A decorative graphic on the left side of the page, consisting of a network of light blue lines and circles that resemble a circuit board or a data network. The lines are of varying thickness and connect to small circles of different sizes, creating a complex, branching structure.

# IC SUPPLY – DOCUMENTARY

ROMAN WIATROWSKI

# IC SUPPLY – EU LAW CONDITIONS

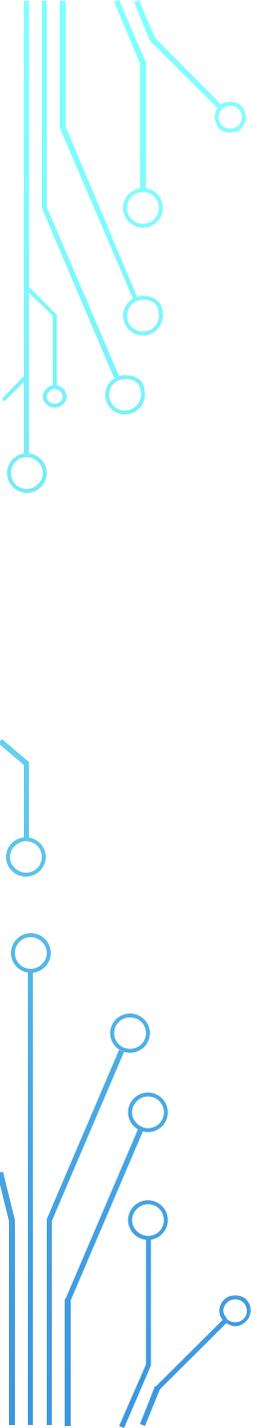
- Case *Teleos*, C-494/04, classification of intra-Community supplies and acquisitions on the basis of objective matters
- The meanings of ‘intra-Community supply’ and ‘intra-Community acquisition’ are objective in nature and apply without regard to the purpose or results of the transactions concerned
- Case *Plöckl*, C-24/15, objective characteristics of an intra-Community supply; if a supply of goods satisfies the conditions laid down in VAT Directive, that supply is exempt from VAT
- Case *EMAG*, C-245/05 – IC acquisition and IC supply are „mirror” transactions

## IC SUPPLY - BURDEN OF PROOF.

- VAT Directive simply sets out aims and leave it to Member States to define more closely the formal evidential requirements
- Need to respect general rules of EU Law (e.g. principle of proportionality)

## ECJ GUIDANCE

- Positive approach -> definition and interpretation of EU conditions both on occurrence of IC supply and exemption of IC supply
- Negative approach -> setting aside national conditions and documents required to prove that IC supply occurred/an exemption is granted



## ECJ GUIDANCE (cont.)

### SUBSTANTIVE VS FORMAL REQUIREMENTS:

**Case Plöckl, C-24/15**, only two situations in which the failure to meet a formal requirement may be decisive

- Taxable person who has intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT
  - Non-compliance with a formal requirement may lead to the refusal of an exemption from VAT if that non-compliance would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied
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## ECJ GUIDANCE (cont.)

### BURDEN OF PROOF

- It is for the operator who relies on an exemption from VAT to establish that the substantive conditions for that exemption are fulfilled. (*Twoh International*, C-184/05, and *R.*, C-285/09).
- where the authority has the information necessary to establish that the substantive requirements have been satisfied, it cannot, in relation to the taxable person's right to an exemption, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (*Case Plöckl*, C-24/15)

