

The European Court of Justice and VAT: the European Commission's Perspective

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I. Introduction

With regard to the perspective of the European Commission in relation to the VAT case law of the Court of Justice of the European Union (CJEU) very many things can be said and analysed. I have chosen to focus on the following aspects:

- the connection between the Commission and the CJEU regarding VAT-related procedures and rulings.
- the main features and principles of interpretation of the CJEU's VAT case law.
- a particular reference to the principle of neutrality, given its particular relevance for VAT case law purposes.

These aspects will be dealt with below in this written contribution.

II. The Connection Between the Commission and the CJEU as Regards VAT Case-Law

The connection between the Commission and the CJEU as regards VAT case law takes place in two different scenarios: on the one hand, preliminary questions addressed to the CJEU by national courts in the field of VAT; on the other, VAT-related infringement procedures launched by the Commission and which lead to a ruling of the CJEU.

A. Preliminary Questions

National courts and tribunals are obliged to apply EU law in order to solve the cases submitted to them. If a national court or tribunal has doubts about the interpretation or the validity of a provision of EU law which it has to apply in a particular case, it has the possibility or, under certain circumstances, the obligation, of referring a question to the CJEU. This is the so-called "preliminary question" or "preliminary ruling", laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU).¹

When a preliminary question is referred to the CJEU, the national court will suspend the national proceedings. A case will be opened at the CJEU and the judg-

1 Art. 267 of the TFEU provides as follows: "*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
(a) *the interpretation of the Treaties;*
(b) *the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

ment eventually released by the CJEU (in which the CJEU will make clear how the EU VAT law provision which has given rise to the preliminary reference has to be interpreted) will have to be followed, not only by the national court which made the reference, but also by all other national courts in the European Union.

The question then is to determine the role of the Commission in VAT-related preliminary questions and how the connection between the Commission and the CJEU occurs. In this regard it must be said that the Commission will always intervene in these cases, and it will do so not as a party to the proceedings, but rather as an “amicus curiae”, as someone who exposes before the CJEU its opinion about the right interpretation of the relevant EU VAT law provision. The Commission, through its General Directorate for Taxation and Customs Union and through its Legal Service, will submit written observations to the CJEU on the case. Further, if there is a hearing, the Commission will also intervene, making oral representations.

The Commission will not take into account the particular interests of the parties involved, nor is the Commission there to defend any of them. The Commission will be moved to act only by the interest to uphold what in its view is the right interpretation of EU law, taking into account its purpose and objectives, as well as the wording of the provisions in question. Thus, it is ensured that no preliminary question is decided without the CJEU being aware of the position of the Commission.

B. Infringement Procedures

According to Article 17(1) of the Treaty on European Union,² the Commission is the “guardian of the treaties”, since one of its tasks is to monitor whether Member States comply properly with EU law. The tool at the disposal of the Commission in order to fulfil this task is the so-called infringement procedure, dealt with in Article 258 of the TFEU.³

2 Art. 17(1) of the Treaty on European Union states the following: “*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements*”.

3 Art. 258 of the TFEU provides as follows: “*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union*”.

The question which arises is what can the Commission do whenever it has information according to which a Member State might be breaching a particular provision of EU law, in particular of EU VAT law. When that is the case, the Commission has the power to initiate an infringement procedure against the relevant Member State, which is a legal procedure that evolves through several steps.

The first step is the “letter of formal notice”. This is a letter addressed by the Commission to the authorities of the relevant Member State, where the Commission brings to the Member State’s attention that, according to the information at its disposal, the Member State might be breaching a specific provision of EU VAT law. The Commission will specify the provision in question and will request observations on the issue from the Member State, which in the majority of cases have to be delivered within two months.

In fact, prior to issuing the letter of formal notice, the Commission usually has other contact with the authorities of the Member State involved. This contact takes place most commonly through the “EU Pilot” tool.

The EU Pilot tool is aimed at a quick resolution of potential breaches of EU law by Member States without entering the infringement procedure, which by its own nature may take a long time to bring about a remedy of the breach. It is designed to improve communication between the Commission services and Member State authorities on issues concerning the application of EU law at an early stage before an infringement procedure is launched under Article 258 of the TFEU.

If the reply of the Member State to the letter of formal notice is not satisfactory, the Commission has the possibility (and not the obligation, as will be explained later) of pursuing the procedure to the next step, the “reasoned opinion”. The “reasoned opinion” is, like the letter of formal notice, a letter addressed by the Commission to the authorities of the Member State concerned. But in this case the Commission will not just state that “it might be the case that the Member State has infringed EU VAT law”: here the Commission (i) will state formally its legal position regarding the interpretation and application of the relevant provision, (ii) will make it clear that in its understanding the Member State is breaching EU law, and (iii) will warn the Member State that if the national rules are not brought into line with EU law, the Commission might consider referring the case to the CJEU.

