting in their own name.

70 *Cf.* Frank Nellen, Ad van Doesum, Simon Cornielje and Herman van Kesteren, *Fundamentals of EU VAT Law* 134 f. (2nd ed. 2020).

71 *See* Case C-526/13, *Fast Bunkering Klaipėda*, [2015] EU:C:2015:536, paras 32–35.

72 *Cf.* Case C-1/08, *Athesia Druck*, [2009] EU:C:2009:108, para. 36.

sion of the term transfer is somewhat speculative since it has not been defined in the VAT Directive or interpreted by the CJEU. According to the Explanatory Memorandum for the 2nd VAT Directive, the fiction of two consecutive supplies of goods applies even if the object of the transactions is handed over directly by the first seller to the last buyer.[73] However, if the quality and quantity of the goods are decided at the same time as the principal acquires them, it is also possible that such a situation falls outside the scope of a transfer according to Article 14.2(c).

6 CONCLUSIONS

The purpose of this article is to analyze what it means for goods to have been transferred pursuant to a commission contract in the context of Article 14.2(c) of the VAT Directive. To fulfill this purpose, an examination of the case-law of the CJEU has been conducted. The CJEU seldom elaborates on why certain circumstances constitute a commission contract within the context of VAT. However, it is possible to present the general trends of the case-law in order to draw generalizable conclusions. These conclusions will be summarized here.

To constitute a supply of goods, the transfer of goods pursuant to a commission contract in accordance with Article 14.2(c) does not require that the intermediary receives the right to dispose of the goods as owner. Instead, to create a legal fiction where goods are deemed to be subject to two subsequent supplies, other criteria need to be fulfilled. These criteria presuppose the involvement of three parties in the form of the principal, the intermediary, and a third party. The legal relations between the parties then need to reflect that the intermediary acts in its own name, on behalf of the principal. When analyzing these relations, factors such as risks and rewards can be utilized.

The assessment of the relation between the principal and the intermediary revolves around if the intermediary acts on behalf of the principal. Regarding sales commission, this is indicated when the principal bears the risks incidental to the goods, such as the economic consequences of the goods not being sold. The principal should also have the right to the profit

73 *See* the Proposal for a second Council Directive for the harmonization among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added (submitted by the Commission to the Council on 14 April 1965), Explanatory Memorandum, para. II, comments on Art. 3.2(e).

made on the sale. Conversely, the intermediary should only receive a fee in relation to the performed transaction. As for purchase commission, the principal should not under normal circumstances have a right of rejection regarding the purchased goods. Additionally, it should be the principal that has an interest in that the price of the goods is kept low.

To establish if the intermediary acts in its own name, the relation between intermediary and third party needs to be examined. Acting in its own name usually means that the intermediary appears as the contracting party from the perspective of the customer/seller. This could be the case if it is only the intermediary's name and brand that is apparent to the third party. Other relevant circumstances are if the intermediary dictates the terms and conditions of the contract with the customer/seller, and is responsible for other practical aspects relating to the transaction.

These conclusions can be compared to the reasoning of the CJEU in the cases *Auto Lease Holland*, *Fast Bunkering Klaipėda*, and *Vega International Car Transports and Logistics*. Many of the characteristics of a commission contract are present in the circumstances of these cases. However, one identified aspect is that the intermediaries had very little involvement in the purchase from the seller, which could have ruled out the possibility for the intermediaries to have acted in its own name, on behalf of the principal. This indirect involvement in the supply could then be the reason why the Court found that the economic and commercial reality of the transactions indicated that the intermediaries had performed mediation or financial services rather than deemed supplies of goods.[74] In contrast, for article 14.2(c) to be applicable in situations such as those in the cases, the intermediaries would likely need to be more directly involved in the contractual relation with the third party, both regarding the price and the quantity and quality of the goods.

Even if this presented line of reasoning could explain the apparent discrepancy in the case-law of the CJEU, definitive answers will likely depend on an explicit request for a preliminary ruling from the national courts. However, there seems to be some agreement on the generalizability of the judgments in cases regarding supply of fuel being quite limited and restricted to the facts of the cases. This is something that is underlined by the

74 As stated, Van Doesum and Nellen disagree, at least regarding *Fast Bunkering Klaipėda*, *see* Ad van Doesum & Frank J.G. Nellen, *Economic Reality in EU VAT*, EC Tax Review 213, 255 n. 5 (2020). However, that is a discussion that falls outside the scope of this article.

VAT Committee regarding *Fast Bunkering Klaipėda*.[75] The opinion is also supported by the fact that the only cases where these questions have arisen are those regarding some form of fuel management. This further indicates that the discussed cases do not affect situations with potential commission contracts beyond those with circumstances akin to the ones found in *Auto Lease Holland*, *Fast Bunkering Klaipėda*, and *Vega International Car Transports and Logistics*.

Mikael Ek is Doctor of Laws and Senior Lecturer at the University of Gävle.

75 *See* VAT COMMITTEE GUIDELINES RESULTING FROM THE 107th MEETING of 8 July 2016 DOCUMENT B – taxud.c.1(2016)7297391 – 911. *See also* David Gómez & Gorka Echevarría Zubeldia, *The VAT Conundrum of Fuel Cards: Thoughts on the ECJ Judgment in Vega International*, International VAT Monitor 255, 260 November/December (2019).