OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 10 November 2005 1(1)

Case C-245/04

EMAG Handel Eder OHG

v

Finanzlandesdirektion für Kärnten

(Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Value Added Tax – Sixth Directive – Intra-Community acquisition – Chain transactions)

I – **Introduction**

1. In the present case, questions have been referred on the interpretation of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (2) (the 'Sixth Directive') as regards the taxation of so-called 'chain transactions'. In such transactions several undertakings from two or more Member States successively conclude contracts for the purchase of the same goods which are then performed by means of a single transfer of goods from the first supplier to the last customer.

2. In the main proceedings before the Verwaltungsgerichtshof (Higher Administrative Court), Austria, the end customer in a chain transaction is in dispute with the tax office over the recognition, for purposes of input tax deduction, of the value added tax paid to the intermediate undertaking. Taxable domestic supplies, but not tax-exempt intra-Community (cross?border) supplies, are eligible for deduction of input tax. The tax office takes the view that the parties wrongly treated the supply to the end customer as a taxable domestic supply.

II – **Legal framework**

A – *Community law*

3. According to Article 2 of the Sixth Directive, the supply of goods is subject to value added tax, and the taxable person, under Article 4(1) and (2), is the independent trader who effects the supply.

4. As regards the determination of the place of the taxable activity, Article 8 provides as follows:

‘(1) The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. …;

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place;

…

(2) By way of derogation from paragraph 1(a), where the place of departure of the consignment or transport of goods is in a country other than the country of import of those goods, the place of the supply by the importer within the meaning of Article 21(2) and the place of any subsequent supplies shall be deemed to be within the country of import of the goods.’

5. Council Directive 91/680 of 16 December 1991 (3) inserted a new Title XVIa (Transitional arrangements for the taxation of trade between Member States; Article 28a to 28m) in the Sixth Directive. These provisions still apply, since so far no definitive rules on the taxation of the movement of goods between undertakings in trade between Member States have been enacted.

6. Article 28(a) of the Sixth Directive reads, in part, as follows:

‘1. The following shall also be subject to value added tax:

(a) intra-Community acquisitions of goods for consideration within the territory of the country by a taxable person acting as such or by a non-taxable legal person where the vendor is a taxable person acting as such who is not eligible for the tax exemption provided for in Article 24 and who is not covered by the arrangements laid down in the second sentence of Article 8(1)(a) or in Article 28b(B)(1).

…

3. “Intra-Community acquisition of goods” shall mean acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.’

7. Article 28b(A) of the Sixth Directive defines the place of acquisition. This provision reads, in part:

‘(1) The place of the intra-Community acquisition of goods shall be deemed to be the place where the goods are at the time when dispatch or transport to the person acquiring them ends.

(2) Without prejudice to paragraph 1, the place of the intra-Community acquisition of goods referred to in Article 28a(1)(a) shall, however, be deemed to be within the territory of the Member State which issued the value added tax identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that that acquisition has been subject to tax in accordance with paragraph 1.

…’

8. Under Article 28c(A) of the Sixth Directive intra-Community supplies between two Member

States are exempt from tax. That provision reads, in part, as follows:

‘Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:

(a) supplies of goods, as defined in Articles 5 and 28a(5)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.

…’

B – *National law*

9. The national provisions relevant to the main proceedings are those of the Umsatzsteuergesetz (Austrian Law on Turnover Tax) 1994 in the version that preceded the Steuerreformgesetz (Law on Tax Reform) 2000 (4) (the ‘UStG 1994’).

10. Paragraph 3(1), (7) and (8) of the UStG 1994 states:

‘(1) “supplies” are transactions in which an undertaking transfers to a customer or a third party authorised on his behalf the right to dispose of goods in his own name. The right to dispose of the goods may be procured by the undertaking itself or by a third party on its behalf.

…

(7) The place of supply of goods is the place where the goods are located at the time when the power to dispose of them is procured.

(8) If there is a supply of goods which are transported or dispatched to the customer or to a third party authorised on his behalf, the supply is to be treated as taking place at the time when the transport of the goods begins or at the time when they are handed over to the forwarding agent, carrier or shipper. Goods are dispatched where the undertaking instructs a carrier or shipper to transport them to a third party or entrusts such transport to a forwarding agent.’