Usually the deadline for the Member State to answer to the reasoned opinion is two months. If the reply of the Member State is not satisfactory, then the Commission has the possibility (once again, not the obligation) of bringing the case before the CJEU. It is here that the connection between the Commission and the CJEU takes place, as far as infringement procedures are concerned: the Commission cannot on its own declare that a Member State has infringed the VAT Direc-

tive⁴ since this is the exclusive competence of the CJEU. In order to obtain such a declaration, the Commission has to bring the case before the CJEU.

If the Commission decides to bring the matter before the CJEU, then a case will be registered at the CJEU. Both the Commission and the Member State will submit observations on the issue, in writing and usually also orally at the hearing. If the judgment of the CJEU declares that the Member State has indeed breached the relevant provision of EU VAT law, then the Member State will be obliged to change its internal rules or its administrative practice in order to comply with that judgment.

At this stage, the Commission intervenes once again, since it is for the Commission to check that the measures taken by the Member State are sufficient to comply with the ruling of the CJEU and appropriate to bring the national rules into line with EU law. If the Commission takes the view that the measures taken are not enough for this purpose then, according to Article 260 of the TFEU⁵ it has the possibility of bringing the matter before the CJEU. A new procedure will be opened before the CJEU and it is important to underline that in this “Article 260 TFEU-based” procedure, contrary to what happens with the “Article 258 TFEU-based” one, the Commission can propose and the CJEU can impose penalties on the Member State.⁶

The Commission explains in its website the criteria regarding the application of Article 260 of the TFEU and in particular the aspects taken into account concerning the penalties proposed in this framework. On this issue the Commission states inter alia that the “*calculation of the penalty payment is based on a method that takes account of the seriousness of the infringement, having regard to the im-*

4 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

5 Art. 260 of the TFEU states the following: “1. *If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.*

2. *If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.*

This procedure shall be without prejudice to Article 259.

3. *When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.”

6 Further information on the procedure under Article 260 TFEU may be found at this link: http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm.

portance of the rules breached and the impact of the infringement on general and particular interests, its duration and the Member State's ability to pay, with a view to ensuring that the penalty itself has a deterrent effect".⁷

In the light of the above, the connection between the Commission and the CJEU when it comes to monitoring the compliance by Member States with EU law becomes clear. It is, to a certain extent, a task entrusted both to the Commission and the CJEU since the legal action against the Member State can only be launched by the Commission, but the final declaration about the existence of an infringement lies only in the hands of the CJEU.

Two aspects should finally be mentioned in relation to the infringement procedure in Article 258 of the TFEU. First, the procedure is only a bilateral one between the Commission and the Member State. On many occasions the procedure is launched as a consequence of a complaint submitted by a taxpayer, or a tax firm, or a company or association; however, the complainant is not a party to the procedure. The procedure is not there to give him satisfaction of its particular interest, rather it is an "objective" procedure, its sole objective being to ensure that the national rules are in line with EU law.

The position of the complainant in this context, and the obligations assumed towards him by the Commission, have been detailed in a Communication on the subject issued by the Commission in 2002 and updated in 2012.⁸

From this Communication, it emerges that the Commission has essentially a duty to keep the complainant updated about the state of play regarding the complaint. If the Commission decides on the basis of the complaint to send a letter of formal notice, or a reasoned opinion, or if it decides to bring the case before the CJEU, it will have to inform the complainant. By contrast, the complainant cannot force the Commission to initiate an infringement procedure: this leads us to the second aspect which should be mentioned here, the Commission's discretion.

In this regard, it must be said that both initiating an infringement procedure (through the letter of formal notice) as well as moving to the next steps therein (reasoned opinion, referral of the case to the CJEU) are not compulsory for the Commission. The Commission has discretion in this regard and this has been confirmed by the CJEU in several judgments.⁹

Finally it is worth mentioning that the Commission publishes an annual report on its action as "guardian of the treaties".¹⁰

7 http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm.

8 See http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm.

9 See for instance CJEU, 14 February 1989, Case C-247/87, *Star Fruit v Commission*, ECR 1989 00291.

10 Those annual reports may be found at the following link:
http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

III. Main Features and Principles of Interpretation Regarding VAT CJEU Case-Law

A. Main Features of VAT Case-Law

Although very many things can be said in this regard, we have chosen three aspects which seem to us particularly relevant and which are exposed below:

- a) The high proportion of preliminary rulings, as compared with judgements delivered on the basis of an infringement procedure launched by the Commission.
- b) The fact that the case law touches on every aspect of VAT.
- c) The pre-eminence of a teleological interpretation over the pure literal meaning of the words.