## ECJ GUIDANCE (cont.)

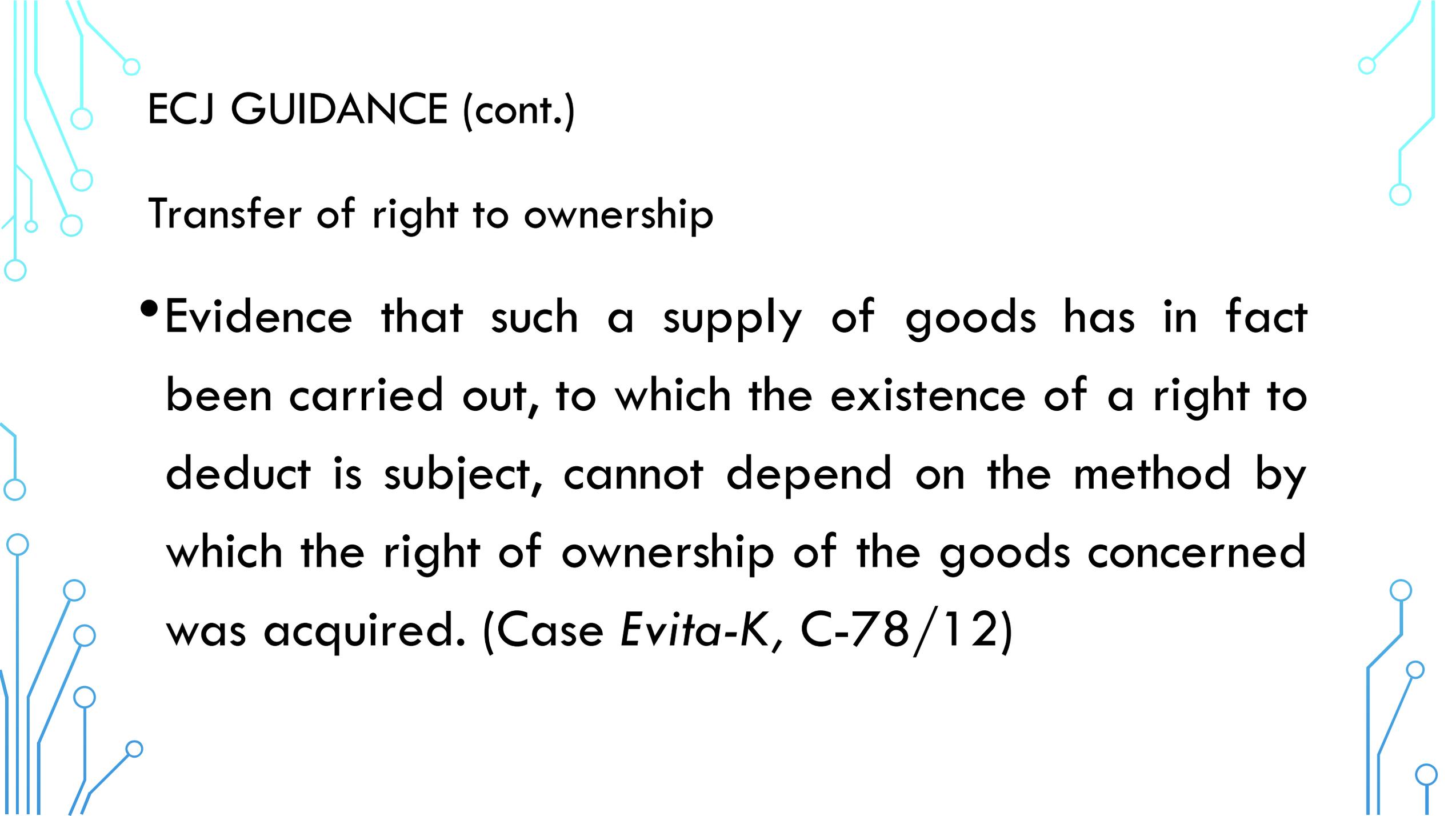
### LACK OF GENERAL EU RULES

- “Neither Article 143(1)(d) and (2)(c) of the VAT Directive nor Article 138 thereof states what evidence taxable persons must provide in order to be granted the exemption from VAT. It follows that, in accordance with Article 131 of the VAT Directive, that issue falls within the competence of the Member States, in accordance with the general principles of law which form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality”
- Opinion RG, *Enteco Baltic*, C-108/17, p.117 ; judgments of: 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 36); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267, paragraph 27) and of 9 February 2017, *Euro Tyre* (C-21/16, EU:C:2017:106, paragraph 33)