11. The Steuerreformgesetz 2000 amended Paragraph 3(8) of the UStG 1994 – according to the official explanatory notes, in order to comply with Article 8(1)(a) of the Sixth Directive – and since then it has read as follows:

‘If there is a supply of goods which are transported or dispatched by the supplier or customer, the place of supply of the goods shall be treated as being the place where the transport or dispatch to the customer or a third person on his behalf begins. Goods are dispatched when they are transported by a carrier or shipper or such a transport is entrusted to a forwarding agent. Dispatch begins at the time when the goods are handed over to the forwarding agent, carrier or shipper.’

12. Paragraph 12 of the UStG 1994, which sets out the relevant provisions relating to deduction of input tax, provides:

‘(1) An undertaking may deduct the following amounts in input tax:

1. Tax which has been included as a separate charge in invoices (Paragraph 11) from other undertakings in respect of supplies made within the territory of the Republic of Austria for the benefit of the undertaking. …'

III – **Facts and questions referred for a preliminary ruling**

13. During 1996 and 1997, under annual contracts, the Austrian company K GmbH sold each month a certain quantity of 'Hütte' soft lead 'free at Arnoldstein, EC customs duty paid, carriage duty paid' to the applicant in the main proceedings, EMAG Handel Eder OHG, Klagenfurt. For its part, K had acquired the soft lead from companies established in Italy and the Netherlands. In each case, the goods were stored in customs warehouses in Rotterdam or Trieste. From there they were shipped by a forwarding agent, on K's instructions, to the specified destination at EMAG or one of EMAG's customers. In its invoices for the supplies, K charged EMAG value added tax at the rate of 20%. However, the tax office refused to allow EMAG to deduct the input tax. In its opinion, K had been wrong to include value added tax in the invoice, since in view of the fact that the goods had been transported to EMAG from Italy or the Netherlands the transaction had to be regarded as a tax-exempt intra-Community supply.

14. EMAG appealed against this decision, arguing that it was only on K's instructions that the forwarding agent dispatched the goods from Italy or the Netherlands to Austria. Therefore there was a supply from another Member State only as between K and its supplier. The subsequent supply from K to EMAG, on the other hand, was a taxable domestic supply so that the deduction of input tax should be allowed.

15. The Carinthia Tax Authority dismissed EMAG's appeal as unfounded. In its view, under Paragraph 3(8) of the UStG 1994 the place for the tax-exempt intra-Community supplies was in the Netherlands or in Italy, as the case might be, since the goods had been handed over to the carriers in Rotterdam or Trieste and transported by the latter to EMAG in Austria.

16. This decision of the Carinthia Tax Authority is the subject of the proceedings before the Verwaltungsgerichtshof. The Verwaltungsgerichtshof has referred the following questions to the Court for a preliminary ruling:

1. Is the first sentence of Article 8(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC) to be interpreted as meaning that the place where dispatch or transport begins is relevant even when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods?

2. Are successive supplies to be treated as exempted intra-Community supplies when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods?

3. If the answer to the first question is in the affirmative, is the place at which the second supply begins the actual place of departure of the goods or the place where the first supply finishes?

4. Is the identity of the party having the right of disposal of the goods during their movement a relevant factor in answering the first, second and third questions?

IV – **Arguments of the parties**

17. In the proceedings before the Court of Justice, EMAG, the Austrian, United Kingdom and

Italian Governments and the Commission have all submitted observations. The parties are all of the opinion that in chain transactions only one supply can be regarded as a tax-exempt intra-Community supply. Moreover, they all agree that in this particular case the transaction between the initial Dutch and Italian suppliers and K constitutes an intra-Community supply within the meaning of the Sixth Directive and that, consequently, where EMAG is concerned, there can no longer be any question of an intra-Community supply.

18. However, the parties express differing views on the general answer to the questions referred for a preliminary ruling. Whereas EMAG and the United Kingdom Government consider that in chain transactions it is always the first supply that constitutes the tax-exempt intra-Community supply, in the view of the Austrian and Italian Governments and the Commission it is the circumstances of each individual case that determine which of the supplies is to be regarded as the exempt intra-Community supply.

V – **Legal analysis**

A – *Preliminary remarks concerning the arrangements for the taxation of trade between Member States*

19. Within national territory, the supply of goods is subject to value added tax (Article 2(1) of the Sixth Directive). On the other hand, in the case of goods supplied from third countries to customers in the Community, it is not the supply but the importation into the Community which constitutes the relevant chargeable event (Article 2(2) and Article 7 of the Sixth Directive).