The high proportion of preliminary rulings: just a brief look at the past few years will indeed confirm that the number of VAT judgments issued in the framework of the preliminary ruling procedure is much higher than the number of judgments arising from infringement procedures. Thus, in 2011 there were 20 VAT judgments in response to preliminary questions and only 5 regarding infringements. In 2012, the difference was more remarkable: 50 preliminary questions and 3 infringement actions. Finally in 2013, the ratio was 43 to 17 (this was a particularly high number of judgments for infringement procedures, due to the fact that the rulings for all the series of cases on VAT grouping and travel agents were released in that year).

One might wonder at the reason for this development. In my view, the decisive factor here is that only a very low number of infringement procedures reach the CJEU. The vast majority of cases are resolved before the CJEU stage: sometimes because the Commission accepts the arguments of the Member State and in other cases because the Member State itself decides to modify its legislation at the request of the Commission.

In this connection, the 2007 communication on “A Europe of Results – Applying Community Law” has indicated that nearly 70 % of the complaints received by the Commission services are closed before starting any infringement procedure; 85 % are finished before reaching the stage of a reasoned opinion and almost 93 % before any ruling by the CJEU. The activity of the Commission as “guardian of the treaties” is thus very intense but has only a limited impact in terms of CJEU rulings.¹¹

The case law touches on every aspect of VAT: all essential aspects of VAT have been touched upon by the case law of the CJEU. The taxable event, the taxable person, taxable amount, rates, exemptions, deductions, liability to VAT and even formal obligations are all aspects which have been examined in a number of rul-

¹¹ The Communication in question may be consulted at the following link: http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm.

ings. In some cases (those regulated in a more detailed way by the VAT Directive), the CJEU has adopted criteria based on the specific provisions of the VAT Directive itself. In other cases, less regulated by the Directive and in which Member States have a wider margin of action (for example, formal obligations) the action of the CJEU has frequently been based on general principles of EU Law (such as for instance the principle of proportionality when it comes to sanctions in the VAT field) or on principles which are essential for the VAT system (such as the principle of neutrality in the field of exemptions or of VAT reduced rates).

The pre-eminence of a teleological interpretation: the CJEU has always given great importance, not just in the field of VAT but in general in its interpretation of the EU rules, to teleological interpretation. That is, that the purpose and objective of the rules is the essential criterion which must lead the interpretation of the EU provisions, the objective being to ensure the useful effect aimed at by the EU legislator regarding those provisions.

A clear example of this approach can be seen in the recent cases related to the special scheme for travel agents.¹² In those cases the CJEU gave pre-eminence to the objective pursued by the special scheme, namely to facilitate the economic activity of the travel agents and tour operators (which under the general VAT rules would face considerable problems in order to recover input tax and to pay output tax) and to ensure a fair distribution of revenues between the Member State in which the travel agent is established and the Member State in which the journey actually takes place. While the literal wording of the original linguistic versions of the Sixth Directive supported a particular approach regarding the scope of the special scheme (according to which the special scheme would only apply where the travel agent provided services directly to the traveller and not for instance where it provided services to another travel agent) the CJEU disregarded that literal approach and underlined the objectives of the special scheme, the attainment of which it considered should be an essential criterion regarding the interpretation of the rules.

B. Principles of Interpretation in the Field of VAT

Different principles of interpretation may be extracted from the VAT case-law of the CJEU. Aside from the principle of neutrality, which will be dealt with extensively later, we have chosen to emphasize the following principles:

12 CJEU, 26 September 2013, Case C-189/11, *Commission v Spain*, (not yet published); 26 September 2013, Case C-193/11, *Commission v Poland*, (not yet published); 26 September 2013, Case C-236/11, *Commission v Italy*, (not yet published); 26 September 2013, Case C-269/11, *Commission v Czech Republic*, (not yet published); 26 September 2013, Case C-293/11, *Commission v Greece*, (not yet published); 26 September 2013, Case C-296/11, *Commission v France*, (not yet published); 26 September 2013, Case C-309/11 *Commission v Finland*, (not yet published) and 26 September 2013, Case C-450/11, *Commission v Portugal*, (not yet published).

- a) The strict interpretation of the provisions entailing derogation from the general rules.
- b) The autonomous and uniform meaning of the concepts used in the VAT Directive.
- c) Linguistic differences between the different versions are to be solved according to the purpose and context of the rules, without any linguistic version having pre-eminence over the others.
- d) Economic reality prevails over purely artificial constructions.

Strict interpretation of the provisions entailing derogation from the general rules: this principle has been frequently used in the field of exemptions and reduced rates. Exemptions are to be interpreted strictly, since they constitute derogations to the general principle according to which all transactions made in the exercise of an economic activity are subject to VAT. Reduced rates are also to be strictly interpreted since they are exceptions to the general rule according to which all supplies of goods and services are subject to the standard VAT rate.