## ECJ GUIDANCE (cont.)

### VAT IDENTIFICATION NUMBER

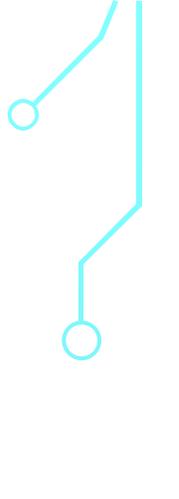
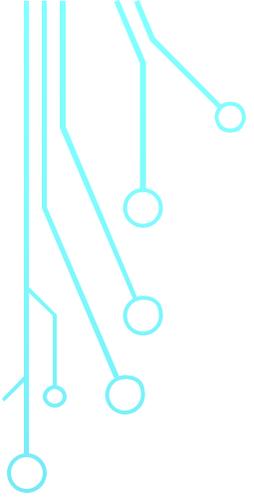
- requirement imposed by national law on the supplier to communicate the VAT identification number of the purchaser of the supplied goods constituted a formal requirement, the non-fulfilment of which could not, without regard to any failure to satisfy the substantive conditions for an intra-Community supply, call into question, in principle, the right of that supplier to obtain exemption from VAT for that transaction. (*Mecsek-Gabona*, C-273/11, VSTR C-587/10; *Plöckl*, C-24/15; *Euro Tyre*, C-21/16)



## ECJ GUIDANCE (cont.)

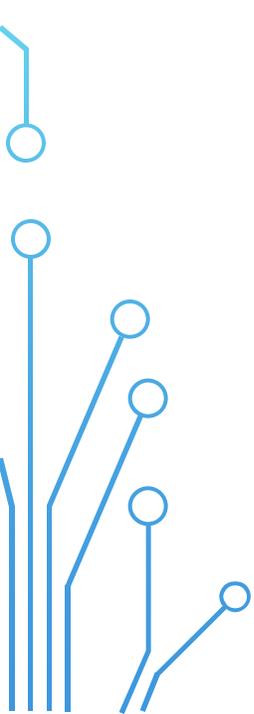
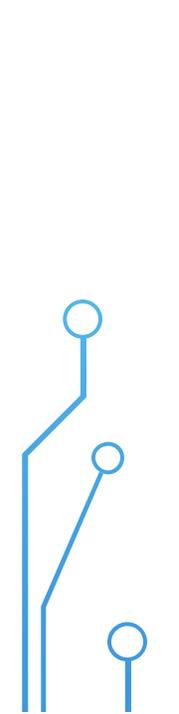
### Transfer of right to ownership

- Evidence that such a supply of goods has in fact been carried out, to which the existence of a right to deduct is subject, cannot depend on the method by which the right of ownership of the goods concerned was acquired. (Case *Evita-K*, C-78/12)



## ECJ GUIDANCE (cont.)

### INITIAL ACCEPTANCE OF SUBMITTED EVIDENCE

- principle of legal certainty precludes a Member State which has accepted, initially, the documents submitted by the supplier/vendor as evidence establishing entitlement to the exemption from subsequently requiring that supplier/vendor to account for the VAT on that supply, because of the purchaser's fraud, of which the supplier/vendor had and could have had no knowledge. (Case: *Teleos*, C-409/04)
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# SYSTEM OF EXCHANGE OF INFORMATION

- EU law on the exchange of information and administrative cooperation between Member States in the field of VAT does not require national authorities to collect, at the request of a taxable person, information from undertakings of other Member States, where that taxable person cannot himself provide the evidence necessary to demonstrate that the right to dispose, as owner, of the goods which have been imported and supplied has been transferred to the purchaser and, more generally, to demonstrate that the importations or supplies by that taxable person are exempt from VAT. (Opinion RG, Enteco Baltic, C-108/17).