20. In the case of cross?border intra-Community trade, under the Transitional arrangements for the taxation of trade between Member States (Title XVIa), Directive 91/680 introduced a further chargeable event, namely, intra-Community acquisition. A brief review of the history of these arrangements, which are still in force, will help to clarify the situation.

21. Before the introduction of intra-Community acquisition, cross?border supplies of goods within the Community were taxed in the same way as other international trade. Under the general rules, a supply was taxable at the place of supply within the meaning of Article 8(1)(a) of the Sixth Directive, that is, at the place of dispatch, but was exempted from tax at exportation. Thus, value added tax fell due on importation into the country of destination. Border controls had to be imposed in order to collect VAT on imports.

22. The completion of the internal market required that this form of taxation and hence the fiscal controls at internal borders be abolished. (5) However, the reforms did not go so far as to extend the rules applicable to domestic supplies to the trade between two Member States, since that would have meant that value added tax would no longer be levied by the State of importation but by the State from which the goods were dispatched. Thus, in trade within a Member State the supply generally constitutes the chargeable event (Article 2(1) of the Sixth Directive) and the place of the taxable activity is the place where the goods are at the time when transport to the person to whom they are supplied begins (Article 8(1)(a) of the Sixth Directive).

23. Under the transitional arrangements, the previous division of authority to tax between Member States was to remain unaffected. As a consumer tax, value added tax was still to be payable in the Member State of final consumption. To that end, Directive 91/680 introduced intra-Community acquisition as a new chargeable event for trade between Member States (Article 28a(1)(a)). Thus, in this case, tax is levied on the receipt of the goods by the person acquiring them in the importing Member State. This chargeable event replaced the former taxation at importation.

24. To avoid double taxation – as Advocate General Ruiz-Jarabo Colomer has already explained in *Lipjes* – tax-raising powers must be coordinated in such a way that, in any intra-Community transaction, where the authority of one Member State ends the authority of the other begins. (6)

25. Since, in accordance with the transitional arrangements in force, the intra-Community acquisition is taxed in the country of destination of the goods, the corresponding intra-Community supply in the country of origin must be exempted from tax (Article 28c(A)(a) of the Sixth Directive). Thus, just as intra-Community acquisition has replaced taxation at importation, exemption of the intra-Community supply has replaced exemption at exportation.

B – *Second question referred for a preliminary ruling*

26. The first two questions referred to the Court are closely intertwined. However, the second question is the more fundamental and should therefore be answered first. Its implications will only be fully appreciated if it is borne in mind how the Austrian tax office appears to treat the stages of a chain transaction.

27. It treats both components of the chain transaction as exempted intra-Community supplies. The transaction between the Dutch or Italian undertaking and K in Austria is regarded as the first tax-exempt intra-Community supply and the transaction between the Austrian K GmbH and the Austrian EMAG as the second. However, these two – from a legal standpoint – independent supplies result in a single movement of goods from the Netherlands/Italy to Austria. In order to be able to treat the transaction between the companies K and EMAG, both of which are established in Austria, as a tax-exempt intra-Community – i.e. cross?border – supply, the tax office ascribes the transport of goods from the Netherlands/Italy, which was actually effected by K, to the second supply also.

28. Against this background, by means of its second question the Verwaltungsgerichtshof seeks to learn whether a chain transaction does in fact involve two exempted intra-Community supplies, even though there has been only one movement of goods.

29. The tax office’s picture of the chain transaction is inconsistent with the objectives of the special arrangements for the taxation of intra-Community supplies in Title XVIa of the Sixth Directive. These arrangements are intended to coordinate the powers of the Member States to tax intra-Community supplies. Cross?border supplies are to be taxed only once, namely – by way of derogation from the arrangements for domestic transactions – in the country of destination.

30. This objective can only be achieved if just one of the supplies in the chain, namely, that which has led to an intra-Community acquisition, is treated as a tax-exempt intra-Community supply. All earlier and later transactions must then be treated as domestic supplies which, under the general rules, are subject to tax in the State in which they are effected.

31. In cross?border transactions, the intra-Community supply exempted from tax under Article 28c(A)(a) of the Sixth Directive is the mirror image of the taxable intra-Community acquisition. If there has been only one movement of goods across the border of a Member State, then there can only be one tax-exempt supply and one taxable acquisition. This ensures that the coordination of the powers of the Member States involved, the goal of the arrangements set out in Title XVIa of the Sixth Directive, functions smoothly and that intra-Community supplies are neither taxed twice nor escape taxation completely (neutrality of taxation). Therefore, in situations such as the present one, in which several persons are involved and could be regarded as acquirers, in order to delimit the authority to tax of the Member States, the cross?border movement of goods must in each case

be ascribed to a single supply or acquisition, as the case may be.