However, the CJEU has toned down somewhat the scope of this principle by stating in the field of exemptions that provisions governing exemptions cannot be interpreted so strictly as to deprive the exemption of its intended effect. This has allowed the CJEU to grant at least on certain occasions, a wider scope to the interpretation of exemptions than that which would have been reached through a purely “strict” approach to the provisions.¹³

The autonomous and uniform meaning of the concepts used in the VAT Directive: it goes without saying that this is necessary in order to ensure the uniform application of the provisions of the VAT Directive across the European Union. Essential in this regard is Case C-320/88¹⁴ where the Court made clear that the notion of “supply of goods” for the purposes of VAT is not conditioned by the different constructions of the notion of “transfer of property” established in the civil law of each of the Member States. By contrast, that notion is to be interpreted in a uniform manner in all Member States. This is absolutely necessary in order to avoid the mismatches which would otherwise happen (in particular in the framework of the intra-Community arrangements) regarding such a basic element of VAT as the concept of “supply of goods”.

The CJEU has emphasized that only where the specific provisions of the VAT Directive refer the definition of a term to Member States, can a uniform and auton-

13 Examples of this wider approach are for instance CJEU, 11 January 2001, Case C-76/99, *Commission v France*, ECR 2001 I-00249; 26 May 2005, Case C-498/03, *Kingscrest Associates and Montecello*, ECR 2005 I-04427 in the field of the medical exemption, 28 September 2006, Case C-434/04, *Ahokainen and Leppik*, ECR 2006 I-09171 in relation to the education exemption and 9 February 2006, Case C-415/04, *Kinderopvang Enschede*, ECR 2006 I-01385 regarding the social security exemption.

14 CJEU, 8 February 1990, Case C-320/88, *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe*, ECR 1990 I-00285.

omous notion of a particular VAT concept be disregarded. But even in this case the judgments of the CJEU have reduced considerably the margin for manoeuvre for Member States. An example is the notion of “investment fund” for the purposes of Article 135(1)(g) of the VAT Directive. Although in principle Member States are competent to define which investment funds can benefit from the exemption, it is a fact that the successive judgments¹⁵ of the CJEU in this field since Case C-363/05¹⁶ have considerably reduced any scope for Member States to exercise any real discretion in this regard.

Another example which may be mentioned here is the interpretation of Article 131 of the VAT Directive.¹⁷ While in principle the wording of the provision could be taken as granting a wide margin for manoeuvre to Member States in the field of exemptions, the CJEU, following its ruling in Case C-124/96¹⁸, has very clearly established that the provision in question does not provide grounds to modify the material scope of any of the exemptions in the VAT Directive.

Linguistic divergences: the CJEU has established consistently that no linguistic version of a directive can be assigned pre-eminence over the others and that these divergences must be resolved according to the purpose and context of the rules. Examples of this approach can be seen, as far as VAT case law is concerned, in cases such as C-384/98¹⁹ and C-498/03²⁰, as well as in the string of cases, already mentioned above, on the special scheme for travel agents. Once again the teleological interpretation is there to solve any possible tension arising from the different versions of the VAT Directive.

Economic reality prevails over purely artificial constructions: we have a very clear example of this approach in the cases related to abuse of law in VAT. Judgments such as C-255/02²¹ (the “Halifax” case, the first ruling in which the CJEU exposed its notion of abuse of law in the field of VAT), C-223/03²², C-277/09²³, C-103/09²⁴ and C-653/11²⁵, inter alia, have made clear that the notion of abuse of law in the field of VAT requires two elements:

15 CJEU, 7 March 2013, Case C-424/11, *Wheels*, (not yet published); CJEU, 13 March 2014, Case C-464/12, *ATP Pension Service*, (not yet published).

16 CJEU, 28 June 2007, Case 363/05, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, ECR 2007 I-05517.

17 Art. 131 of the VAT Directive provides as follows: “*The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse*”.

18 CJEU, 7 May 1998, Case 124/96, *Commission v Spain*, ECR 1998 I-02501.

19 CJEU, 14 September 2000, Case 384/98, *D.*, ECR 2000 I-06795.

20 CJEU, 26-5-2005, Case C-498/03, *Kingscrest*, ECR 2005 I-04427

21 CJEU, 21 February 2006, Case C-255/02, *Halifax and Others*, ECR 2006 I-01609.

22 CJEU, 21 February 2006, Case 223/03, *University of Huddersfield*, ECR 2006 I-01751.

23 CJEU, 22 December 2010, Case 277/09, *RBS Deutschland Holding*, ECR 2010 I-13805.

24 CJEU, 22 December 2010, Case 103/09, *Weald Leasing*, ECR 2010 I-13589.

25 CJEU, 20 June 2013, Case C-653/11, *Newey* (not yet published).