# VENDOR REQUIREMENTS

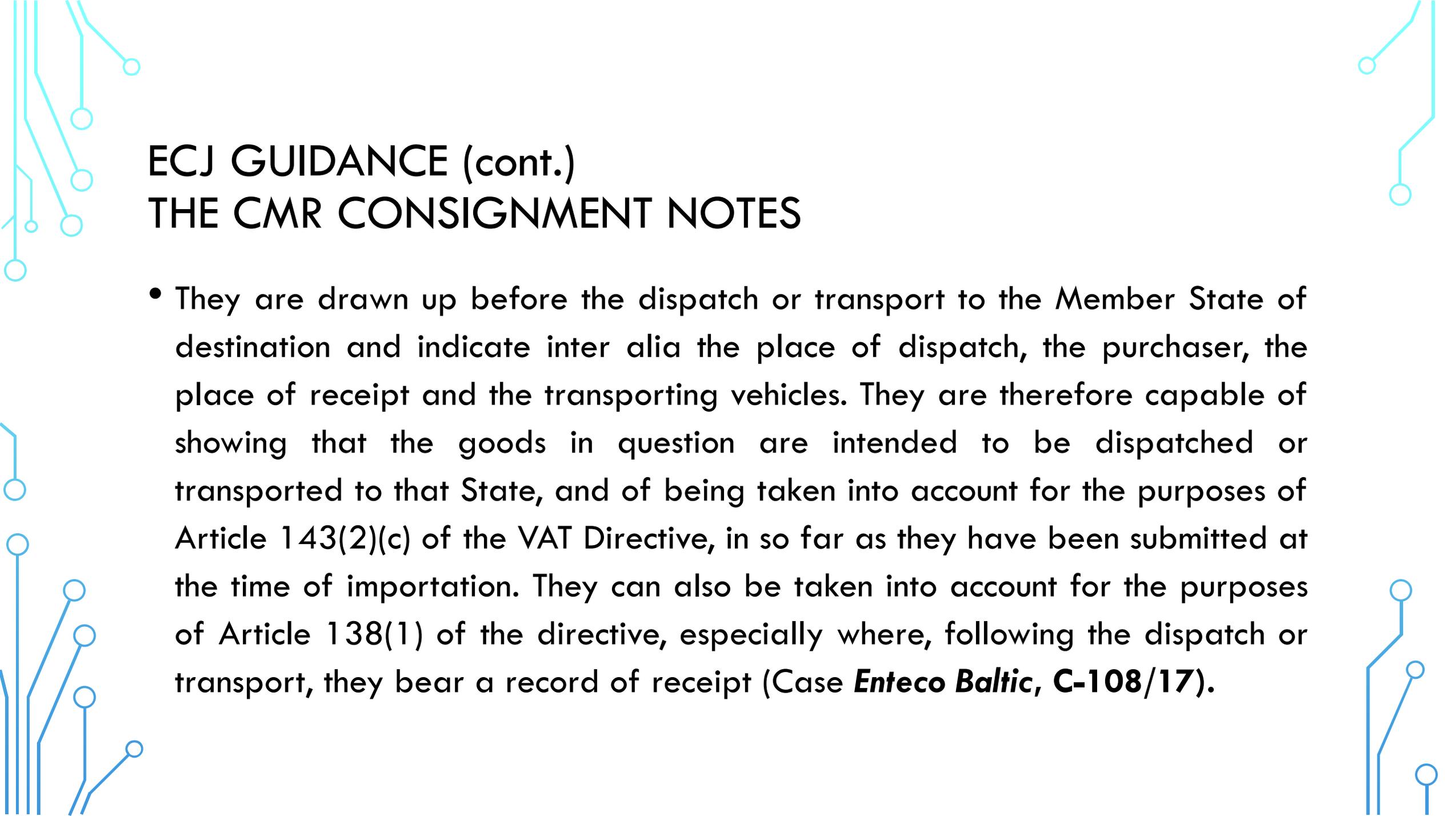
- **Article 138(1) of the VAT Directive and the case-law of the Court that the condition concerning the dispatch or transport of the goods is satisfied where the goods have actually left the territory of the Member State from which they are dispatched or transported in order to be transferred to the territory of the Member State of destination (Case: *Teleos*, C-409/04; „Enteco Baltic” UAB, C-108/17).**
- It follows that, to benefit from the exemption on importation in Article 143(1)(d) of the VAT Directive, the importer must in particular provide the authorities of the Member State of import with evidence that, at the time of importation, the goods in question are intended for dispatch or transport to another Member State and that, in the context of the subsequent intra-Community supply, they have been the subject of such a dispatch or transport (**Case: „Enteco Baltic” UAB, C-108/17, , paragraph 69).**