32. The anomalies that would ensue if, in a case such as that which forms the subject-matter of the present dispute, two tax-exempt intra-Community supplies were assumed to be present are apparent from the following considerations. There would then be an exempted intra-Community supply from the initial Dutch/Italian supplier to K. This would correspond to a taxable intra-Community acquisition by K in Austria. Under Article 28b(A)(a), the place of this transaction would be the place where the goods were at the time when dispatch or transport to the person acquiring them ended.

33. Then, for the supply by K to EMAG also to be treated as a tax-exempt intra-Community supply, the place of this supply would necessarily again have to be in a Member State other than Austria, in which case the only possibilities would be the Netherlands or Italy. Therefore, in this supply chain, K would again supply the same goods from the Netherlands or Italy to Austria, even though it had already acquired them in an intra-Community acquisition within the meaning of the Sixth Directive.

34. Finally, the second intra-Community supply thus construed would be accompanied by a further intra-Community acquisition by EMAG in Austria taxable under Article 28a(1)(a) of the Sixth Directive. Thus, the fictitious duplication of the movement of goods is not only artificial but also leads to double taxation, inasmuch as the same goods trigger two taxable intra-Community acquisitions in Austria.

35. Accordingly, the reply to the second question referred for a preliminary ruling should be that only one of the successive supplies is to be treated as an exempted intra-Community supply when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods; in this case the intra-Community supply is that supply which corresponds to an intra-Community acquisition within the meaning of Article 28a(1)(a) of the Sixth Directive.

C – *First question referred for a preliminary ruling*

36. The first question referred to the Court concerns the determination of the place of the two supplies under Article 8(1)(a) of the Sixth Directive. In the light of the facts of the initial dispute, the question should be interpreted narrowly as relating only to a chain transaction affecting two Member States.

37. The tax office argues that in each case the place of supply should be considered as being the place of actual dispatch in the Netherlands or Italy. In its view, this means that both supplies are exempted intra-Community supplies, a result which is said to follow from an interpretation of Article 8 of the Sixth Directive.

38. However, as already established in the reply to the second question, in the case of a cross?border movement of goods of the present kind there is only one exempted intra-Community supply. Where the first question is concerned, it follows that the place where transport begins within the meaning of Article 8(1)(a) of the Sixth Directive is not relevant to the assessment of both supplies when several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single cross?border movement of goods.

39. Admittedly, the text of Article 8(1)(a) does allow the Netherlands or Italy to be regarded as the place of supply for both the contractual relationship between the Dutch or Italian supplier and K and that between K and EMAG since when transport began the goods were indeed situated in those Member States. However, this position cannot be reconciled with the arrangements for intra-

Community acquisition in Title XVIa of the Sixth Directive.

40. Thus, the determination of the exempted intra-Community supply does not depend on which place was the actual point of departure for the movement of goods and hence constituted the place of supply within the meaning of Article 8(1)(a) of the Sixth Directive. What matters is which supply triggered an intra-Community acquisition within the meaning of Article 28a(1)(a). That supply is the exempted intra-Community supply.

41. On the other hand, supplies forming part of the chain which precede or follow intra-Community acquisition are domestic supplies in the State of dispatch or the State of destination, whose place of supply is to be determined in accordance with Article 8 of the Sixth Directive.

42. Thus, in its judgment in *Lipjes* (7) the Court pointed out that intra-Community acquisition constitutes the relevant transaction in intra-Community trade. The place of this transaction is governed by Article 28b(A) and (B), which derogates in this respect from the general provisions of Article 8 regulating the supply of goods within a Member State.

43. Accordingly, the reply to the first question referred to the Court should be that the place where dispatch begins within the meaning of Article 8(1)(a) of the Sixth Directive does not determine whether, within the context of a chain transaction of the present kind, a supply is to be regarded as an exempted intra-Community supply.

D – *Third question referred for a preliminary ruling*

44. The third question needs to be answered only if the answer to the first question is in the affirmative. In the process of answering the first question it was shown that Article 8(1)(a) of the Sixth Directive cannot be interpreted as meaning that successive supplies in a cross?border chain transaction can be characterised as intra-Community supplies solely on the basis of the actual place of supply within the meaning of that provision.

