

Important ECJ decision concerning intra-EU movements of goods
Teleos Plc and Others (Teleos)

In 2002, Teleos sold mobile phones to a Spanish company, Total Telecom SA (TT). The supplies were on ex-works terms, whereby Teleos was required only to deliver the goods to the UK warehouse of TT's forwarding agent for despatch to France and Spain. For each transaction, TT sent by courier a stamped and signed original Cargo Movement Request Form (CMR) to Teleos showing that the goods had reached their destination. Following checks by HMRC it transpired that some of the CMR notes contained false indications concerning the destination and vehicles used. HMRC acknowledged that Teleos had not been involved in any fraud and was unaware that the phones had not left the UK, but still raised assessments running into several million pounds.

The first two questions referred asked the Court to confirm whether the goods have to physically leave the Member State of despatch for exemption to apply or whether it is enough for there to be an intention for the goods to be delivered. The third and key question then asked whether the Sixth Directive allows a Member State to refuse exemption on the basis that, contrary to the supplier's belief, it transpired that the evidence provided was false. The fourth and final question asked whether a corresponding intra-Community acquisition is sufficient proof of an intra-Community despatch.

The Court ruled that the exemption of such intra-Community supplies depends on the supplier establishing that those goods have been despatched (i.e., have physically left the Member State). The Court added that even if the purchaser declared corresponding intra-Community acquisitions this does not constitute conclusive proof for exemption. However, where the supplier acted in good faith but the evidence is found to be false, the court ruled that Member States should not seek to recover the VAT from the supplier.

In reaching its decision, the Court stated the requirement to provide conclusive proof was incompatible with the principles of legal certainty, proportionality and fiscal neutrality. The decision was based upon the accepted facts that Teleos were unaware of any fraud. Importantly the answer was caveated on the proviso that "the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was affecting did not lead to his participation in such evasion"

Teleos is an important decision for all businesses involved in ex-works supplies where evidence of despatch and export is a pre-requisite for zero rating. It reemphasises the practical importance of ensuring that robust processes and controls are in place, and the need to secure reliable evidence which may involve entering into contractual obligations as well as verifying the customer's status.

Like many European countries, the UK is investing significant time and resources in tackling fraud and in particular MTIC Fraud. Once again, HMRC has attempted to penalise and recover VAT from innocent parties in the supply chain. This decision follows last year's defeat for HMRC in the joined ECJ cases of *Optigen*, *Bondhouse* and *Fulcrum Electronics*. These cases concluded that the right of a taxable person to deduct input tax cannot be affected by the fact that a prior or subsequent transaction in a supply chain is tainted by fraud, unless that taxable person knows or has any means of knowing that to be the case.

What now?

The *Teleos* judgment limits exemption to where a supplier "took every reasonable measure in his power to ensure that the intra-Community supply he was affecting did not lead to his participation in such evasion". This could be widely interpreted and opens the debate on what is meant by 'every reasonable measure' and has interesting parallels with the new penalty regime which focuses on reasonable care. HMRC may choose to challenge businesses where they deem insufficient processes and controls in place to verify the identity of customers and to validate the evidence of despatch they provide. Any business involved in ex-works transactions or, for that matter, cross border trade generally should be considering how they may be affected.