## VENDOR REQUIREMENTS

- **In this respect, it suffices that the importer shows that the goods in question are intended to be dispatched or transported and subsequently are actually dispatched or transported to another Member State, without it being necessary to show that they are dispatched or transported specifically to the address of the purchaser of the goods („Enteco Baltic” UAB, C-108/17, paragraph 70).**

## **REPORT OF RECEIPT E-AD**

- **A report of receipt e-AD is capable of showing that the goods in question actually left the territory of the Member State of dispatch and were dispatched or transported to another Member State within the meaning of Article 138(1) of the VAT Directive („Enteco Baltic” UAB, C-108/17, paragraph 76).**



## ECJ GUIDANCE (cont.)

### THE CMR CONSIGNMENT NOTES

- They are drawn up before the dispatch or transport to the Member State of destination and indicate inter alia the place of dispatch, the purchaser, the place of receipt and the transporting vehicles. They are therefore capable of showing that the goods in question are intended to be dispatched or transported to that State, and of being taken into account for the purposes of Article 143(2)(c) of the VAT Directive, in so far as they have been submitted at the time of importation. They can also be taken into account for the purposes of Article 138(1) of the directive, especially where, following the dispatch or transport, they bear a record of receipt (Case *Enteco Baltic*, C-108/17).

## **ECJ GUIDANCE (cont.)**

# **THE E-ROR CONFIRMATIONS**

- **In so far as they do not yet exist at the time of importation, those confirmations cannot show that, at that time, the goods in question are intended to be dispatched or transported to another Member State within the meaning of Article 143(2)(b) of the VAT Directive. On the other hand, they are capable of being taken into account for the purpose of showing that the goods have actually been dispatched or transported in accordance with Article 138(1) of that directive (Case *Enteco Baltic*, C-108/17).**

## POLISH PERSPECTIVE

- open catalog of evidence - both in Polish VAT Act and in the judgments of Supreme Administrative Courts.
- No general rules as to what documentary evidence - apart from those enumerated in VAT act – is required since it depends on the specific circumstances of the case (Resolution of Supreme Administrative Court of 11th of October 2010, case no. I FPS 1/10).

# INSUFFICIENT EVIDENCE

- E-mail correspondence is not sufficient to apply the 0% VAT rate if there was no other evidence or the evidence was illegible or it could not be assigned to individual transactions (Judgment of Supreme Administrative Court of 26th of October 2017, case no. **I FSK 47/16**)
- In the situation when there is an obligation to document certain activities with documents (even accepting a wide catalog of evidence confirming the IC), they can not be replaced by evidence from witnesses. They can only supplement the documentary evidence (judgment of Supreme Administrative Court of 19th of July 2017, case no. **I FSK 169/17**)
- **The intentions of a buyer are to be taken into account only if it is supported by the documentary proof of fulfillment of objective conditions of IC supply (judgment of Supreme Administrative Court of 17th of July 2018, case no. I FSK 1528/16)**

# GOOD FAITH AND PROOF OF IC SUPPLY

- Failure to display an evidence proving that the taxpayer performed actions to verify his contractor excludes the defence of acting in good faith

This was based on failure to provide documentary proof as to: 1) commercial contacts, business correspondence, contracts, authorisations, orders, specific numbers of goods transferred and the method of their transport) (Judgment of the Supreme Administrative Court of 17 October, 2017, case no. I FSK 97/16).

# MAIN CHALLENGES FACED WHEN DECIDING IC SUPPLY CASES.

- 1. Lack of sufficient guidance from the ECJ – which documents are sufficient or necessary to prove an occurrence of IC supply and on whom lies the burden of proof?
- 2. Divergences in practice of national courts when establishing the proof of occurrence of IC supply
- 3. Possible tension between the fundamental principles
- 4. High risk of tax fraud
- 5. Uncertainty both for taxpayers and tax authorities.