45. However, this does not mean that the answer to the third question is of no relevance to the main proceedings. Thus Article 8 remains generally applicable to domestic supplies that precede or follow the intra-Community supply.

46. There is nothing special about the application of Article 8 to supplies that took place before intra-Community acquisition in the State of dispatch alone.

47. However, the position is quite different in the case of a domestic supply that follows intra-Community acquisition. If the goods are supplied by the acquirer in the intra-Community acquisition (in this case K) to a third party in the same Member State (in this case EMAG), then, by way of derogation from Article 8(1)(a) of the Sixth Directive, the place of supply cannot be assumed to be the place where the goods actually were when dispatch or transport began (in this case the Netherlands or Italy).

48. Instead, consideration should be given to the question of whether there has already been an intra-Community acquisition in the country of destination of the goods (in this case Austria). Then the country of destination must also be regarded as the place of the supply that follows this acquisition.

49. There are two ways of arriving at this conclusion. Firstly, one might regard the domestic supply following acquisition as a case of Article 8(1)(b) of the Sixth Directive (so-called immobile supply). This seems reasonable since the cross?border movement has already been ascribed to the preceding intra-Community supply and cannot now be ascribed to a further supply.

50. Secondly, Article 8(2) of the Sixth Directive could be applied by analogy. This provision concerns a special arrangement for determining the place of supply when goods are dispatched to the Community from a third country on the instructions of the importer. Then the place of supply is not the actual place of dispatch in the third country but the Member State of import of the goods. Since, in practice, intra-Community acquisition has taken the place of importation, this would also appear to be a tenable position.

51. Since, ultimately, both approaches lead to the place of supply being situated in the Member State in which the preceding intra-Community acquisition was effected, there is no need to decide which approach should be given preference.

52. Accordingly, the answer to the third question referred to the Court should be that within the context of a chain transaction of the present kind the place from which the goods are actually dispatched is not to be regarded as the place of a supply that follows an intra-Community acquisition. On the contrary, the place of supply is situated in the Member State of intra-Community acquisition.

E – *Fourth question referred for a preliminary ruling*

53. By its fourth question, which does not depend on any particular answer to Questions 1 to 3, the Verwaltungsgerichtshof seeks to learn whether the identity of the party having the right of disposal of the goods during their movement is a relevant factor in answering these questions.

54. As already explained, in a chain transaction of the present kind the supply that leads directly to an intra-Community acquisition is to be regarded as the exempted intra-Community supply.

55. According to Article 28a(3) of the Sixth Directive, intra-Community acquisition means acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods by or on behalf of the vendor or the person acquiring the goods to a Member State other than that from which the goods are dispatched or transported.

56. Since in this case a factual element is involved, namely, the acquisition of the right of disposal, a formalised solution is ruled out. Thus, neither the first nor the last supply relationship can always be decisive. Instead it is the circumstances of the individual case that need to be taken into account.

57. The ‘transfer of the right to dispose of tangible property as owner’ is also the essence of the definition of supply in Article 5(1) of the Sixth Directive. In this connection, in *Shipping and Forwarding Enterprise Safe*, the Court of Justice has already ruled that the definition does not refer to the transfer of ownership within the meaning of national law. (8) On the contrary, it covers any transfer of property that empowers the acquirer actually to dispose of it as if he were the owner. These observations also apply, mutatis mutandis, to the definition of intra-Community acquisition.

58. A typical expression of ownership is the right to dispose of property as one sees fit, especially to exercise physical control over it and to sell it.

59. The relevant factor in an intra-Community acquisition, apart from transfer of ownership, is

the passage of the goods across the border. It therefore seems reasonable to assign special importance to their carriage or the arrangement for it. In principle, the person who arranges for the carriage of the goods decides when they will be in a particular place. Where he makes use of a third-party carrier, physical control is ultimately imputable to the principal. Control over the whereabouts of the goods is an expression of the rights of ownership, as constitutive of intra-Community acquisition.

60. Consequently, in the absence of other indications, (9) intra-Community acquisition is effected by the person who arranges for the carriage of the goods and hence directly or indirectly exercises power of disposal over them during the cross?border movement. A further requirement is that the person arranging carriage should not be established in the State from which the goods are dispatched or should be not be trading under a VAT number allocated by that State.

61. Linking acquisition with responsibility for transport also seems appropriate inasmuch as the person on whose instructions the goods are transported and who has power of disposal over them during carriage is, of all the participants in the supply chain, the one best informed about the places of departure and destination. Within the context of the cross?border supply, this operator has special responsibility for the correct tax treatment of the cross?border transaction.

62. Exceptionally, however, the test of arranging for the carriage cannot be applied if the goods are transported by the first supplier in the chain himself (in this case K's initial supplier in the Netherlands or Italy) or on his behalf. Clearly, the supplier/seller cannot at the same time be the acquirer. In arranging for carriage the first supplier does not acquire any (new) rights of ownership but is merely exercising his pre-existing rights.

63. In this case Community acquisition can be effected only by one of the subsequent customers. To ensure effective taxation it is then appropriate to regard the direct customer of the first supplier as the tax debtor of the intra-Community acquisition, even if the goods were not actually conveyed to him but to the final customer in the supply chain.

64. In fact, only the first supplier, – because he has arranged for the carriage –, knows that this is an exempted intra-Community supply. Accordingly, he advises his customer (in this case K) that he is not invoicing any value added tax, as a result of which this first customer necessarily incurs the obligation to pay tax on an intra-Community acquisition. On the other hand, in all subsequent supplies value added tax can be shown as a matter of course and taken into account for purposes of input tax deduction.

65. The fact that the proposed solution is consistent with the system of Title XVIa of the Sixth Directive is demonstrated by a comparison with the special arrangements in Article 28c(E)(3) of the Sixth Directive for so-called triangular operations. A triangular operation is ultimately a special form of chain transaction in which, however, undertakings from at least three Member States form the supply chain.

66. Briefly, these special arrangements mean that an intermediary which as such effects the taxable acquisition in the country of destination because it has arranged for carriage can be exempted from tax liability if it is not established in that country of destination and the end customer established there has been designated as the person liable for tax. (10) These special arrangements confirm my position on (simple) chain transactions, namely, that intra-Community acquisition is normally effected by whoever arranges for the carriage of the goods.

VI – **Conclusion**

67. In conclusion, I propose that the questions referred to the Court by the

Verwaltungsgerichtshof be answered as follows:

(1) When several undertakings enter into arrangements for the supply of the same goods and those arrangements are implemented by way of a single movement of goods, only one of the successive supplies is to be treated as an exempted intra-Community supply; in this case the intra-Community supply is that supply which corresponds to intra-Community acquisition within the meaning of Article 28a(1)(a) of the Sixth Directive.

(2) The place where dispatch begins within the meaning of Article 8(1)(a) of the Sixth Directive does not determine whether, within the context of such a chain transaction, a supply is to be treated as an exempted intra-Community supply.

(3) In a situation such as that which forms the subject of the main proceedings, the place from which the goods are actually dispatched is not to be treated as the place of a supply that follows upon an intra-Community acquisition. On the contrary, the place of supply is situated in the Member State of intra-Community acquisition.

(4) In determining who in such chain transactions effects the intra-Community acquisition, in the absence of other indications, it is of decisive importance to establish who transported the goods or on whose behalf they were transported and who possessed the right of disposal of the goods during transport.

1 – Original language: German.

2 – OJ 1977 L 145, p. 1.

3 – OJ 1991 L 376, p. 1.

4 – BGBl. I No 106/1999.

5 – Cf. the second recital of Directive 91/680.

6 – Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer of 13 January 2004 in Case C?68/03 *Staatssecretaris van Financiën* v *D. Lipjes* [2004] ECR I-5879, paragraph 35.

7 – Judgment in Case C-68/03 *Lipjes* [2004] ECR I-5879, paragraph 25.

8 – Judgment in Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8. See also the judgment in Case C-185/01 *Auto Lease Holland* [2003] ECR I?1317, paragraph 32.

9 – Conceivably, the contracting parties might designate a party other than that which arranged for the carriage as the person liable to tax. Thus, K and EMAG might have agreed that EMAG should be the person liable to the tax due on the intra-Community acquisition in Austria. Such agreements are expressly mentioned, for example, in Article 28c(E)(3), fifth indent, of the Sixth Directive, as amended by Council Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47), within the context of so-called triangular operations. (For further details concerning triangular operations see point 65 et seq. below.)

10 – This obviates practical difficulties with tax collection, since as a rule the non-resident will not be registered for value added tax in the country of destination.